



## **MEMORANDUM**

**Date:** June 24, 2021

**To:** Dave Corliss, Town Manager

**From:** Matt Gohl, Special Projects Manager

**Subject:** Update: CDBG Rule Change

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### **Executive Summary**

The following information provides an update regarding a US Department of Housing and Urban Development (HUD) rule change affecting the Town's acceptance of Community Development Block Grant (CDBG) funding. This Interim Final Rule (**Attachment A**) was published in the Federal Register on June 10, 2021 and will become effective on July 31, 2021.

HUD, among other changes, reinstated a previous definition of Affirmatively Furthering Fair Housing (AFFH) requiring grantees to take proactive and meaningful actions that will combat segregation and discrimination in order to promote fair housing. This definition, and associated certification requirements, were of concern to past Town Councils. Concerns were centered on potential federal input into local land use matters and resulted in the Town choosing to not participate in the CDBG program for many years. Additional efforts will be required to properly certify compliance under this new rule and HUD has indicated that additional rule making efforts will occur in the future regarding AFFH.

### **Discussion**

Town Council, on September 1, 2020 accepted entitlement status to participate in HUD's CDBG program. In 2011, the Town participated in the program with Douglas County and utilized funds to complete alleyway and downtown accessibility improvements. Following this time, the Town and County both opted out of the CDBG program for several years due to concerns with AFFH as stated and defined in a 2015 rule. Primary concerns were that by accepting CDBG funding, the corresponding AFFH requirements could open local land use decisions (zoning, etc.) to federal input.

Last year, HUD rescinded the 2015 rule, redefined AFFH and simplified the AFFH certification requirements for CDBG grantees. This rule change alleviated prior Town Council concerns with AFFH and resulted in acceptance of Castle Rock's entitlement status in the HUD program. This year, HUD released an Interim Final Rule on June 12, 2021 that reinstates much of the 2015 rule, including AFFH definitions. The current presidential administration released this new rule because it does not believe last year's rule was promulgated following proper rule making procedures and that it did not meet statutory fair housing requirements.

## Rule Change Overview

The 2021 Interim Final Rule was published in the Federal Register on June 10, 2021 with an effective date of July 31, 2021 – prior to the August 16, 2021 deadline to submit the Town's Consolidated Plan (ConPlan). The full text of this rule is available in **Attachment A**. The following information summarizes key differences between the 2020 and 2021 rules.

Essentially, the previous 2020 rule simplified AFFH processes and changed the AFFH definition to allow grantees to make *“a general commitment that grantees will use the funds to take active steps to promote fair housing. Thus, grantee AFFH certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination.”* The 2020 rule included a reduction in administrative burden related to AFFH. Prior to this rule, a thorough analysis of impediments to fair housing and a detailed certification process were required which resulted in significant administrative burden. These onerous requirements were rescinded by HUD prior to 2020 due to the complexity and inability of many grantees to successfully meet the AFFH criteria.

The 2021 rule reverts to 2015 definitions, but explicitly *“does not require program participants to undertake any specific type of fair housing planning to support their certifications.”* However, it is logical to expect that a local analysis regarding AFFH will be necessary in order to meet the revised definition of AFFH stated below:

*“taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means 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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.”*

A key distinction in this definition is the emphasis on “meaningful actions.” Essentially, simply being non-discriminatory with housing/development practices is not sufficient for AFFH certification. Rather, proactive measures to combat any existing discriminatory housing practices would be required. The rule goes on to define meaningful actions as *“significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”*

## Potential Impacts

Under both rules, the Town would be required to certify that it meets AFFH criteria. As seen previously, the definition of AFFH has changed in the 2021 rule and, upon approval of the Town's ConPlan, the Town will have to certify that it is taking meaningful actions to AFFH according to this new rule. While staff believes that current practices would satisfy the 2020 definition of AFFH, additional actions may be required to ensure

compliance with the new rule. No changes to the current draft of the Town's ConPlan would be required.

In order to fairly certify this compliance, staff would recommend completion of an analysis of impediments to fair housing in the future and would then make recommendations for "meaningful actions." These actions could include an education program to ensure homeowners/renters are aware of fair housing rights, initiatives alleviating housing cost burden or others. HUD will be able to provide technical assistance to help grantees and it is ultimately at HUD's discretion when determining if an entity is properly AFFH.

Past concerns with AFFH were centered on potential federal input into local land use matters. Staff believes that this is unlikely, however it is important to note that HUD will be the agency determining if Castle Rock's efforts to AFFH are sufficient to comply with the current rule. No examples of noncompliance have been found and consequences of failing to comply are unknown. However, it would be reasonable to assume that consequences could include repayment of grant funding or implementation of other activities deemed by HUD to appropriately AFFH.

To further understand potential impacts, staff reviewed the matter with Civitas, LLC who is developing the Town's 2021-2021 Consolidated Plan and has over a decade of experience with the CDBG program. Civitas, LLC was successful in previous certifications for other entities in stating that some AFFH options are not feasible given limited grant funding – the Town's award is \$230,932. It is important to note that this occurred under previous federal administration and it is possible that HUD may take a different approach at this time.

Additionally, it is reasonable to expect additional fair housing rule changes in the future. The attached 2021 rule includes a statement that HUD will seek additional rule changes *"on a more detailed proposed implementation of a program participants AFFH obligations and will seek to build on and improve the processes set forth in the 2015 AFFH rule..."* The exact nature of these changes is unknown at this time and staff will continue to provide information as more information is available.

## **Attachments**

**Attachment A:** 2021 Rule (FR-6249-I-01)

one industry association, and several individual entities endorsed the telework provisions and requested that these measures be extended, potentially indefinitely. DDTC agreed and extended the two measures because DDTC believed that a failure to extend the temporary suspensions, modifications, and exceptions would have a negative impact on regulated entities' ability to safely engage in continued operations in the midst of the ongoing global public health emergency. Based upon the comments received and DDTC's experience over the course of the pandemic, it is apparent that these measures support the current work environment and are expected to remain relevant in a post-pandemic environment.

Although the Department is of the opinion that the notice and comment requirements of the Administrative Procedure Act are not applicable, in addition to the efforts described above, the Department published a notice of proposed rulemaking (NPRM) (86 FR 28503, May 27, 2021), to solicit comments to proposed revisions to the ITAR provisions related to remote work. DDTC is seeking in this proposed rule to adapt to the new reality of how the regulated community is working and will work in the future. DDTC's position is consistent with the Arms Export Control Act and informed by the regulated community's comments and DDTC's assessment of the security requirements appropriate for ITAR-controlled technical data. The NPRM is entitled "Amendment to the International Traffic in Arms Regulations: Regular Employee" (RIN 1400-AF17). In the interest of ensuring sufficient time to adequately address comments and prepare publication of a final rule, and to ensure there is no disruption of regulated entities' ability to safely engage in continued operations, DDTC is modifying and extending these temporary suspensions, modifications, and exceptions until it publishes a final rule for RIN 1400-AF17; the Department intends to terminate the temporary actions announced herein in that **Federal Register** publication.

DDTC notes that the text of the temporary suspensions, modifications, and exceptions below differs slightly from that of the prior two documents in that specific reference to Russia has been removed from the clause "so long as the individual is not located in a country listed in ITAR § 126.1." By rulemaking of March 18, 2021, DDTC amended ITAR § 126.1 to include Russia (86 FR 14802), thereby making specific reference here unnecessary.

Pursuant to ITAR §§ 126.2 and 126.3, in the interest of the security and foreign policy of the United States and as warranted by the exceptional and undue hardships and risks to safety caused by the public health emergency related to the SARS-COV2 pandemic, notice is provided that the following temporary suspensions, modifications, and exceptions are being extended as follows:

1. As of March 13, 2020, a temporary suspension, modification, and exception to the requirement that a regular employee, for purposes of ITAR § 120.39(a)(2), work at the company's facilities, to allow the individual to work at a remote work location, so long as the individual is not located in a country listed in ITAR § 126.1. The Department will terminate this suspension, modification, and exception by publication of a document in the **Federal Register**.

2. As of March 13, 2020, a temporary suspension, modification, and exception to authorize regular employees of licensed entities who are working remotely in a country not currently authorized by a technical assistance agreement, manufacturing license agreement, or exemption to send, receive, or access any technical data authorized for export, reexport, or retransfer to their employer via a technical assistance agreement, manufacturing license agreement, or exemption so long as the regular employee is not located in a country listed in ITAR § 126.1. The Department will terminate this suspension, modification, and exception by publication of a document in the **Federal Register**.

This document makes no other revision to the document published at 85 FR 25287, nor does it make any other temporary suspension, modification, or exception to the requirements of the ITAR.

(Authority: 22 CFR 126.2 and 126.3)

**Michael F. Miller,**

*Deputy Assistant Secretary for Defense Trade Controls, U.S. Department of State.*

[FR Doc. 2021-12206 Filed 6-9-21; 8:45 am]

**BILLING CODE 4710-25-P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**24 CFR Parts 5, 91, 92, 570, 574, 576, 903**

[Docket No. FR-6249-I-01]

RIN 2529-AB01

### Restoring Affirmatively Furthering Fair Housing Definitions and Certifications

**AGENCY:** Office of Fair Housing and Equal Opportunity, HUD.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Department of Housing and Urban Development (HUD) publishes this interim final rule to restore certain definitions and certifications that have been through notice-and-comment scrutiny and that are grounded in legal precedent to its regulations implementing the Fair Housing Act's requirement to affirmatively further fair housing (AFFH) and reinstate a process by which HUD will provide technical assistance and other support to funding recipients who are engaged in fair housing planning to support their certifications. No program participant will be required to participate in this process, which is for the benefit of those who want assistance in fulfilling their statutory obligations. HUD will provide these services prior to the effective date of this interim final rule. HUD determined that it is necessary for this narrowly focused rule to go into effect on July 31, 2021, because HUD funding recipients must certify compliance with their duty to AFFH on an annual basis and HUD itself has a continuous statutory obligation to ensure that the Fair Housing Act's AFFH obligations are followed. HUD finds that the definitions in the current regulation, which was promulgated in 2020 without notice-and-comment procedures, are at odds with the statutory AFFH duty as described in decades of judicial precedent and agency practice. This risks confusing funding recipients, who are certifying compliance with a regulatory definition that does not in fact satisfy their statutory AFFH obligation. While HUD therefore has determined that this rule will go into effect on July 31, it nonetheless solicits comments on this action so that it may consider public views before the effective date. HUD promulgates this interim final rule to ensure that program participants have regulatory certainty, while delaying the effective date long enough to provide time for HUD to

review comments and, if necessary, act on them prior to the effective date.

**DATES:**

*Effective date:* July 31, 2021.

*Comment due date:* July 12, 2021.

**ADDRESSES:** Interested persons are invited to submit comments regarding this interim final rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

*1. Submission of Comments by Mail.*

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

*2. Electronic Submission of Comments.*

Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](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 [www.regulations.gov](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.

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

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

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service, toll-free, at

800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:**

Sasha Samberg-Champion, Deputy General Counsel for Enforcement and Fair Housing, 451 7th Street SW, Room 10110, Washington, DC 20410 telephone number 202-402-3413 (this is not a toll-free number). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*The Affirmatively Furthering Fair Housing Mandate*

The Fair Housing Act (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619) declares that “it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” See 42 U.S.C. 3601. The Fair Housing Act prohibits among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, because of “race, color, religion, sex, familial status,<sup>1</sup> national origin, or handicap.”<sup>2</sup> See 42 U.S.C. 3604 and 3605. The Fair Housing Act extends beyond this non-discrimination mandate, requiring HUD to administer its programs and activities relating to housing and urban development in a manner that affirmatively furthers the purposes of the Fair Housing Act. 42 U.S.C. 3608(e)(5). While this mandate is directly imposed on HUD, HUD carries it out primarily by extending the obligation to certain recipients of HUD funding. Congress has repeatedly reinforced the AFFH mandate for funding recipients, embedding within the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act of 1990, and the Quality Housing and Work Responsibility Act of 1998, the obligation that certain HUD program participants certify, as a condition of

<sup>1</sup> The term “familial status” is defined in the Fair Housing Act at 42 U.S.C. 3602(k). It includes one or more children who are under the age of 18 years being domiciled with a parent or guardian.

<sup>2</sup> Although the Fair Housing Act was amended in 1988 to extend civil rights protections to persons with “handicaps,” the term “disability” is more commonly used and accepted today to refer to an individual’s physical or mental impairment that is protected under federal civil rights laws, the record of such an impairment, and being regarded as having such an impairment. For this reason, except where quoting from the Fair Housing Act, HUD uses the term “disability.”

receiving Federal funds, that they will AFFH. See 42 U.S.C. 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16). As described below, Congress enacted these requirements against the background of judicial and administrative construction of the Fair Housing Act’s AFFH requirement, which is presumed to have been incorporated in those later-enacted Congressional mandates.

For decades, courts have held that the AFFH obligation imposes a duty on HUD and its grantees to affirmatively further the purposes of the Fair Housing Act. These courts have held that funding recipients, to meet their AFFH obligations, must, at a minimum, ensure that they make decisions informed by preexisting racial and socioeconomic residential segregation. The courts have further held that, informed by such information, funding recipients must strive to dismantle historic patterns of racial segregation; preserve integrated housing that already exists; and otherwise take meaningful steps to further the Fair Housing Act’s purposes beyond merely refraining from taking discriminatory actions and banning others from such discrimination.

Soon after the enactment of the Fair Housing Act, the U.S. Court of Appeals for the Third Circuit, in *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), held that HUD is obligated to “utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties” under the Fair Housing Act. *Id.* at 821. The Third Circuit further held that any HUD discretion must be exercised to not just prevent discrimination in housing, but to align the federal government “in favor of fair housing.” *Id.* at 819-20. It follows that, where HUD delegates decision-making responsibility to its grantees, HUD grantees must likewise gather and consider relevant information such as racial and socioeconomic segregation in housing to inform decisions that will foster integration and not further perpetuate segregation.

Only a few years later, the U.S. Court of Appeals for the Second Circuit, in *Otero v. New York City Housing Auth., et al.*, 484 F.2d 1122 (2d Cir. 1973), similarly held that the obligation to AFFH requires that “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos,<sup>3</sup> of

<sup>3</sup> Reflecting the era in which it was enacted, the Fair Housing Act’s legislative history and early

racial groups whose lack of opportunity the Act was designed to combat.” *Id.* at 1134. *Otero* further held that, to accomplish this goal, HUD and funding recipients must take into account the socioeconomic and demographic makeup of the neighborhoods they govern, reasoning that “the affirmative duty placed on the Secretary of HUD by § 3608(e)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built.” *Id.* at 1133–34.

In *NAACP, Boston Chapter v. HUD*, 817 F.2d 149 (1st Cir. 1987), the U.S. Court of Appeals for the First Circuit likewise found that the AFFH mandate in 42 U.S.C. 3608(e)(5) requires, “as a matter of language and of logic,” that HUD and its funding recipients do more than refrain from discrimination. *Id.* at 154. *NAACP* involved a claim that HUD and Boston officials knew the city’s neighborhoods and housing were racially segregated, yet they failed to utilize the “immense leverage” of federal funds to “provide desegregated housing so that the housing stock is sufficiently large to give minority families a true choice of location.” *Id.* at 152. The court held that HUD’s obligation to AFFH requires that “HUD do more than simply not discriminate itself”; rather, HUD must “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” *Id.* at 155. Like *Shannon*, *NAACP* explained that, to carry out this AFFH obligation effectively, HUD and its grantees must “consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area,” including historical patterns of segregation. *Id.* at 156.

Thus, each federal court of appeals that has construed the Fair Housing Act’s AFFH requirement has recognized that the AFFH obligation requires a funding recipient to consider existing segregation, including racial segregation, and other barriers to fair housing, and then take meaningful action to address them. These cases make plain that the AFFH obligation requires HUD and recipients of its funding to take proactive steps towards fair housing in this manner, beyond merely refraining from discrimination. These judicially recognized AFFH

principles cannot be reconciled with PCNC’s far more limited definition of affirmatively furthering fair housing, which a funding recipient satisfies by taking any step rationally related to any of a large set of objectives, some of which are not intrinsically about fair housing at all. More recently, courts applying and construing the AFFH requirement, and the precedents described above, have recognized that discretion and flexibility that HUD and its funding recipients have are inherent to the statutory obligation, because the precise actions needed depend on the local context. At the same time, they have continued to recognize that this discretion is cabined by the obligations to meaningfully assess racial and other forms of segregation and other impediments to fair housing and then take meaningful actions to address them. For example, in *Thompson v. HUD*, 348 F. Supp. 2d 398, 409 (D. Md. 2005), the court found that HUD violated its duty to AFFH by limiting its efforts to desegregate public housing in Baltimore to the city limits, as opposed to widening its focus to the Baltimore region as a whole. *Id.* at 459, 461. In ordering HUD to take a regional approach, the court found that the AFFH mandate requires HUD to adopt policies “whereby the effects of past segregation in Baltimore City public housing may be ameliorated by the provision of public housing opportunities beyond the boundaries of Baltimore City.” *Id.* at 462. *See also U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009) (finding program participant’s certification that it would AFFH deficient where it failed to adequately consider the impact of race on housing opportunities in the county).

While the Supreme Court has never had occasion to consider the scope of the AFFH provision, it has consistently recognized and noted the Fair Housing Act’s broad and remedial goals and has repeatedly observed that the Act is meant not just to bar discrete discriminatory acts, but to affirmatively counteract the nation’s long history of racial segregation and discriminatory housing practices and policies.

In *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972), while analyzing the scope and purpose of the Act soon after the law was enacted and finding that it conferred very broad standing on private litigants to challenge discrimination, the Court relied on the statements of the Act’s co-sponsor Senator Walter F. Mondale that: “the reach of the proposed law was to replace the ghettos ‘by truly integrated

and balanced living patterns.’” Decades later, in confirming the unanimous view of the courts of appeals that the Act permits disparate-impact claims, the Court further explained that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation. . . . The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546–47 (2015). As the Supreme Court held in *Inclusive Communities Project*, the Act’s broad remedial purposes cannot be accomplished simply by banning intentional discrimination. The AFFH requirement plays a key role in the accomplishment of those purposes, requiring HUD and recipients of federal financial assistance to take affirmative steps to create an open, integrated society and to eliminate the barriers that stand in the way of truly equal housing opportunities for underserved populations.

Moreover, Congress has repeatedly confirmed its view that the AFFH mandate imposes affirmative obligations on HUD funding recipients. In three separate statutes post-dating the Fair Housing Act—the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and the Quality Housing and Work Responsibility Act of 1998—Congress has required covered HUD program participants to certify, as a condition of receiving Federal funds, that they will AFFH. *See* Public Law 93–383, the Housing and Community Development Act of 1974, 88 Stat. 633, (Aug. 22, 1974), *as amended* by Public Law 98–181, Supplemental Appropriations Act of 1984, 97 Stat. 1153, (Nov. 30, 1984) (*codified at* 42 U.S.C. 5304(b)(2), Pub. L. 101–625, Cranston-Gonzalez National Affordable Housing Act, 104 Stat. 4079 (Nov. 28, 1990) (*codified at* 42 U.S.C. 5306(d)(7)(B), 12705(b)(15); Pub. L. 105–276, Quality Housing and Work Responsibility Act of 1998, 112 Stat. 2461, (Oct. 21, 1998) (*codified at* 42 U.S.C. 42 1437C–1(d)(16)). The certifications these laws require are designed to ensure compliance with a term that Congress necessarily understood to have the content given it by the courts and the agency tasked with overseeing compliance. *See e.g.*, 42 U.S.C. 5304(b)(2) (requiring certification “that the grantee will affirmatively further fair housing”); 5306(d)(7)(B) (“No amount may be distributed by any State or the Secretary under this

court decisions, including those referenced throughout this preamble, refer to “ghettos” when discussing racially concentrated areas of poverty.

subsection . . . unless such unit of general local government certifies that . . . it will affirmatively further fair housing”), 12705(b)(15) (requiring certification “that the jurisdiction will affirmatively further fair housing”), 1437C–1(d)(16) (requiring the public housing agency’s certification that it “will affirmatively further fair housing”). It is well-settled that Congress is presumed to be aware of an administrative or judicial interpretation of a statutory provision and to adopt that interpretation when it re-enacts that statute or uses the same statutory language elsewhere without change. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (explaining that “[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”). See also *Tex. Dep’t of Hous. & Cmty. Affairs*, 576 U.S. at 536–38 (applying the concept of “implicit ratification” to the Fair Housing Act).

#### *HUD’s Implementation of the Affirmatively Furthering Fair Housing Mandate*

For decades, consistent with this judicial precedent, HUD interpreted the AFFH mandate as requiring the agency to use its programs to do more than simply not discriminate and bar others from discriminating. HUD instead interpreted this obligation to mean that it was required to use its programs to take affirmative steps to proactively overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all.<sup>4</sup> Since 1996, HUD required its grantees to support their certifications that they were affirmatively furthering fair housing by undertaking an Analysis of Impediments to Fair Housing Choice (AI), a form of fair housing planning. For example, HUD regulations for program participants that submit

Consolidated Plans require an AFFH compliance certification. For many years, these regulations provided that, in making such certification, a grantee would commit to conducting an “analysis of impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.” 24 CFR 91.225(a)(1), 91.325(a)(1) and 91.425(a)(1) (1996). The AI is meant to be an assessment of conditions, both public and private, that affect fair housing choice within a grantee’s jurisdiction. HUD’s Fair Housing Planning Guide (FHPG) provided extensive guidance on how to AFFH by supplying a framework for fair housing planning.

#### *The 2015 AFFH Rule*

In July 2013, HUD proposed regulations that codified and implemented the agency’s longstanding interpretation of the AFFH requirement. After undertaking an extensive review of comments, HUD issued its 2015 final AFFH rule to implement the statutory requirement with respect to consolidated plan and public housing agency program participants, published on July 16, 2015 at 80 FR 42272.

Consistent with decades of understanding of the obligation to AFFH as discussed throughout this preamble, the rule defined a funding recipient’s AFFH duty as “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with racially balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.” The rule further defined “meaningful actions” as “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.” The AFFH rule defined “fair housing choice,” in turn, to mean that “individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to race, color, religion, sex, familiar status, national origin, or disability.” In sum, HUD restated and memorialized the substantive content of the statutory obligation to AFFH, based on longstanding precedent in caselaw,

administrative practice, and congressional intent and ratification, in various definitions in the 2015 AFFH rule.

In addition, the 2015 AFFH rule established a process whereby program participants<sup>5</sup> would conduct a more standardized Assessment of Fair Housing (AFH) instead of an AI. The rule further required the program participant to certify that it would take meaningful actions to further the goals identified in its AFH. Program participants were not required to conduct and submit an AFH until after HUD had made available its Assessment Tool available for their use,<sup>6</sup> and instead were instructed to continue conducting AIs (*i.e.*, a variant of the same process they had followed for many years) to meet their AFFH obligations. 24 CFR 5.160(a)(3) (2015).

Following promulgation of the 2015 AFFH rule, HUD began to implement the process contemplated by its 2015 AFFH rule, including producing assessment tools for program participants to use to conduct AFHs. HUD reviewed forty-nine submitted AFHs. In 2018, however, HUD paused implementation. HUD published three **Federal Register** Notices on May 23, 2018, one of which withdrew the Assessment Tool for Local Governments, the only available HUD-provided Assessment Tool for program participants to use when conducting an AFH. 83 FR 23927 (May 23, 2018). As explained in a second **Federal Register** Notice published that same day, HUD directed all program participants who had not yet completed an AFH that they would continue to be required to conduct an AI. 83 FR 23927–23928.<sup>7</sup> This well-established AI obligation and planning process continued to be in place until the PCNC regulation took effect on September 8, 2020.

<sup>5</sup> Program participants subject to the requirements of the 2015 rulemaking included jurisdictions and insular areas required to submit consolidated plans for the Community Development Block Grant (CDBG) program (see 24 CFR part 570, subparts D and I); the Emergency Solutions Grants (ESG) program (see 24 CFR part 576); the HOME Investment Partnerships (HOME) program (see 24 CFR part 92); and the Housing Opportunities for Persons With AIDS (HOPWA) program (see 24 CFR part 574); as well as Public housing agencies (PHAs) receiving assistance under sections 8 or 9 of the United States Housing Act of 1937 (42 U.S.C. 1437f or 42 U.S.C. 1437g).

<sup>6</sup> Along with a HUD-provided assessment tool, HUD-provided data also needed to be available to program participants to trigger the obligation to conduct an AFH under the 2015 AFFH rule.

<sup>7</sup> The third **Federal Register** Notice withdrew an earlier Notice that had extended the deadline for submitting an AFH for certain program participants. 83 FR 23928.

<sup>4</sup> The requirement of recipients of Federal housing and urban development funds and other Federal funds to affirmatively further fair housing has also been reiterated through executive order predating the PCNC rule. Executive Order 12892, entitled “Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing,” issued January 17, 1994, vests primary authority in the Secretary of HUD for all federal executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner that furthers the purposes of the Fair Housing Act.



## The 2020 Proposed Rule and PCNC

HUD published a proposed rule in January 2020, 85 FR 1014 (January 14, 2020), to repeal and replace the 2015 AFFH rule. However, on August 7, 2020, at 85 FR 47899, HUD abandoned that proposed rulemaking and instead promulgated the PCNC final rule, which not only repealed the 2015 AFFH rule, but eliminated the regulatory framework that preexisted that rule. It thus left program participants without any obligation to undertake any type of fair housing planning (whether an AFH, an AI, or any other) and leaving HUD without any mechanism to assist jurisdictions that wished to continue such activity. As described below, and of particular relevance to this rulemaking, the PCNC rule also redefined the AFFH obligation to which funding recipients must certify, without reconciling the new definition with the statutory requirement and judicial precedent.

HUD promulgated PCNC without following notice-and-comment rulemaking procedures deciding that the PCNC rule was exempt from the Administrative Procedure Act (APA)'s notice and comment requirement because the regulation "applies only to the AFFH obligation of grantees." The APA exempts from notice-and-comment rulemaking any "matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. 553(a)(2). However, as PCNC acknowledged, HUD's "rule on rules" at 24 CFR part 10 requires HUD generally to follow the APA notice-and-comment rulemaking procedures notwithstanding any statutory exception that might otherwise apply, such as the grantmaking exception. HUD instead relied upon the Secretary's general regulatory waiver authority at 24 CFR 5.110 and codified at 42 U.S.C. 3535(q) to waive any regulatory requirement "[u]pon determination of good cause." As justification, the preamble to the PCNC rule stated that "AFFH has been the subject of significant debate and public comment over the course of many years and this rule will ensure that program participants have the timely clarity they need concerning their legal obligations as grantees." 85 FR 47901. In the waiver notice accompanying the PCNC regulation, HUD asserted that "[i]n light of this public engagement, continued notice and comment concerning AFFH is unnecessary and would simply be a legal formality without adding

substance to the debate."<sup>8</sup> The waiver did not acknowledge that, while other issues related to the AFFH requirement had been the subject of notice and public comment, the definition of AFFH that appears in the PCNC rule had never been published for public comment. Notwithstanding this lack of prior notice and comment, the PCNC rule withdrew the 2015 rule's definition of the AFFH obligation and replaced it with a novel definition that HUD now finds was not a reasonable interpretation of the statutory mandate. The PCNC rule acknowledged that, under any reasonable reading of the AFFH requirement, compliance "requires more than simply not discriminating," and grantees are required to "actually promote fair housing." 85 FR 47902. Nevertheless, the rule went on to define "fair housing" as "housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws." 85 FR 47905. The rule thus redefined "fair housing" to include attributes such as "safe" and "decent" that, while laudable and consistent with HUD's mission, are legally distinct from the requirements of the Fair Housing Act's AFFH obligation. It then revised the regulatory definition of "affirmatively further" to mean "to take any action rationally related to promoting any attribute or attributes of fair housing . . ." *Id.* (emphasis added). Finally, the PCNC rule provided that a program participant's certification of compliance with this statutory duty would be deemed sufficient if the participant took, during the relevant period, "any action that is rationally related to promoting one or more attributes of fair housing. . . ." using the definition of "fair housing" described above. 85 FR 47906.

Thus, under the PCNC rule, a program participant's certification of compliance with the AFFH obligation amounted to a certification that the program participant would take any action rationally related to promoting one or more of the following "attributes": Housing that is affordable, safe, decent, free of unlawful discrimination, or accessible as required under civil rights laws. This certification requirement can be satisfied with minimal or no action not already required by other non-civil rights statutes and HUD rules, and without doing anything to remedy fair

housing issues. For example, a jurisdiction taking any steps to meet HUD's programmatic requirements for maintaining the physical condition of federally supported housing, such as ensuring that fire exits are not blocked, smoke detectors are in good working order, or lighting is adequate, could certify compliance under the PCNC rule, despite taking no steps to stop discrimination that violates the Fair Housing Act, let alone any proactive steps of the kind the AFFH statutory mandate requires. Put simply, the PCNC rule made a participant's certification insufficient to ensure compliance with the AFFH obligation.

HUD thus finds that the PCNC rule did not interpret the AFFH mandate in a manner consistent with statutory requirements, HUD's prior interpretations, or judicial precedent. Nor did it provide sufficient justification for this substantial departure. Rather than attempting to reconcile its definition with these precedents, the PCNC rule dismissed them as mistaken in conclusory fashion. 85 FR 47902.

Through this rule, HUD is repealing the PCNC rule and publishing this interim final rule to reinstate the relevant definitions that were promulgated pursuant to the APA's notice and comment requirements in HUD's 2015 AFFH rule, as well as appropriate certifications that incorporate these definitions, effective on July 31, 2021. This interim final rule thus reinstates the regulatory requirement, consistent with the statutory mandate, agency interpretations, and judicial precedent, that program participants certify that they take 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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. Program participants have long been accustomed to certifying compliance with this substantive standard and comparable procedural requirements (such as completion of the AI process). Additionally, while this interim final rule does not require program participants to undertake any specific type of fair housing planning to support their certifications, it provides notice that HUD will once again offer technical support and other assistance for jurisdictions that wish to undertake AFHs, AIs, or other forms of fair housing planning.

<sup>8</sup> Partial Waiver of 24 CFR 10.1 Notice-and-Comment Requirement (July 23, 2020), <https://www.hud.gov/sites/dfiles/ENF/documents/6228-F-01%20PCNC%20-%20SIGNED%20Waiver%20-%207.23.20.11.42.pdf>.



## II. Justification for Interim Rule

### *Good Cause Under the Administrative Procedure Act*

In general, HUD publishes a rule for public comment in accordance with both the APA, 5 U.S.C. 553, and the agency's regulation on rulemaking at 24 CFR part 10. Both the APA and Part 10, however, provide for exceptions from that general rule where HUD finds good cause to omit advance notice of the opportunity for public comment. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). In order to publish a rule for effect prior to receiving and responding to public comments (*i.e.*, an interim final rule), the agency must make a finding that "good cause" exists.

HUD has determined that good cause exists to promulgate this interim final rule because it is in the public interest to publish this rule without advance notice and public comment in light of the present circumstances, and that subjecting the rule to notice and comment prior to publication would be impracticable and unnecessary. HUD's determination is based on, among other things, a combination of the following considerations. This interim final rule rescinds the PCNC regulation, currently codified at 24 CFR parts 5, 91, 92, 570, 574, and 903. HUD finds that the PCNC rule was promulgated improperly without notice and comment, and without sufficient explanation for its substantial departure from prior agency interpretations and judicial precedent concerning the AFFH obligation. As a result, the PCNC Rule creates substantial risks that reliance on the rule's certifications by HUD funding recipients, many of which are in jurisdictions where caselaw is irreconcilable with the PCNC rule, may place them in jeopardy of violation of their statutory AFFH obligations, and, were HUD to accept these certifications, may place the agency at risk of violating its own statutory duty to affirmatively further fair housing. While the PCNC rule fundamentally altered the regulatory landscape, this interim final rule is limited in scope and imposes no new requirements that have not already been the subject of prior notice and comment. It reinstates provisions that were in effect prior to the PCNC rule's promulgation. Under the unique circumstances here, HUD has good cause to omit advance notice and public comment prior to this rule taking effect.

Notwithstanding these good cause determinations for this IFR interim final rule to take effect without advance

notice and comment, HUD still requests and encourages public comments on all matters addressed in this rule.

Moreover, HUD recognizes that program participants may need some time to adjust to this restoration and may choose to seek assistance from HUD in doing so, and therefore delays the effective date until July 31, 2021. HUD has determined this is the longest delay it can provide consistent with the need to reinstate AFFH certifications that help ensure program participants' compliance with their statutory AFFH obligations in their expenditure of billions of federal dollars prior to the date on which many program participants make their annual certifications of compliance. HUD thus requests comments within 30 days of publication so that it may consider public views prior to the effective date.

### *This Limited Rulemaking Is Consistent With Notice-and-Comment Principles, Because It Restores Provisions That Have Gone Through Notice and Comment While Rescinding Provisions That Have Not*

This limited rulemaking reinstates definitions and corresponding certifications from the 2015 AFFH rule and provides notice of the reinstatement of a voluntary process by which HUD will assist program participants in complying with their AFFH obligations. HUD previously promulgated these provisions after extensive notice-and-comment process, so they are familiar to HUD program participants. HUD published a Notice of Proposed Rulemaking (NPRM) for its AFFH rule in 2013 and received over one thousand public comments. 78 FR 43709. HUD reviewed and considered those comments and then promulgated the AFFH rule in 2015.<sup>9</sup> In this interim final rule, HUD is reinstating definitions already promulgated in the 2015 rule, with a few technical changes to conform provisions that previously assumed the existence of mandatory fair housing

<sup>9</sup> HUD's full response to public comment on the restored definitions is contained in the preamble to the original publication of the 2015 AFFH rule at 80 FR 42272. *Cf. Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F. Supp. 162, 170–71 (S.D. Ala. 1975), remanded on other grounds, 578 F.2d 1149 (5th Cir. 1978) (noting that the agency could have invoked "good cause" if it had been required to repromulgate its existing regulations because the regulations had previously been promulgated pursuant to notice and comment, stating, "No real purpose would have been served by requiring the redundant solicitation of public comment. This had already been previously accorded for exactly the same regulation in question . . . Repromulgation would have required the administrative procedures be once more employed, necessitating delay and a lapse in regulatory enforcement. This would have served no useful purpose.").

planning process and other procedures, such as completing an AFH or AI, to the more limited structure of this interim final rule.

Reinstating these definitions and corresponding certifications prior to public notice and comment is also necessary because the PCNC rule provided no opportunity for the public to comment before comprehensively redefining the AFFH mandate and the content of corresponding certifications that funding recipients make on a regular basis. Where, as here, a familiar regulatory definition that has passed through extensive notice and comment scrutiny is available, HUD believes the public interest is disserved by requiring funding recipients to certify compliance to a definition that has not benefited from public comment.

As an initial matter, HUD now believes it is doubtful that PCNC's invocation of notice and comment waiver authority was appropriate. PCNC invoked HUD's general regulatory waiver authority under 24 CFR 5.110 to waive its Part 10 regulations, which otherwise would have required notice-and-comment procedures, but in doing so it downplayed the statutory requirement that HUD maintain its Part 10 regulation, as well as the general principle that notice-and-comment rulemaking for major legal change best serves the public interest. A longstanding statutory provision requires HUD to maintain its Part 10 requirements, *i.e.*, to comply with notice-and-comment requirements.<sup>10</sup> In the PCNC rule, HUD minimized the significance of this provision, stating that Congress did "not abrogate the Secretary's independent statutory authority under 42 U.S.C. 3535(q) to waive regulations in specific circumstances." 85 FR 47904 (FN 78). HUD now believes that this was an overly restrictive reading of this provision that ignored Congress's clear intent to limit HUD's authority to eschew notice-and-comment requirements.

In any event, regardless of whether PCNC's reliance on the regulatory waiver to bypass notice-and-comment requirements was lawful, HUD believes it disserved the public interest such that there is a strong interest in immediately restoring a regulatory definition that has gone through notice-and-comment scrutiny and more sustained agency and public consideration. PCNC abandoned the agency's longstanding

<sup>10</sup> See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Public Law 105–65, 111 Stat. 1344, 1365, § 208 (Oct. 27, 1997).

understanding of the AFFH obligation, declined to follow judicial precedent, and suddenly altered the duties and obligations of funding recipients around the country. No judicial authority or HUD guidance exists that would help program participants, communities, and fair housing stakeholders reconcile this newly minted definition with better-established understandings of the AFFH requirement. PCNC acknowledged this lack of judicial or agency precedent supporting its redefinition of the AFFH requirement. *See* 85 FR 47902, 47903 FN 54, 62.<sup>11</sup> It relied solely on dictionaries, *id.* at 47901–902, but without explaining how this approach justified the redefinition of the term “fair housing” to include actions that do not constitute fair housing as this term is ordinarily used. HUD relied heavily on a policy-driven conclusion that it is too burdensome for program participants to conduct any fair housing analysis, not just of the sort that was required by the 2015 rule, but of the sort that was required for decades before. *Id.* at 47902–903. These fundamental changes in how the agency understands and implements a statutory obligation are of the magnitude that should warrant notice and comment.

In this context, this interim final rule is not an attempt to avoid notice and comment obligations; instead, it suspends a rule that is inconsistent with the AFFH statutory mandate, HUD’s prior interpretations, and judicial precedent and was improperly promulgated without notice and opportunity for comment in favor of provisions drawn from a rule that assiduously followed that process. HUD believes that leaving the PCNC rule in place—thus causing grant recipients to rely upon a confusing rule that was promulgated in disregard of notice and comment obligations—while seeking comment prior to publication on a proposal to reinstate provisions from the 2015 rule would subvert rather than honor the purposes of the notice and comment process. *Cf. Friends of*

*Animals v. Bernhardt*, 961 F.3d 1197, 1206 (D.C. Cir. 2020) (“But we do not see how a government action that illegally never went through notice and comment gains the same status as a properly promulgated rule such that notice and comment is required to withdraw it. . . . we are faced only with the repeal of a “rule” that illegally never went through notice and comment—in other words, a ‘non-rule rule.’”). The notice-and-comment requirement is intended to “serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations.” *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018); *see also Consumer Energy, Etc. v. F.E.R.C.*, 673 F.2d 425, 446 (D.C. Cir. 1982) (“The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.”). HUD has determined that these salutary purposes are best served by reinstating provisions that have been subject to this “robust debate” but were undone without notice and comment, particularly as there has been little reliance on the PCNC rule’s definitions and certifications, which have been in place for only a short period of time.

Consistent with its commitment to principles of notice-and-comment rulemaking, HUD now solicits comments on the provisions it now promulgates on an interim basis and will consider all comments prior to the effective date of this interim final rule. HUD anticipates separately issuing an NPRM, which (unlike this interim final rule) will propose provisions that have not previously gone through notice and comment rulemaking. That notice will set forth and seek comment on more detailed proposed implementation of a program participant’s AFFH obligations and will seek to build on and improve the processes set forth in the 2015 AFFH rule to further help funding recipients comply with their statutory obligation while reducing the regulatory burden on them. HUD welcomes public participation in these efforts to continue to strengthen fair housing outcomes while reducing burden on program participants.

*HUD Believes the PCNC Rule Is Not Based on a Reasonable Construction of the AFFH Requirement as Construed by the Courts and Ratified by Congress*

While HUD has ample discretion to construe and apply the AFFH requirement, the PCNC regulation is

fundamentally inconsistent with the agency’s longstanding interpretation of its and funding recipients’ statutory obligation to AFFH, as well as the decades of authority described above interpreting the scope of this obligation. The current regulation does not require that program participants take any steps to further any fair housing outcomes as the term “fair housing” is generally understood, whereas the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and the Quality Housing and Work Responsibility Act of 1998 all require program participants to certify that they will affirmatively further fair housing as Congress understood and ratified the term. This conflict puts program participants at risk of confusion and violation of a statutory duty. It is in the public interest not to expose program participants to that risk.

As explained above, under the current regulation, a program participant’s certification of compliance with the AFFH obligation amounts only to a certification that the program participant will take any single action rationally related to promoting one or more of the following “attributes:” Housing that is affordable, safe, decent, free of unlawful discrimination, or accessible as required under civil rights laws. Put simply, under PCNC, HUD is not requiring program participants to certify that they are taking actions that meet their actual statutory obligation to AFFH, and HUD risks not fulfilling its own understanding of its statutory obligations.

The PCNC rule thus does not represent a selection among reasonable options within HUD’s discretion. Had HUD given notice and taken comment before promulgating it, this substantive infirmity would almost certainly have been pointed out and HUD would have had to address it. The failure to abide by notice-and-comment requirements before promulgating the PCNC rule therefore is closely connected with the failure to put in place regulatory definitions that are consistent with precedent and that foster compliance with the law. HUD believes the public interest is best served by the timely reinstatement, prior to the deadline by which a great number of program participants must certify compliance, of definitions that not only went through notice-and-comment procedures but are familiar to program participants; are consistent with well-established judicial and agency precedent construing the AFFH obligation and certifications incorporating these definitions; and are further elaborated by years of regulatory

<sup>11</sup> PCNC’s preamble pointed to the Cranston-Gonzales National Affordable Housing Act, of 1990, Public Law 101–625 102, 105, for the proposition that “Congress also broadened national housing policy grants administered by HUD, requiring AFFH certifications, to include goals such as a ‘decent, safe, and sanitary housing for every American’ and increasing the supply of ‘affordable housing.’” *See* 85 FR 47901. But this statute has several purposes. While one of its purposes was to promote decent, safe, and sanitary housing, and it incorporated a requirement that covered entities certify that they would affirmatively further fair housing, the statute does not include a nexus between that purpose and fair housing. As a result, HUD’s prior reliance on Cranston Gonzalez to justify this novel definition of fair housing was misplaced.

guidance that HUD has issued to assist grantees in compliance. Compliance with AFFH is included as a condition in a myriad of funding notices that HUD publishes on a regular basis and that it cannot delay past the effective date of this interim final rule. Similarly, HUD cannot delay past the effective date of this interim final rule because participants in the Community Development Block Grant (CDBG) program must submit their Annual Action Plans, which include AFFH certifications, by August 16 each year.

Each year, HUD provides States, local governments, and public housing agencies with billions of dollars in federal financial assistance, appropriated and authorized by Congress. As part of HUD's obligations as a grantor agency, consistent with longstanding statutory requirements, HUD oversees the use of such funds to ensure that taxpayer dollars are used in a responsible manner that is consistent with the law. For example, HUD is obligated to ensure that all federal grants are made consistently and in accordance with federal grant making requirements set forth at 2 CFR part 200. These requirements obligate HUD to engage in active oversight of its recipients, including ensuring compliance with civil rights requirements. *See, e.g.*, 2 CFR 200.300 ("The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: Including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.").

As a vital part of this oversight role, HUD requires program participants to annually certify that they will comply with various federal requirements, including the obligation to affirmatively further fair housing. Under the PCNC Rule, these certifications are to a standard that is inconsistent with the underlying legal obligation, preventing HUD from relying on them to carry out its oversight obligations. For these reasons, and with impending deadlines including the August 16 CDBG annual action plan deadline, it is imperative that HUD immediately provide its recipients with legally supportable definitions and certifications for HUD to meet its own obligations as a grantor agency and put its grantees on notice that PCNC represents a standard that HUD now believes is not consistent with the statutory obligation to

affirmatively further fair housing. Moreover, because certifications made under the PCNC rule do not require compliance with the Fair Housing Act, allowing that rule to remain in place risks further entrenching segregation and inequity in access to housing and opportunity, challenges that have been exacerbated by presently converging health, economic, and climate crises.

#### *HUD Is Delaying the Effective Date of This Interim Final Rule Until July 31, 2021*

While HUD is providing notice immediately that it does not regard the PCNC definitions as compliant with the statutory AFFH obligation, HUD's prior interpretations, and judicial precedent, HUD is delaying the effective date of this interim final rule until July 31, 2021 to give program participants time to adjust. HUD has determined that this is the longest delay of the effective date it can provide while ensuring that municipalities and other participants in the Community Development Block Grant program can submit annual action plans, including AFFH certifications, that are consistent with the AFFH statutory obligation as described above. CDBG annual action plans must be submitted by August 16 each year, and so HUD has determined that it is necessary for this rule to go into effect before then and to provide program participants with sufficient notice.<sup>12</sup>

Between the date of publication and the effective date, HUD will provide additional clarity to affected program participants. HUD will provide guidance and technical support to program participants regarding the interim final rule, including with respect to the reinstated definitions and certifications and with respect to fair housing planning and actions that program participants may voluntarily undertake in support of their certifications. Additionally, although the definitions have already been the subject of notice-and-comment rulemaking, HUD will seek comment for a period of 30 days from publication to solicit additional views. HUD will carefully consider all such comments and in response to those comments, as it deems appropriate, may amend the interim final rule accordingly.

#### *Conclusion*

Under the totality of the circumstances described above, HUD believes this limited-in-scope interim

final rule is justified by good cause.<sup>13</sup> HUD finds that the PCNC rule is contrary to the AFFH statutory mandate and constitutes a substantial departure from HUD's prior interpretations and judicial precedent. Moreover, the PCNC rule is contrary to multiple Congressional mandates with which HUD must act promptly to comply by removing the PCNC regulation and restoring definitions upon which program participants can reasonably rely in certifying compliance with their statutory duty to AFFH. HUD further finds that the PCNC rule was improperly promulgated without a sufficient reason for forgoing notice and comment rulemaking. This interim final rule reinstates provisions that have already undergone sufficient notice and comment processes, and HUD is now inviting additional comment and delaying the effective date of this interim final rule until July 31, 2021. HUD may further revise this interim final rule before its effective date in response to these comments. Additionally, HUD is reestablishing voluntary processes and technical assistance to assist program participants in complying with their statutory AFFH obligations and engage in fair housing planning.

#### **III. This Interim Final Rule**

Against this backdrop, this interim rulemaking is narrowly focused to meet the urgent need to withdraw the PCNC rule definition, which promotes confusion and noncompliance with the statutory obligation to AFFH, and to reinstate a definition that properly states that duty and is the result of notice and comment rulemaking. This interim final rule restores the understanding of the AFFH obligation for certain recipients of federal financial assistance from HUD to the previously established understanding by reinstating legally supportable definitions that are consistent with a meaningful AFFH requirement and certifications that incorporate these definitions. HUD has also amended the certifications in the program regulations at 24 CFR 91.225, 91.325, 91.425, 570.487, 903.7, and related record keeping requirements to restore meaningful AFFH certifications that incorporate appropriate definitions.

<sup>13</sup> *See* *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984) ("For here the combination of several extraordinary factors validates the Department's adoption of the interim rule under the mantle of 'good cause.'"); *see also* *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 105–107 (D.D.C. 2006) (finding that, under the totality of circumstances, a combination of the four reasons advanced by the agency established good cause to promulgate an interim final rule).

<sup>12</sup> *See* 42 U.S.C. 5316(b); 24 CFR 91.15(a); 24 CFR 570.304(c)(1).

Amendments to 24 CFR parts 92, 570, 574, and 576 include updated cross-references and clarification of program participants in the HOME, CDBG, Housing Opportunities for Persons With AIDS (HOPWA), and Emergency Solutions Grants programs regarding recordkeeping requirements. In a similar manner, this interim final rule amends 24 CFR 903.7(o), 903.15, and 24 CFR 903.23(f) to update cross-references to the amended definitions and certification provisions in 24 CFR 5.151 and 5.152 and to explain the relationship of the public housing agency plans to the consolidated plan and a PHA's fair housing requirements. The regulations also explain how HUD will assist program participants in carrying out their obligation and provides attendant definitions in 24 CFR 5.152. With this interim final rule, HUD does not, however, reinstate the obligation to conduct an AFH or AI, or mandate any specific fair housing planning mechanism.

The effect of the reinstatement of the 2015 AFFH rule definitions and certifications incorporating those definitions is that recipients once again can rely on HUD's regulatory definition to accurately articulate the purpose and meaning of their AFFH obligation. The critical importance of requiring funding recipients to certify to a regulatory definition that is consistent with longtime understandings of the AFFH obligation was recognized by the court in *National Fair Housing Alliance v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018). In that case, plaintiffs challenged HUD's withdrawal of the Local Government Assessment Tools (and effective suspension of the AFH process), contending that eliminating these procedural requirements put HUD in violation of its own obligation to ensure that funding recipients comply with the AFFH requirement. The court determined that HUD's actions were not contrary to the Fair Housing Act because the AI requirement and the 2015 rule's definitions and certifications incorporating those definitions remained in place. *See* 330 F. Supp. 3d at 45. Accordingly, when HUD published PCNC and replaced the 2015 rule's definitions with ones unmoored from the Fair Housing Act, it withdrew the underpinnings of *National Fair Housing Alliance v. Carson's* reasoning that HUD was continuing to require compliance with the Act's substantive obligation.

Since some of the 2015 Rule's definitions may not be applicable absent the obligation to conduct an AFH or AI, HUD is not reinstating all definitions from the 2015 AFFH rule at 24 CFR

5.152 (2015). Instead, HUD is promulgating only those that are applicable and in force under this limited-in-scope interim final rule.<sup>14</sup> HUD is providing the definitions at 24 CFR 5.151 in order to inform program participants of how these terms are applied. The definitions include: "Affirmatively Furthering Fair Housing," "Disability," "Fair Housing Choice," "Housing Programs Serving Specified Populations," "Integration," "Meaningful Actions," "Racially or Ethnically Concentrated Areas of Poverty," "Segregation," and "Significant Disparities in Opportunity." These definitions correspond with the AFFH statutory mandates, HUD's long-standing interpretations, and judicial precedent.

HUD provides the definition of "Affirmatively Furthering Fair Housing" based on numerous judicial interpretations of the Fair Housing Act. For example, in *Otero v. New York City Housing Auth.*, the Second Circuit held that the AFFH mandate requires that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero*, 484 F.2d at 1134. It found that this requirement flows from the evident legislative purpose, as Senator Mondale "pointed out that the proposed law was designed to replace the ghettos 'by truly integrated and balanced living patterns.'" *Otero*, 484 F.2d at 1134 (*citing* 114 Cong. Reg. 3422).

Similarly, in *NAACP, Boston Chapter v. HUD*, 817 F.2d at 154, the First Circuit held that "as a matter of language and logic, a statute that instructs an agency 'affirmatively to

further' a national policy of nondiscrimination would seem to impose an obligation to do more than simply not discriminate itself." *NAACP, Boston Chapter*, 817 F.2d at 154. It found that ". . . a failure to 'consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area' would be inconsistent with the Fair Housing Act's mandate. *Id.* at 156. Further, the court found that "the need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *Id.* If HUD is "doing so in any meaningful way, one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing." *Id.*

Similarly, in *Thompson v. HUD*, the court found that the AFFH mandate requires consideration of the effect of its policies on the racial and socioeconomic composition of the surrounding area. *Thompson*, 348 F. Supp. 2d at 409; *see also* *Garrett v. Hamtramck*, 335 F. Supp. 16, 27 (E.D. Mich. 1971), *aff'd* 503 F.2d 1236 (6th Cir. 1974). HUD believes the 2015 rule's definition of AFFH is consistent with these rulings and others and can ensure that HUD and its program participants comply with the AFFH requirement.

Relatedly, in this interim final rule, HUD is including a definition of "Fair Housing Choice" that is consistent with these cases and others. For example, in *Thompson*, the court found that, "it is appropriate to note that there is a distinction between telling a person that he or she may not live in [a] place because of race and giving the person a choice so long as the place in question is, in fact, available to anyone without regard to race." 348 F. Supp. 2d at 450.

The other definitions provided in this interim final rule, which help to detail the meaning of the AFFH obligation, are similarly rooted in judicial precedent and statutory purpose. In *Otero*, the Second Circuit held that the AFFH mandate extends beyond HUD and to its recipients (in that case, the housing authority) and required funding recipients to take affirmative steps to promote integration. 484 F.2d at 1124. The obligation of program participants to take "Meaningful Actions," as defined in the 2015 rule and in this interim final rule, is a reasonable interpretation of this holding. *See also* *NAACP, Boston Chapter*, 817 F.2d at

<sup>14</sup> While some definitions from the 2015 AFFH rule referred to the Assessment Tool to provide more information, HUD does not restore these references. HUD has removed references to the AFH and other provisions of the 2015 AFFH rule that are no longer applicable. HUD restores 24 CFR 5.150 to similarly align with this approach, explaining that the purpose of the regulations, pursuant to the statutory obligation to affirmatively further fair housing, is to provide program participants with a substantive definition of the AFFH requirement, as well as to provide access to an effective planning approach to aid those program participants that wish to avail themselves of it in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination. These conforming edits to the definitions and purpose do not change the meaning of the terms; they merely align them to the previously published regulations that are restored here. HUD believes that the restoration of these definitions will be helpful to recipients as they certify that they are affirmatively furthering fair housing consistent with prior judicial interpretations of the statutory mandate to affirmatively further fair housing.

154 (requiring the assessment of actions in a “meaningful way”).

In addition, because the AFFH obligation as intended by Congress and construed by the courts requires efforts to decrease segregation and promote integration, HUD finds it appropriate to once again include those concepts in the definition of AFFH and, in turn, reinstate the definitions for both “Segregation” and the converse, “Integration,” from the 2015 rule. *See Client’s Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) (“Congress enacted section 3608(e)(5) to cure the widespread problem of segregation in public housing”); *see also Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1013–1019 (E.D. Pa. 1976) *aff’d in part, rev’d in part on other grounds*, 564 F.2d 126 (3d Cir.), *cert. denied*, 435 U.S. 908 (1977) (“Each case brought under [3608(e)(5)] requires a close analysis of the facts peculiar to that case and the city in which the facts have occurred . . . in view of the pattern of racial segregation which prevailed in both private and public housing in Philadelphia, the City of Philadelphia has not, under the facts of this case, met its duty of affirmatively implementing the national policy of fair housing and has violated Title VIII of the Civil Rights Act of 1968.”); *Otero*, 484 F.2d at 1133–34 (explaining that “. . . the affirmative duty placed on the Secretary of HUD by § 3608(e)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built.”).

HUD is also reinstating the definition of “Housing Programs Serving Specified Populations” in this rule. Such programs include HUD and Federal Housing programs, such as HUD’s Supportive Housing for the Elderly, Supportive Housing for Persons with Disabilities, and homeless assistance programs under McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301, *et seq.*), and housing designated under section 7 of the United States Housing Act of 1937 (42 U.S.C. 1437e) that serve specific identified populations and comply with Federal civil rights statutes and regulations. The inclusion of this definition is necessary to assure current and prospective program participants that participation in these specified Federal housing programs does not present a fair housing issue of segregation, provided that such programs are administered to comply with program regulations and applicable civil rights requirements.

Judicial precedents similarly held that, as a necessary precursor to fulfilling the ultimate obligation of pursuing actions that foster desegregation and avoid perpetuating segregation, the AFFH mandate requires program participants to assess the demographics of discrete geographic areas when conducting an analysis. For example, the Third Circuit found that the AFFH mandate requires obtaining the information necessary to make informed decisions on the effects of site selection or type selection of housing with regard to racial concentration, determining that even within the discretion afforded by the AFFH mandate, judgment must be “informed.” *See Shannon*, 436 F.2d at 820–22.

In light of these judicial precedents, this rule reinstates the definitions of “Data” and “Significant Disparities in Access to Opportunity.” In doing so, it restores a reasonable interpretation of precedents holding that the AFFH obligation requires the consideration of data such as the racial demographics of neighborhoods, other geographic areas, and housing developments, as a necessary precursor to taking meaningful action to promote integration, decrease segregation, undo racially or ethnically concentrated areas of poverty, and overcome significant disparities in access to opportunity. *See, e.g., Blackshear Res. Org. v. Housing Auth. of City of Austin*, 347 F. Supp. 1138, 1148 (W.D. Tex. 1971) (holding that both the PHA and HUD were charged with the obligation to AFFH and their decision “failed to consider that policy” and must be set aside because HUD had not considered “hard, reliable data showing the racial demography of any of these areas” despite the readily available data that could have been consulted.).

Finally, HUD is including definitions of “Protected Characteristic,” “Protected Class,” and “Disability.” The definition of “Disability” in this interim final rule, as in the 2015 AFFH Rule, is intended to be consistent with other federal civil rights laws with which program participants must comply, such as Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008. HUD incorporates by reference the definition of disability under Section 504 and the ADA as interpreted by the Attorney General, *see* 28 CFR 35.108, for purposes of the affirmatively furthering fair housing obligation under Section 808(e)(5) so as to provide consistency and clarity to HUD program participants, which are all already

bound by the same definition under those statutes.

In addition to reinstating these definitions, HUD restores the certifications that incorporate these definitions. HUD has sometimes required funding recipients to certify to compliance with certain procedures (such as creating an AI) that implement the caselaw above and has sometimes required certification to a substantive standard. HUD is not mandating any particular procedure by which program participants must engage in fair housing planning in this interim final rule, but rather is reinstating a meaningful substantive definition of AFFH.

Additionally, HUD interprets its own statutory obligation as requiring it to assist program participants with compliance, and in any event HUD’s experience teaches it that such assistance leads to better fair housing outcomes. Through this interim final rule, HUD resumes a process for providing technical assistance to program participants that engage in fair housing planning, including, in particular, the familiar AI and AFH processes.

HUD anticipates that many program participants may wish to engage in voluntary fair housing planning processes that support their AFFH certifications. Most program participants have already prepared an AI or AFH, which were required by the regulations that preceded the PCNC rule, and so HUD anticipates that many program participants may wish to continue to implement or update their AI or AFH to support their AFFH certifications. Accordingly, HUD will provide technical assistance and other support to program participants that voluntarily engage in the AI or AFH planning processes. This interim final rule does not require program participants to comply with these processes, but HUD anticipates the continued use of the AI or AFH process are ways program participants may choose to support AFFH certifications while maintaining continuity.

Program participants may also choose to support their certifications and maintain records in other meaningful ways, provided they can appropriately certify that they will AFFH, consistent with the definitions that are restored in this rule. Program participants are encouraged to seek technical assistance from HUD’s Office of Fair Housing and Equal Opportunity (FHEO) regarding any fair housing planning process.

Under its authority regarding a grantee’s certifications, HUD may review recipients’ records and documents to confirm the validity of

certifications submitted to HUD in connection with the receipt of Federal funds. HUD only intends to undertake such a review when it has reason to believe the certifications submitted are not supported by the recipients' actions. HUD expects these instances to be rare and will provide all required notice to recipients of any review to be undertaken.

Consistent with this interim final rule, HUD will separately restore the guidance and resources available for recipients' use in conducting fair housing planning until such time as HUD finalizes a new regulation to implement the statutory mandate to AFFH at 42 U.S.C. 3608(e)(5). While the AFFH Rule Guidebook was published to further the implementation of the 2015 AFFH rule, its content may assist recipients in identifying areas of analysis and strategies and actions that would overcome historic patterns of segregation, promote integration, increase access to opportunity, and ensure fair housing choice. As such, HUD will republish both the FHPG and the AFFH Rule Guidebook. It also will keep the AFFH Data and Mapping Tool (the AFFH-T) publicly available,<sup>15</sup> so that program participants have racial, socioeconomic, and other data to engage in fair housing planning.

HUD will also make available the Assessment Tool for Local Governments and the Assessment Tool for Public Housing Agencies, which previously were made available as an optional format to follow to conduct an AI, and which some program participants have chosen to use to guide their fair housing planning processes.

HUD's provision on a voluntary basis of a variety of familiar tools is intended to reduce the burden on recipients while ensuring that they have tools for fair housing planning in order to AFFH as HUD works toward an implementation scheme that will further reduce burden for recipients while bolstering fair housing outcomes.

As noted, HUD will solicit comments through a separate NPRM on how to amend the 2015 AFFH rule to achieve both burden reduction and material, positive change that affirmatively furthers fair housing.

For the reasons described in this preamble, this rule is necessary to comply with the Congressional mandate to AFFH and the statutory certifications, consistent with the directive in the FY1998 appropriations. While HUD will solicit public comments on the NPRM

through separate **Federal Register** notice, HUD here requests and encourages public comments on all matters addressed in this interim final rule.

#### IV. 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. This interim final rule has been determined to be a "significant regulatory action," as defined in section 3(f) of Executive Order 12866, but not economically significant. Because nothing in this rule imposes any specific regulatory requirements and because the substantive standard that this rule reinstates is one that program participants have long followed, HUD anticipates that this rule will have no economic effects.

Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This interim final rule clarifies the obligation with which HUD grantees are already required to comply by statute. HUD, therefore, believes that this final rule would provide flexibility and freedom for HUD grantees to AFFH, consistent with the statutory mandate, and is consistent with Executive Order 13563.

##### *Executive Order 13132, 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 final rule is a policy document that sets out fair housing and nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final 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. Because HUD determined that good cause exists to issue this rule without prior public comment, this rule is not subject to the requirement to publish an initial or final regulatory flexibility analysis under the RFA as part of such action.

##### *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 for Affirmatively Furthering Fair Housing collected have previously been approved by OMB under the Paperwork Reduction Act and assigned OMB control number 2506–0117 (Consolidated Plan, Annual Action Plan & Annual Performance Report).

##### *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

<sup>15</sup> HUD has continued to update the data used in this tool on a yearly basis. The data was last updated in summer 2020.

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.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 5, 91, 92, 570, 574, 576, and 903 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; Executive Order 11063, 27 FR 11527, 3 CFR, 1958–1963 Comp., p. 652; Executive Order 12892, 59 FR 2939, 3 CFR, 1994 Comp., p. 849.

■ 2. Revise § 5.150 to read as follows:

#### § 5.150 Affirmatively Furthering Fair Housing: Purpose.

Pursuant to the affirmatively furthering fair housing mandate in section 808(e)(5) of the Fair Housing Act, and in subsequent legislative enactments, the purpose of the Affirmatively Furthering Fair Housing (AFFH) regulations is to provide program participants with a substantive definition of the AFFH requirement, as well as to provide access to an effective planning approach to aid those program participants that wish to avail themselves of it in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.

■ 3. Revise § 5.151 to read as follows:

#### § 5.151 Affirmatively Further Fair Housing: Definitions.

For purposes of §§ 5.150 through 5.152, the terms “consolidated plan,” “consortium,” “unit of general local government,” “jurisdiction,” and “State” are defined in 24 CFR part 91. For PHAs, “jurisdiction” is defined in 24 CFR 982.4. The following additional definitions are provided solely for purposes of §§ 5.150 through 5.152 and related amendments in 24 CFR parts 91, 92, 570, 574, 576, and 903:

**Affirmatively furthering fair housing** means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means 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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.

**Disability.** (1) The term “disability” means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(ii) A record of such an impairment;

or

(iii) Being regarded as having such an impairment.

(2) The term “disability” as used herein shall be interpreted consistent with the definition of such term under section 504 of the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act Amendments Act of 2008. This definition does not change the definition of “disability” or “disabled person” adopted pursuant to a HUD program statute for purposes of determining an individual’s eligibility to participate in a housing program that serves a specified population.

**Fair housing choice** means that individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to race, color, religion, sex, familial status, national origin, or disability. Fair housing choice encompasses:

(1) Actual choice, which means the existence of realistic housing options;

(2) Protected choice, which means housing that can be accessed without discrimination; and

(3) Enabled choice, which means realistic access to sufficient information regarding options so that any choice is informed. For persons with disabilities, fair housing choice and access to opportunity include access to accessible housing and housing in the most integrated setting appropriate to an individual’s needs as required under Federal civil rights law, including disability-related services that an individual needs to live in such housing.

**Housing programs serving specified populations.** Housing programs serving specified populations are HUD and Federal housing programs, including designations in the programs, as applicable, such as HUD’s Supportive Housing for the Elderly, Supportive Housing for Persons with Disabilities, homeless assistance programs under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 *et seq.*), and housing designated under section 7 of the United States Housing Act of 1937 (42 U.S.C. 1437e), that:

(1) Serve specific identified populations; and

(2) Comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601–19), including the duty to affirmatively



further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*); and other Federal civil rights statutes and regulations.

*Integration* means a condition, within the program participant's geographic area of analysis, in which there is not a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a particular type of disability when compared to a broader geographic area. For individuals with disabilities, integration also means that such individuals are able to access housing and services in the most integrated setting appropriate to the individual's needs. The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). See 28 CFR part 35, appendix B (2010) (addressing 28 CFR 35.130 and providing guidance on the Americans with Disabilities Act regulation on nondiscrimination on the basis of disability in State and local government services).

*Meaningful actions* means significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.

*Racially or ethnically concentrated area of poverty* means a geographic area with significant concentrations of poverty and minority populations.

*Segregation* means a condition, within the program participant's geographic area of analysis, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). (See 28 CFR part 35, appendix B (2010), addressing 25 CFR 35.130.) Participation in "housing programs serving specified populations" as defined in this section does not present

a fair housing issue of segregation, provided that such programs are administered to comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4) (Nondiscrimination in Federally Assisted Programs): The Fair Housing Act (42 U.S.C. 3601–19), including the duty to affirmatively further fair housing; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*); and other Federal civil rights statutes and regulations.

*Significant disparities in access to opportunity* means substantial and measurable differences in access to educational, transportation, economic, and other important opportunities in a community, based on protected class related to housing.

■ 4. Add § 5.152 to read as follows:

**§ 5.152 AFFH Certification and Administration.**

(a) *Certifications.* Program participants must certify that they will comply with their obligation of affirmatively furthering fair housing when required by statutes or regulations governing HUD programs. Such certifications are made in accordance with applicable regulations. Consolidated plan program participants are subject to the certification requirements in 24 CFR part 91, and PHA Plan program participants are subject to the certification requirements in 24 CFR part 903.

(b) *Administration.* To assist program participants in carrying out their obligation of affirmatively furthering fair housing, and supporting their certifications pursuant to paragraph (a) of this section, HUD will provide technical assistance to program participants in various ways, including by:

(1) Making HUD-provided data and informational resources available, including about how to voluntarily engage in fair housing planning, such as:

(i) Analyzing fair housing data, assessing fair housing issues and contributing factors, assessing fair housing priorities and goals; taking meaningful actions to support identified goals; and taking no action that is materially inconsistent with the obligation to affirmatively further fair housing; or

(ii) Conducting an analysis to identify impediments to fair housing choice within the jurisdiction, taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintaining

records reflecting the analysis and actions in this regard; or

(iii) Engaging in other means of fair housing planning that meaningfully supports this certification;

(2) Permitting a program participant to voluntarily submit its fair housing planning for HUD feedback from the responsible office; and

(3) Engaging in other forms of technical assistance.

(c) *Procedure for challenging the validity of an AFFH certification.* The procedures for challenging the validity of an AFFH certification are as follows:

(1) For consolidated plan program participants, HUD's challenge to the validity of an AFFH certification will be as specified in 24 CFR part 91.

(2) For PHA Plan program participants, HUD's challenge to the validity of an AFFH certification will be as specified in 24 CFR part 903.

(d) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Data* refers collectively to the sources of data provided in paragraphs (d)(1)(i) and (d)(1)(ii) of this definition. When identification of the specific source of data in paragraphs (d)(1)(i) and (d)(1)(ii) is necessary, the specific source (HUD-provided data or local data) will be stated.

(i) *HUD-provided data.* The term "HUD-provided data" refers to HUD-provided metrics, statistics, and other quantified information that may be used when conducting fair housing planning. HUD-provided data will not only be provided to program participants but will be posted on HUD's website for availability to all of the public;

(ii) *Local data.* The term "local data" refers to metrics, statistics, and other quantified information, relevant to the program participant's geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and may be used to conduct fair housing planning.

(2) *Program participants* means:

(i) Jurisdictions and Insular Areas, as described in 570.405 and defined in 570.3, that are required to submit consolidated plans for the following programs:

(A) The Community Development Block Grant (CDBG) program (see 24 CFR part 570, subparts D and I);

(B) The Emergency Solutions Grants (ESG) program (see 24 CFR part 576);

(C) The HOME Investment Partnerships (HOME) program (see 24 CFR part 92); and

(D) The Housing Opportunities for Persons With AIDS (HOPWA) program (see 24 CFR part 574).

(ii) Public housing agencies (PHAs) receiving assistance under sections 8 or

9 of the United States Housing Act of 1937 (42 U.S.C. 1437f or 42 U.S.C. 1437g).

(3) *Protected characteristics* are race, color, religion, sex, familial status, national origin, having a disability, and having a type of disability.

(4) *Protected class* means a group of persons who have the same protected characteristic; e.g., a group of persons who are of the same race are a protected class. Similarly, a person who has a mobility disability is a member of the protected class of persons with disabilities and a member of the protected class of persons with mobility disabilities.

#### **PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS**

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

**Authority:** 42 U.S.C. 3535(d), 3601–19, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 6. Revise § 91.225(a)(1) to read as follows:

##### **§ 91.225 Certifications.**

(a) \* \* \*

(1) Affirmatively furthering fair housing. Each jurisdiction is required to submit a certification, consistent with §§ 5.151 and 5.152 of this title, that it will affirmatively further fair housing.

■ 7. Revise § 91.235(c)(4) to read as follows:

(c) \* \* \*

(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 § 570.440 of this title. This includes the certification that the grantee will affirmatively further fair housing pursuant to §§ 5.151 and 5.152 of this title.

\* \* \* \* \*

■ 8. Revise § 91.325(a)(1) to read as follows:

##### **§ 91.325 Certifications.**

(a) \* \* \*

(1) *Affirmatively furthering fair housing.* Each State is required to submit a certification, consistent with §§ 5.151 and 5.152 of this title, that it will affirmatively further fair housing.

\* \* \* \* \*

■ 9. Revise § 91.425(a)(1)(i) to read as follows:

##### **§ 91.425 Certifications.**

(a) \* \* \* (1) \* \* \* (i) *Affirmatively furthering fair housing.* Each Consortium is required to submit a certification, consistent with §§ 5.151 and 5.152 of this title, that it will affirmatively further fair housing.

\* \* \* \* \*

#### **PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM**

■ 10. 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.

■ 11. Amend § 92.508 by revising paragraph (a)(7)(i)(C) to read as follows:

##### **§ 92.508 Recordkeeping.**

(a) \* \* \*

(7) \* \* \*

(i) \* \* \*

(B) Documentation of the actions the participating jurisdiction has taken to affirmatively further fair housing pursuant to §§ 5.151, 5.152, 91.225, 91.325, and 91.425 of this title.

\* \* \* \* \*

#### **PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS**

■ 12. 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.

■ 13. Revise § 570.487(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 HUD's satisfaction that it will affirmatively further fair housing pursuant to §§ 5.151 and 5.152 of this title. The Act also requires each unit of general local government to certify that it will affirmatively further fair housing.

\* \* \* \* \*

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

##### **§ 570.506 Records to be maintained.**

\* \* \* \* \*

(g) \* \* \*

(1) Documentation of the actions the participating jurisdiction has taken to affirmatively further fair housing pursuant to §§ 5.151, 5.152, 91.225, 91.325, and 91.425 of this title.

■ 15. Revise § 570.601(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 community development in a manner to affirmatively further the policies of the Fair Housing Act.

\* \* \* \* \*

#### **PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS**

■ 16. 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.

■ 17. Revise § 574.530(b) to read as follows:

##### **§ 574.530 Recordkeeping.**

\* \* \* \* \*

(b) Documentation of the actions the grantee has taken to affirmatively further fair housing, pursuant to §§ 5.151 and 5.152 of this title.

\* \* \* \* \*

#### **PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM**

■ 18. 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).

■ 19. Amend § 576.500 by revising paragraph (s)(1)(ii) to read as follows:

##### **§ 576.500 Recordkeeping and reporting requirements.**

\* \* \* \* \*

(s) \* \* \*

(1) \* \* \*

(ii) Documentation of the actions that the recipient has taken to affirmatively further fair housing, pursuant to §§ 5.151 and 5.152 of this title.

\* \* \* \* \*

#### **PART 903—PUBLIC HOUSING AGENCY PLANS**

■ 20. 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.

■ 21. Amend § 903.7 by revising paragraph (o) to read as follows:

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

\* \* \* \* \*

(o) *Civil rights certification.* (1) The PHA must certify that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 20000d–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), and title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), and other applicable Federal civil rights laws. The PHA must also certify that it will affirmatively further fair housing pursuant to §§ 5.151 and 5.152 of this title.

(2) The certification is applicable to the 5-Year Plan and the Annual Plan.

\* \* \* \* \*

■ 22. Amend § 903.15 by adding paragraph (c) 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?**

\* \* \* \* \*

(c) *Fair housing requirements.* A PHA is obligated to affirmatively further fair housing in its operating policies, procedures, and capital activities. 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.

(1) *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.

(2) *Affirmatively furthering fair housing.* A PHA's policies should be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability. Any affirmative steps or incentives a PHA plans to take must be stated in the admission policy.

(i) HUD regulations provide that PHAs must take steps to affirmatively further fair housing. PHA policies should include affirmative steps to overcome the effects of discrimination and the effects of conditions that resulted in limiting participation of

persons because of their race, national origin, disability, or other protected class.

(ii) Such affirmative steps may include, but are not limited to, marketing efforts, use of nondiscriminatory tenant selection and assignment policies that lead to desegregation, 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 disability agencies 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.

(3) *Validity of certification.* (i) A PHA's certification under § 903.7(o) will be subject to challenge by HUD where it appears that a PHA:

(A) Fails to meet the affirmatively furthering fair housing requirements at 24 CFR 5.150 through 5.152

(B) Takes action that is materially inconsistent with its obligation to affirmatively further fair housing; or

(C) Fails to meet the fair housing, civil rights, and affirmatively furthering fair housing requirements in 24 CFR 903.7(o).

(ii) 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 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.

■ 23. Amend § 903.23 by revising 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 pursuant to §§ 5.151, 5.152, and 903.7(o) of this title.

Dated: June 4, 2021.

**Marcia L. Fudge,**

*Secretary.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R01–OAR–2020–0327; FRL–10024–76–Region 1]

### Air Plan Approval; Maine; Infrastructure State Implementation Plan Requirements for the 2015 Ozone Standard and Negative Declaration for the Oil and Gas Industry for the 2008 and 2015 Ozone Standards; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; correction.

**SUMMARY:** The Environmental Protection Agency (EPA) is correcting a final rule that was published in the **Federal Register** on May 13, 2021 which will be effective on June 14, 2021. The final rule approved a State Implementation Plan (SIP) revision submitted by the State of Maine which addresses the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2015 ozone National Ambient Air Quality Standards (NAAQS); as well as a SIP revision containing amendments to Maine's 06–096 CMR Chapter 110, “Ambient Air Quality Standards,” and SIP revisions submitted by Maine that provide the state's determination, via a negative declaration for the 2008 and 2015 ozone standards, that there are no facilities within its borders subject to EPA's 2016 Control Technique Guideline (CTG) for the oil and gas industry. This correction does not change any final action taken by EPA on May 13, 2021; this action merely provides further clarification on the amendments to the regulatory