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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 576

[Docket No. FR-5474-N-02]

RIN 2506-AC29

Emergency Solutions Grants (ESG) Program, Solicitation of Comment on Specific Issues

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Regulatory review; request for comments.

SUMMARY: On December 5, 2011, HUD published an interim rule entitled "Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments" (interim rule). The comment period for the interim rule ended on February 3, 2012. Because recipients and subrecipients have now had more experience implementing the interim rule, HUD recognizes that they may have additional input and comments for HUD to consider in its development of the ESG final rule (final rule). Therefore, this document takes comments for 60 days to allow additional time for public input, and for HUD to solicit specific comment on certain issues.

DATES: *Comment due date*: **[Insert date that is 60 days after date of publication in the Federal Register].**

ADDRESSES: Interested persons are invited to submit comments responsive to this request for information to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-7000. Communications must refer to the above docket number and title and should contain the information specified in the "Request for Comments" of this notice.

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

Submission of Hard Copy Comments. Comments may be submitted by mail or hand delivery. To ensure that the information is fully considered by all of the reviewers, each commenter submitting hard copy comments, by mail or hand delivery, should submit comments or requests to the address above, addressed to the attention of the Regulations Division. Due to security measures at all federal agencies, submission of comments or requests by mail often result in delayed delivery. To ensure timely receipt of comments, HUD recommends that any comments submitted by mail be submitted at least 2 weeks in advance of the public comment deadline. All hard copy comments received by mail or hand delivery are a part of the public record and will be posted to *http://www.regulations.gov* without change.

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 Comments. All comments submitted to HUD regarding this notice will be available, without charge, 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 documents must be scheduled by calling the Regulation Division at 202-708-3055 (this is not a toll-free number). Copies of all comments submitted will also be available for inspection and downloading at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW, Room 7262, Washington, DC, 20410-7000, telephone number (202) 708-4300 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

A. Background

1. Reasons for Re-Opening Public Comment Period:

The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act) (Division B of Public Law 111-22), enacted into law on May 20, 2009, amended the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11371 et seq.) (McKinney-Vento Act) to consolidate the following homeless programs–the Supportive Housing Program, the Shelter Plus Care program, and Moderate Rehabilitation Single Room Occupancy program–into a single program, the Continuum of Care Program. The HEARTH Act also revised the Emergency Shelter Grants program and renamed it the Emergency Solutions Grants (ESG) program, which is the subject of this notice.

The HEARTH Act broadened the emergency shelter and homelessness prevention activities of the Emergency Solutions Grants program beyond those of its predecessor program, the Emergency Shelter Grants program, and added short- and medium-term rental assistance and services to rapidly re-house persons experiencing homelessness. The change in the program's name reflects the change in the program's focus from addressing the needs of homeless people in emergency or transitional shelters to assisting people to quickly regain stability in permanent housing after experiencing a housing crisis or becoming homeless.

On December 5, 2011, at 76 FR 75954, HUD published an interim rule for ESG entitled "Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments."[1] The interim rule revised the regulations for the Emergency Shelter Grants Program by establishing the new requirements for the Emergency Solutions Grants Program at 24 CFR part 576 and making corresponding amendments to HUD's Consolidated Plan regulations at 24 CFR part 91.

The interim rule took effect on January 4, 2012, and the public comment period for the interim rule ended on February 3, 2012. HUD has carefully reviewed all comments received in response to the interim rule. However, since the issuance of the interim rule, communities have gained valuable experience implementing the Emergency Solutions Grants (ESG) program, and HUD has been working with and hearing from ESG recipients, ESG subrecipients, Continuums of Care (CoCs), interest and advocacy groups, and other stakeholders to gather information about this experience. As is the case with any new program, ESG recipients and subrecipients have raised questions and issues about various components of the interim rule. HUD appreciates the questions and feedback provided to date, and consequently has decided to re-open the public

[1] It is available at the following link: https://www.hudexchange.info/resource/1927/hearth-esg-program-and-consolidated-plan-conforming-amendments.

comment period on the interim rule for the purpose of seeking broader input on implementation of the interim rule, before HUD makes final decisions for the final rule. In fact, HUD is raising many of the issues for consideration in this notice in order to be able to more clearly establish in the final rule what is or is not eligible and what the limitations are with ESG funds, in many cases based on recipient or subrecipient feedback. This notice offers an opportunity for ESG recipients and subrecipients, the public, and all interested parties to provide their feedback about particular issues in the interim rule.

Re-opening public comment period for the interim rule supports HUD's goals of increasing public access to and participation in developing HUD regulations and other related documents, and promoting more efficient and effective rulemaking through public involvement.

2. Statutory and Regulatory Changes Affecting the ESG Program:

Since HUD issued the ESG interim rule, the following significant statutory or regulatory changes have occurred or are in progress, which will impact the ESG program:

a. MAP-21. On July 18, 2012, President Obama signed into law the "Moving Ahead for Progress in the 21st Century Act" (MAP-21) (Public Law 112-141, 126 Stat. 405), which changed the program requirements in the following four areas:

- Changed the applicable environmental review requirements from 24 CFR part 50 back to part 58.
- Defined the term "local government" to include an instrumentality of a unit of general purpose local government (other than a public housing agency) to act on behalf of the local government with regard to ESG activities, and to include a combination of general purpose local governments.

- Defined the term "State" to include an instrumentality of a State to act on behalf of the State with regard to ESG activities.
- Allowed a metropolitan city and urban county that each receive an ESG allocation and are in the same Continuum of Care (CoC) to receive a joint allocation of ESG funds.

HUD's ESG final rule will incorporate these statutory changes, which are in effect now. Later in this notice, HUD seeks comment on specifics related to implementing joint allocations and instrumentalities.

b. VAWA 2013. The Violence Against Women Reauthorization Act (VAWA) of 2013 (Public Law 113-4, 127 Stat. 54) was enacted on March 7, 2013. On August 6, 2013, at 78 FR 47717, HUD issued a *Federal Register* notice that provided an overview of the applicability of VAWA 2013 to HUD programs. This notice listed the HUD programs–including the ESG program–that VAWA 2013 added to the list of covered programs, described the changes that VAWA 2013 made to existing VAWA protections, and identified certain issues for which HUD specifically sought public comment. VAWA will be implemented through notice and comment rulemaking and a proposed rule was published in the Federal Register on April 1, 2015. However, the core protections of VAWA–not denying or terminating assistance to victims of domestic violence and expanding the VAWA protections to victims of sexual assault—are in effect, and do not require notice and comment rulemaking for compliance. Recipients and subrecipients should proceed to comply with the basic VAWA protections, and HUD's program offices have advised program participants of the immediate applicability of the core protections.[2]

[2] Listserv message from HUD's Office of Special Needs Assistance Programs, at https://www.hudexchange.info/news/reauthorization-of-the-violence-against-women-act-vawa

The ESG regulations will reflect all applicable VAWA protections following promulgation of a VAWA final rule.

c. OMB OmniCircular. On December 26, 2013, at 78 FR 78590, the Office of Management and Budget (OMB) issued final guidance on administrative costs, cost principles and audit requirements for federal awards. This final guidance supersedes and streamlines requirements from OMB Circulars A-21, A-87, A-110, and A-122 and Circulars A-89, A-102, and A-133. OMB has finalized the guidance in Title 2 of the Code of Federal Regulations (CFR). OMB charged federal agencies with adopting the policies and procedures in the final guidance by December 26, 2014. HUD is in the process of adopting such guidance in regulation and, when adopted, the ESG regulations will cross-reference to the applicable regulations addressing these award requirements.

d. Equal Access rule. The "Equal Access to Housing in HUD Programs–Regardless of Sexual Orientation or Gender Identity" final rule (77 FR 5662) was published on February 3, 2012. It amends 24 CFR 5.105 to create a new regulatory provision that generally prohibits HUD's assisted and insured housing programs, including ESG, from considering a person's marital status, sexual orientation, or gender identity (a person's internal sense of being male or female) in making housing assistance available. CPD Notice 15-02, "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities," published in February 2015, provides guidance on how recipients of ESG funding can ensure compliance with this rule.

e. Definition of Chronically Homeless. HUD intends to finalize the definition of "chronically homeless," which affects 24 CFR part 91 (the Consolidated Plan regulations). Once

published, it will apply to part 91, and the current definition will be amended. This will establish a consistent definition of chronically homeless across HUD's homeless assistance programs.

f. HMIS final rule. HUD intends to publish a final rule for Homeless Management Information Systems (HMIS). Once published, this rule will apply to all entities using the CoC's HMIS, including Consolidated Plan jurisdictions (both those that receive ESG funds and those that do not) and ESG subrecipients. The ESG regulations will reflect applicable HMIS requirements following promulgation of the HMIS final rule.

B. How to Read this Notice

In re-opening the public comment period for the ESG rule, HUD strives to present a structure to this notice that is informative and encourages meaningful public input to the questions posed by HUD. Accordingly, this notice commences with solicitation of comments on definitions and then generally follows the organization of the regulations in the interim rule. This notice describes specific areas of the interim rule on which HUD seeks additional public comment, in order to assist HUD in deciding policy for the final ESG rule. In addition to seeking additional feedback and comment on certain provisions of the ESG interim rule, for some provisions, HUD proposes specific language for comment. This notice contains some regulatory language to provide context to certain questions or proposed language presented by HUD, but it may be helpful to the reader to review this notice in conjunction with the interim rule. HUD appreciates and values the feedback that commenters provide, particularly feedback that draws on their experience with the interim rule.

The issues addressed in this notice are limited; there are several reasons for this. First, HUD has received public comments on numerous issues, and many of these comments are sufficient for HUD to be able to make a decision–in some cases, a change–for the final rule.

Such issues are not specifically addressed in this notice. For example, HUD is planning to change the income requirement for re-evaluation from "at or below 30 percent AMI" to "below 30 percent AMI" to match the requirement at initial intake, because many people have been confused by the distinction. Second, some issues–including the definition of "homeless," the corresponding recordkeeping requirements, and the definition of "chronically homeless"–are not subject to further public comment. Public comment for the definition of "homeless" and the corresponding recordkeeping requirements were addressed in the Defining Homeless final rule published in the December 5, 2011, *Federal Register*. Likewise, please note that there are some elements of the ESG program that HUD cannot change because they are statutory, such as the cap on Street Outreach and Emergency Shelter program components, or the fact that public housing agencies (PHAs) cannot be recipients or subrecipients (with limited exceptions). Lastly, HUD requests that commenters not resubmit any comments already submitted in the first public comment period unless they provide new information or insights based on research or experience with the program. As mentioned above, HUD has already carefully considered the first set of comments. These are all available online at: www.regulations.gov/#!docketDetail;D=HUD-2011-0153. When the final rule is published, HUD will provide a response to each comment received in either comment period. Please take these factors into consideration when developing and submitting comments.

II. AREAS OF THE CONSOLIDATED PLAN AND ESG INTERIM RULE ON WHICH HUD SEEKS ADDITIONAL PUBLIC COMMENT

A. Definitions

HUD seeks comments on possible changes to several definitions included in the interim rule at §§91.5 and 576.2.

1. At risk of homelessness (§§ 91.5 and 576.2): HUD received many comments requesting further elaboration about the condition referenced at § 576.2(1)(iii)(G), which states: "Otherwise lives in housing that has characteristics associated with instability and an increased risk of homelessness, as identified in the recipient's approved Consolidated Plan." HUD recognizes that, given the variety of types, characteristics, and conditions of housing in urban, suburban, and rural areas around the country, this definition could encompass many different housing situations. However, it is important to note that this condition focuses on characteristics of the *housing*, not the *household.* For example, in a housing unit that does not have the capacity for utilities (e.g., broken water pipes, non-functional wiring for electricity, etc.), the lack of utilities would be a characteristic of the housing. Other examples might include a leaking roof or damage from rodents. On the other hand, if the utilities have been shut off in a housing unit, due to the household's inability to pay, HUD considers this a characteristic of the household, not a characteristic of the housing (of course, that household might still be able to receive ESG assistance under a different category of the At Risk of Homelessness definition).

HUD is considering adding specificity to this condition in the ESG final rule, and seeks comments on the following questions:

a. What types of housing conditions exist in your region that would support this interpretation, or what housing conditions exist that would necessitate different regulatory language?

b. What characteristics, if any, should be added to this portion of the definition of "At Risk of Homelessness" to aid recipients in determining who is at risk of homelessness?

Note: For the corresponding recordkeeping requirement, see Section II.C.19.a. of this notice.

2. Emergency shelter (§§ 91.5 and 576.2): The definition of "emergency shelter" in the interim rule states: "Any facility, the primary purpose of which is to provide a temporary shelter for the homeless in general or for specific populations of the homeless, and which does not require occupants to sign leases or occupancy agreements. Any project funded as an emergency shelter under a Fiscal Year 2010 Emergency [Shelter] Grant may continue to be funded under ESG." HUD is considering revising the definition in §576.2 to address several issues, and seeks comment on the following proposed definition (italicized language added or changed from the interim rule definition): "Emergency shelter means any facility *(including any building or portion of a building)*, the primary purpose of which is to provide a temporary shelter for homeless *individuals or families* in general or for specific populations of homeless *individuals or families. If occupancy creates rights of tenancy under state or local law, the primary purpose is not temporary shelter. The use of the building as an emergency shelter must not be inconsistent with applicable state and local law, including zoning and building codes*." Each of the proposed changes addressed by the above language is described in greater detail below, with some alternatives discussed. Further, HUD seeks comment on an additional clause for inclusion in the definition: adding to the definition that the facility (building or portion of a building) must also be designated as an emergency shelter on the CoC's most recent Housing Inventory Count.

HUD's proposed changes to the definition of emergency shelter are designed to convey the following: 1) It is not solely the structure of the building that makes something an emergency shelter, it is its purpose—essentially temporary sleeping accommodation—and local zoning laws and building codes determine whether a particular use or structure is allowed in an area; 2) The primary purpose of emergency shelter is to provide a habitable place for a homeless individual or family to sleep, and occupancy by an individual or family in an emergency shelter

is temporary (no rights of tenancy are conferred by occupancy); and 3) The homeless shelter provider and program participant relationship is fundamentally different than that of a landlord-tenant relationship.

Below is a discussion of the intent of the proposed changes as well as specific questions for public comment.

a. Adding "building or portion of a building." HUD recognizes that an emergency shelter can take many shapes, especially in rural areas and during local emergencies (e.g. hypothermia season), and communities need flexibility to ensure that all homeless persons have a safe place to sleep at night. In light of this recognition, HUD is considering changing the definition of emergency shelter to include the term "building or portion of a building." This change is intended to clarify that an emergency shelter might consist of a building (such as one designed as an emergency shelter facility or a residential-style building), or it might consist of only a portion of a building, such as a wing, room, or floor of a building, or even one or more apartment units, in which homeless families or individuals are given temporary shelter, as evidenced by restrictions on occupancy and use. HUD intends for each of these possible arrangements to be covered under the emergency shelter definition, and HUD invites comments as to whether adding "building or portion of a building" would be helpful clarification.

The requirements that apply to each emergency shelter would apply to each building or portion of a building used as an emergency shelter. Further, each separate building would be considered a separate emergency shelter, even if multiple buildings are located on the same site. However, multiple emergency shelters (whether whole buildings or portions of buildings) could comprise a single emergency shelter *project* if the recipient or subrecipient decides to group the shelters together under HUD's proposed definition of "project" (discussed

below). Consequently, the recipient or subrecipient could apply a single set of written standards to all emergency shelters that are classified as the same emergency shelter project. HUD will consider other requirements that could apply when determining where the word "project" is to be used in the final rule, with the goal of improving the ease of administering a "project" for recipients and subrecipients. However, note that any ESG requirement that uses "emergency shelter" but not "project" would apply on a shelter-by-shelter basis, not project-wide. For example, a subrecipient might be able to group two or more shelters under one emergency shelter project for purposes of funding and written standards, but could not group the shelters together for purposes of meeting the involuntary family separation prohibition, which uses "emergency shelter," not "project."

With respect to this idea, HUD seeks comment on the following specific questions:

(1) If HUD were to add "building or portion of a building" to the definition of "emergency shelter," are there any particular issues or challenges that it would cause for ESG recipients and subrecipients, and if so, what are they? Or, would this be a helpful addition, and if so, how?

(2) Alternatively, HUD is considering adding "building, buildings, or portions(s) of a building." However, in order to consider multiple buildings to be a single emergency shelter, HUD would need to make additional qualifications to be consistent with the nondiscrimination and other ESG requirements. HUD seeks comment on the following questions related to this proposal:

(a) Should HUD require the shelter buildings to be within a certain distance of each other to be considered the same emergency shelter? For example, could two emergency shelter buildings on opposite sides of a large urban county be considered a single emergency

shelter, or should HUD set a distance limit? Is there a circumstance under which there would be an advantage – either administrative or otherwise – to consider two emergency shelter buildings as a single shelter, especially if they can be administered as the same project, with the same written standards and other rules?

(b) Should HUD require the buildings to be operated by the same subrecipient to be considered the same emergency shelter?

(c) Are there any other requirements HUD should establish in order to establish commonalities that makes the different buildings a single emergency shelter?

(d) If multiple shelter buildings could be considered a single project, would it make a significant difference in your community if HUD were to adopt "building, buildings, or portion" of a building, as opposed to "building or portion of a building?"

(3) Are there any other considerations about this distinction that are important for HUD to take into account in determining the final rule on this topic?

b. Clarifying that occupancy in an emergency shelter must not create any rights of tenancy under state or local law. In formally recognizing that a facility could include an apartment or other building to serve as an emergency shelter, HUD aims to distinguish emergency shelter provided by a recipient or subrecipient where the shelter resident is sleeping in an apartment or other standard unit from the provision of rental assistance. This bolsters the requirement that emergency shelter is temporary. Therefore, HUD is considering adding the following sentence to the definition of emergency shelter: "*If occupancy creates rights of tenancy under state or local law, the primary purpose is not temporary shelter.*" In other words, if the shelter resident's occupancy of a space creates a right of tenancy or entitlement to occupancy to that space, it is not temporary and, therefore, it is not emergency shelter. HUD seeks comment on this proposal, in

particular: In communities that have "right to shelter" laws, would this addition create any conflicts? If any problems could arise, what are they?

c. Establishing a clearer distinction between emergency shelter and transitional housing, including removing "leases or occupancy agreements" from the definition. The primary distinction between emergency shelter and transitional housing is incorporated into the statutory definitions of these terms in the McKinney-Vento Act, as follows: the purpose of an emergency shelter is to provide temporary shelter; the purpose of transitional housing is "to facilitate the movement of individuals and families experiencing homelessness to permanent housing within 24 months." HUD's proposed definition incorporates two related issues for the public to consider:

(1) In the ESG and CoC Program interim rules, HUD attempted to further clarify for recipients the distinction between the two by stating that transitional housing projects must require a lease or occupancy agreement and emergency shelters could not. HUD received many questions about what constitutes an occupancy agreement, and has since determined that this is not necessarily the best way to make this distinction. This is in part because an occupancy agreement is, simply, a document that is a contract between two parties that is not a legal lease under local landlord/tenant law (though in some communities an occupancy agreement meets the requirements of a lease). Therefore, HUD is proposing removing the phrase "and which does not require occupants to sign leases or occupancy agreements" from the definition of emergency shelter.

(2) In its place, HUD is considering adding to the definition a requirement that each emergency shelter must be designated as such on the most recent Housing Inventory Count (HIC) for the applicable CoC for the geographic area, in order to establish a clear and consistent

location to identify the status for each emergency shelter or transitional housing project each year. Under this proposal, each recipient or subrecipient would be required to choose the status of a particular project, based on the primary purpose of the project, as either emergency shelter or transitional housing, and indicate this designation formally on the HIC. Per this proposal, the purpose of the project would become the distinguishing factor, as designated on the HIC. This designation would only apply to the project's eligibility for funding under HUD's CoC or ESG Programs.

HUD recognizes that in some ESG-funded "transitional shelter" projects, program participants tend to stay for longer than 3 or 6 months, and the program has a heavy service focus. HUD intends to require these types of projects to carefully consider their purpose. HUD also notes that if a subrecipient's emergency shelter contains overnight sleeping accommodations (i.e. not a day shelter), it could operate a rapid re-housing project in conjunction with that emergency shelter, to help move program participants to permanent housing. The primary purpose of the emergency shelter bed would be to provide temporary shelter, and the primary purpose of the rapid re-housing project would be to help program participants move quickly into permanent housing (whereas the primary purpose of a transitional housing project is to provide housing for up to 24 months while facilitating the movement to permanent housing). In addition, any emergency shelter that has used ESG funds for renovation and is under a 3- or 10-year minimum period of use requirement would be required to be designated as an emergency shelter. Likewise, any building rehabilitated under the transitional housing component of the CoC Program would be required to be designated as transitional housing.

If included in the final rule, HUD plans to issue guidance to help recipients and subrecipients make this determination. This Notice is not intended to provide that guidance;

rather, it is intended to introduce this concept, and seek public comment on it in order to determine whether to move forward with it in the ESG final rule, and in the CoC final rule. HUD seeks public comment on including a requirement in the definition of emergency shelter for recipients and subrecipients to designate emergency shelter projects on the HIC; specifically the following questions:

(a) Would it be helpful to include a provision making the HIC the required place for designating whether a particular bed is considered emergency shelter or transitional housing? Or would it create an unnecessary burden, or would it make no difference since emergency shelters must be designated on the HIC already?

(b) If added, should it be included in the definition of emergency shelter or elsewhere in the final rule (e.g. the emergency shelter requirements section at § 576.102 or documentation section at § 576.500)? Alternatively, should it be required elsewhere, such as in the subrecipient agreement?

(c) Finally, HUD has considered that there may be an ESG subrecipient with an emergency shelter in an area that is either not covered by a CoC or where the CoC has not submitted a HIC, for some reason. Has this scenario occurred? Should HUD address this in the final rule?

d. Removing or altering the concept of "grandfathering in" projects in the interim rule.

The ESG interim rule includes the following language, "Any project funded as an emergency shelter under a Fiscal Year 2010 Emergency [Shelter] Grant may continue to be funded under ESG." The current language was intended to continue funding of "transitional shelters" which were included in the definition of "emergency shelter" under the Emergency Shelter Grants Program. HUD is considering whether to remove, alter, or maintain this clause in

the definition, based on the changes described above which more clearly define an emergency shelter versus transitional housing.

If HUD were to remove this clause, HUD recognizes that there may be some facilities currently classified as emergency shelters that would not meet the revised definition of emergency shelter as proposed, and these facilities would not be eligible for continued funding under the ESG Program. HUD seeks comment on the following questions related to this issue:

(1) If removing the "grandfathering" clause *would not* affect your project or community, what strategies have you undertaken to meet the needs without providing ESG-funded transitional shelter or transitional housing?

(2) If removing the "grandfathering" clause *would* affect your project or your community, please describe the significance of the impact, specifically the number of beds that would lose ESG funding as a result. Also, what is it about the project that makes it not temporary, or what is the purpose of the project or activities provided that make it overlap between transitional housing and emergency shelter?

(3) How could HUD change the definition of emergency shelter—specifically, the "grandfathering clause"—to ensure that beds that are truly needed as emergency shelter in the community can continue to receive ESG funds in the future?

e. Ensuring that emergency shelters are placed in locations that are not inconsistent with an area's zoning and building code. Especially as HUD clarifies that buildings such as apartment buildings can be used as emergency shelters, HUD wants to ensure that recipients and subrecipients fully understand that the use of a building as emergency shelter (e.g., the designation as such) must be in compliance with state and local laws. For this reason, HUD is considering adding the following language either to the definition of emergency shelter or to the

requirements in §576.102, to emphasize it: "*The use of the building as an emergency shelter must not be inconsistent with the applicable state and local law, including zoning and building codes*." If HUD were to adopt such language in the final rule:

(1) Would it be helpful in ensuring that all recipients and subrecipients understand the context in which emergency shelter must be provided, especially if it is a building or portion of a building that is not traditionally used as emergency shelter, or would including this language make no practical difference?

(2) If HUD were to include this requirement, would it be most appropriate in the definition or the elsewhere in the final rule (e.g. §576.102(a))?

(3) Additionally, would it be helpful to remind recipients and subrecipients in the final rule that all emergency shelters must be operated consistently with state or local law? If so, should that reminder be incorporated into the definition of emergency shelter or elsewhere in the final rule?

f. Other comments. In addition to the specific feedback requested above, HUD seeks any additional feedback on this the revised, proposed definition of emergency shelter.

3. Local government and State (Instrumentalities) (§576.2): MAP-21 expanded the statutory definition of "local government" to include an instrumentality of the unit of general purpose local government, other than a public housing agency, provided that the instrumentality is established pursuant to legislation and designated by the chief executive to act on behalf of the local government regarding activities funded under title IV of the McKinney-Vento Act. MAP-21 also expanded the statutory definition of "state" to include any instrumentality of a state that is designated by the governor to act on behalf of the state.

HUD is considering the following standards for recognizing instrumentalities under ESG and seeks comments on the following proposals, specifically how burdensome it would be to obtain this information:

a. Instrumentality of a State. For HUD to recognize an instrumentality as the state for ESG, the state must submit the following to the local HUD field office:

(1) The governor's written designation of the instrumentality to act on behalf of the state with respect to activities funded under ESG; and

(2) A legal opinion from the attorney general of the state that the instrumentality either:

(a) Meets each of the following criteria:

(i) Is used for a governmental purpose and performs a governmental function;

(ii) Performs its function on behalf of the state;

(iii) The state has the authority to appoint members of the governing body of the entity, or the control and supervision of the entity is vested in the state government;

(iv) Statutory authority is needed by the state to create and/or use the entity; and

(v) No part of the net earnings inures to the benefit of any private shareholder, member or individual; or

(b) The entity otherwise qualifies as an instrumentality of the state under its state law.

b. Instrumentality of a local government. For HUD to recognize an instrumentality as the metropolitan city or urban county for ESG, the metropolitan city/urban county must submit the following to the local HUD field office:

(1) The chief executive's written designation of the instrumentality to act on behalf of the metropolitan city/the urban county with respect to activities funded under ESG; and

(2) Certification by the metropolitan city or urban county (chief executive or authorized attorney for the metropolitan city or urban county) that:

(a) The instrumentality is established pursuant to legislation to act on behalf of the metropolitan city/the county with regard to homeless assistance activities, but is not a public housing authority/agency; and

(b) The instrumentality either:

(i) Meets the following criteria:

(A) The entity is used for a governmental purpose and performs a governmental function;

(B) The entity performs its function on behalf of the metropolitan city/the county;

(C) The metropolitan city/the county has the authority to appoint members of the governing body of the entity or the control and supervision of the entity is vested in the metropolitan city/the county;

(D) State or local statutory authority is needed to create and/or use the entity; and

(E) No part of the net earnings inures to the benefit of any private shareholder, member or individual;

or

(ii) Otherwise qualifies as an instrumentality of the metropolitan city/urban county under its state or local law.

4. Project (§576.2): HUD is considering adding a definition of "project," in order to establish a clear meaning for the term's primary use in the ESG final rule. HUD is considering that this definition read as follows:

> *"Project means an activity or group of related activities under a single program component, designed by the recipient or subrecipient to accomplish, in whole or in part, a specific objective, and which uses a single HMIS implementation for data entry on these activities. A project may include both ESG-funded and non-ESG-funded activities. This definition does not apply to the term "project" when used in the requirements related to environmental review, project-based rental assistance, or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."*

Under this proposed definition, a single organization could self-define the project in accordance with this definition, and administer one or more than one project. For example, a nonprofit subrecipient could administer a Rapid Re-housing project that only provides case management to persons receiving rental assistance through another federal program. Or, it could administer a Rapid Re-housing project that provides various activities under the Rapid Re-housing component. Alternatively, it could set up and administer two rapid re-housing projects in two different locations (e.g., in different parts of a state), in a single location (e.g. one project for city-funded activities and one project for state-funded activities), or it could consider the two as a single rapid re-housing project. However, if a single provider used ESG funds for rapid re-housing and emergency shelter, these would be two separate projects. Similarly—related to the proposed definition of emergency shelter discussed above—multiple emergency shelters (whether whole buildings or portions of buildings) could comprise a single emergency shelter

project. Also note that this proposed definition requires activities defined as a project to use the same HMIS implementation. This means that if an ESG recipient/subrecipient operates rapid re-housing activities, for example, in two different CoCs that use different HMIS implementations, they would need to consider these two separate projects. In addition, this definition of project may have implications for other aspects of the ESG final rule: for example, a recipient or subrecipient could establish a single set of written standards at the project level (also addressed under written standards, below). Finally, note that this definition of "project" would not apply to the term when used for purposes of the Integrated Disbursement and Information System (IDIS).

HUD seeks comment on the following questions related to the definition of "project:"

(1) HUD could allow each recipient or subrecipient to self-define the project in accordance with HUD's definition (such as the one proposed above), such as in a recipient's Annual Action Plan, in a subrecipient's request for funding from the recipient, or in the subrecipient agreement. Should HUD require recipients or subrecipients to formally define or declare each project, and should HUD define how it should be done? If so, what should that requirement be?

(2) What are the potential effects—positive and negative—of adopting the proposed definition?

(3) Are there suggestions for alternate definitions or changes to this definition?

5. Rapid Re-housing (§ 91.5):

HUD is reviewing whether to revise the definition in §91.5 as follows (italicized text replaces current language):

"The provision of *a package of rental assistance, financial assistance, and/or services, tailored to the household,* necessary to help a homeless individual or

family move as quickly as possible into permanent housing and achieve stability in that housing."

This definition would be consistent with a model established by HUD in collaboration with the U.S. Interagency Council on Homelessness, other federal agencies, and stakeholders. HUD seeks comment on this proposed definition.

B. Request for comment on the amendments to Consolidated Submissions for Community Planning and Development (CPD) Programs (24 CFR part 91)

1. Submission of Action Plans - Timing (§91.15 and §91.115): HUD is considering revising the Consolidated Plan regulations to prohibit Consolidated Plan jurisdictions from submitting Action Plans to HUD before formula allocations have been announced for each fiscal year, as explained in CPD Notice 2014-015, published on October 21, 2014.[3] However, this CPD Notice identified ways in which a jurisdiction could initiate citizen participation on its proposed plan before the jurisdiction knows its actual allocation amounts for a given year. HUD solicits comments on whether HUD should revise the regulations governing citizen participation (§91.105 and §91.115) to reflect the CPD Notice; that is, to allow a jurisdiction to conduct citizen participation on a proposed plan that does not reflect actual allocation amounts, but only if the proposed plan provides "contingency language" explaining how the jurisdiction will adjust the proposed plan to reflect actual allocation amounts once known. (See also the discussions of §570.200 and §91.500 in sections II.B.2 and II.B.7 of this Notice, respectively.)

2. Reimbursement for Pre-Agreement Costs in the Entitlement Community Development Block Grant (CDBG) Program (§570.200(h)): In conjunction with CPD Notice 2014-15 HUD issued a waiver to certain CDBG Entitlement grantees to allow them to reimburse themselves for

[3] CPD Notice 2014-015 is available at: https://www.hudexchange.info/resources/documents/Notice-CPD-14-015-Guidance-Submitting-Con-Plans-Annual-Action-Plans-FY-2015.pdf

costs incurred as of the earlier of the grantee's program year start date or the date the Consolidated Plan/Action Plan is received by HUD. Should HUD revise the Consolidated Plan rule to prohibit submission of Action Plans before formula allocations have been announced, as described above, HUD would also pursue a conforming revision to the Entitlement CDBG program regulations; such a change would permanently adopt the alternative requirements provided by the waiver. HUD seeks comment on this proposal. (See also the discussions of §§ 91.15 and 91.115, and §91.500 in sections II.B.1 and II.B.7 of this Notice, respectively.)

3. Area-Wide Systems Coordination Requirements – Consultation and Coordination (§91.100(a)(2) and (d), §91.110(b) and (e), §576.400(a), (b), and (c)): See Section II.C.12 of this Notice for more detail.

4. Housing and Homeless Needs Assessment (§91.205 and §91.305):

a. "Nearing the termination of rapid re-housing assistance" (§91.205(b)(1)(i)(K) and §91.305(b)(1)(i)(K)). HUD is reconsidering the inclusion of the following element in the housing needs assessment (currently required as a narrative in the Consolidated Plan): "Formerly homeless families and individuals who are receiving rapid re-housing assistance and are nearing the termination of that assistance." HUD originally included this element to encourage Consolidated Plan jurisdictions to identify those households who are housed but who might be more likely to become homeless again than other households, and to focus on helping these families stay housed after their rapid re-housing assistance ends. HUD received a comment indicating that the requirement to obtain this data is too burdensome for states, and is considering removing the requirement for both states and local governments due to the difficulty in obtaining consistent and accurate data. Alternatively, HUD could attempt to clarify the requirement by changing it to "Formerly homeless families and individuals who are receiving

ESG or CoC-funded rapid re-housing assistance and are *within 30 days of the end of* that assistance." HUD seeks comment on the following questions:

(1) Is this information useful as a part of a jurisdiction's analysis of housing needs and its planning process? If so, in what ways? If not, should HUD eliminate this as a requirement in the final rule for states, local governments, or both?

(2) Is there a better way for HUD to encourage jurisdictions to identify and focus efforts on the households most likely to become homeless again? HUD seeks suggestions about how the requirement could be changed to make it easier to capture this or similar information.

b. Estimating needs for States (§91.305(b)(1)(i)). For states, the interim rule also added a requirement to estimate the number and type of families in need of housing assistance for public housing residents (paragraph (b)(1)(i)(F)) and families on the public housing and Housing Choice Voucher tenant-based waiting list (paragraph (b)(1)(i)(G)). HUD received a comment that it is too burdensome for states to collect this data, and is reconsidering the inclusion of both of these elements for states. HUD seeks comment on the following questions:

(1) Is this information useful as a part of a state's analysis of housing needs and its planning process? If so, in what ways?

(2) How are states collecting this data? Are states obtaining reliable estimates on these elements?

(3) Should HUD remove either of these elements from the housing needs assessment of the Consolidated Plan for states, and why or why not?

c. Estimation of homeless data (§91.305(c)(i) and §91.205(c)(i)). The interim rule requires Consolidated Plan jurisdictions to include, in their Housing and Homeless Needs Assessment, the following:

> "for each category of homeless persons specified by HUD (including chronically homeless individuals and families, families with children, veterans and their families, and unaccompanied youth), the number of persons experiencing homelessness on a given night, the number of persons who experience homelessness each year, the number of persons who lose their housing and become homeless each year, the number of persons who exit homelessness each year, and the number of days that persons experience homelessness."

HUD expects Consolidated Plan jurisdictions to obtain this data from CoCs, and CoCs will be able to obtain most elements from the local HMIS and the PIT count. However, CoCs must ensure that the data reflects the boundaries of the Consolidated Plan jurisdiction rather than the boundaries of the CoC. The HMIS Data Standards Manual at https://www.hudexchange.info/resources/documents/HMIS-Data-Standards-Manual.pdf, released in 2014, establishes certain data elements to be collected in HMIS that enable jurisdictions to report on the above-required measures. However, HUD recognizes that communities are currently working towards setting up their HMIS solutions in order to fully meet these requirements, and that some of this data may only be based on estimates until the new data standards are fully implemented. When a CoC's claimed geographic area includes multiple Consolidated Plan jurisdictions that CoC will need to disaggregate CoC-wide data for each Consolidated Plan jurisdiction. States, territories, and local Consolidated Plan jurisdictions with multiple CoCs need to compile relevant data from all of CoCs within their geographic area. HUD recognizes that some Consolidated Plan jurisdictions might have encountered challenges related to collecting data for the Homeless Needs Assessment of the Consolidated Plan due to the

overlap of CoC boundaries and Consolidated Plan jurisdictions. HUD seeks feedback about how jurisdictions are currently providing estimates for these measures, specifically:

(1) What steps are CoCs currently carrying out to disaggregate CoC-wide data for the Consolidated Plan jurisdiction, when their geographies do not align?

(2) What are the barriers to obtaining accurate data for these measures at the Consolidated Plan jurisdiction level?

(3) Are Consolidated Plan jurisdictions using this data for planning or other purposes, and how?

(4) Based on the information above, should HUD make any additional changes to the regulation? If so, what would be most helpful?

d. Scope of Consolidated Plan Data for States (§91.305). In its Action Plan, each state is required to describe "…the geographic areas of the state… in which it will direct assistance during the ensuing program year, giving the rationale for the priorities for allocating investment geographically…" (required at §91.320(f) for the Action Plan and found in the eCon Planning Suite on screen AP-50). Because the information gathered for the Consolidated Plan Housing and Homeless Needs Assessment establishes the need in the state and is the basis for the Strategic Plan and Action Plan, it is important for the public and for HUD to understand the scope of data being reported. However, there might be great variance in the universe of data that states report in their Needs Assessment: some states include data from entitlement jurisdictions that receive their own allocation of Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), ESG, and/or Housing Opportunities for Persons With AIDS (HOPWA) funding, some only report data on non-entitlement jurisdictions, and some states include partial data from entitlement jurisdictions. In fact, the eCon Planning Suite pre-

populates some default data in compliance with different program regulations that require entitlement jurisdictions' data to be either included or excluded for different parts of the Consolidated Plan Needs Assessment. Because *homeless* data is not pre-populated in the eCon Planning Suite, it might be unclear whether, and which, data from entitlements are included in the state's Consolidated Plan Homeless Needs Assessment.

In the final rule, HUD is considering adding one of the following requirements to §91.305 to help obtain the most precise data possible so that each state can better demonstrate how it is tracking and addressing homelessness in its area, and seeks comments on which option HUD should select, if any:

(1) The state has the option to include in its Homeless Needs Assessment data on entitlement jurisdictions within its boundaries, and must cite all data sources. If the state's Needs Assessment includes data from any entitlement jurisdictions, it must cite which entitlement jurisdictions' data is included and the source of that data (if appropriate, the state could reference the applicable entitlement jurisdiction's Consolidated Plan). If the state's Homeless Needs Assessment is limited to non-entitlement areas' data, then the Consolidated Plan must indicate this; or

(2) The state must only report non-entitlement data in its Homeless Needs Assessment. If a state intends to allocate funds to an entitlement jurisdiction, the state would be required to incorporate the entitlement jurisdiction's data in its Homeless Needs Assessment by reference only (e.g., provide a link to a website or to the jurisdiction's Consolidated Plan containing the data).

e. Funding services to people on tribal lands (§§91.205, 91.305). HUD intends to provide ESG recipients with the discretion to choose whether or not to use ESG to fund nonprofit

organizations serving people living on tribal lands. HUD is considering adding the following language: "An ESG recipient may fund activities in tribal areas located within the recipient's jurisdiction, provided that the recipient includes these areas in its Consolidated Plan." HUD seeks comment on this proposal–specifically:

(1) What effects will this requirement have?

(2) How are ESG recipients already including tribal areas in their consolidated planning process?

(3) If included, should this language be added at part 91 or in part 576?

f. States' use of HMIS and PIT data (§91.305(c)(1)). The interim rule does not include the following requirement for states, which is in the regulation for local governments: "At a minimum, the recipient must use data from the Homeless Management Information System (HMIS) and data from the Point-In-Time (PIT) count conducted in accordance with HUD standards." HUD is considering including this requirement for states in the final rule, because most states are already obtaining this data from CoCs and HMIS systems, and this change would make the collection consistent with the requirement for metropolitan cities and urban counties. HUD seeks comment on this addition.

g. Coordination between the Con Plan jurisdiction and CoC on Planning (24 CFR 91.100(a)(2)(i) and 91.110(b)(1)). Currently, the consultation provisions at 24 CFR 91.100(a)(2)(i) and 91.110(b)(1) require each Consolidated Planning jurisdiction to consult with the applicable CoC(s) when preparing the portions of the consolidated plan describing the jurisdiction or state's homeless strategy and the resources available to address the needs of homeless persons and persons at risk of homelessness. In order to develop this strategy, Con Plan jurisdictions must assess the needs and identify available resources to address those needs.

For the final rule, HUD is considering specifying that the consultation requirements include a requirement for the Con Plan jurisdiction to consult with the applicable CoC(s) on the following homeless-specific aspects of the Con Plan: the jurisdiction's homeless needs assessment (§§91.205(c) and 91.305(c)), one-year goals and specific action steps for reducing and ending homelessness (§§91.220(i)(1) and 91.320(h)(1)), and performance reports (§91.520).

HUD expects that in many places, especially where the geographic boundaries of CoCs and Con Plan jurisdiction are coterminous, CoCs and Con Plan jurisdictions are already coordinating to align the strategies in the Con Plan and CoC plan. HUD has received questions about what acceptable consultation, participation, and collaboration consist of, between the CoCs and Con Plan jurisdictions, and especially for states. The purpose of proposing this requirement would be to specify the requirements and ensure that Con Plan jurisdictions and CoCs are collaborating on all aspects of the plan that directly impact the homeless goals and strategies, in order to develop a more complete and cohesive strategy to end homelessness in these overlapping plans.

HUD seeks comment on this concept, specifically:

(1) Would this requirement facilitate or improve collaboration and coordination between CoCs and Con Plan jurisdictions on homelessness activities? If so, how? If not, why not?

(2) Are the current consultation requirements in the interim rule sufficient for Con Plan jurisdictions to establish the needs and strategies for addressing homelessness in the jurisdiction?

(3) Should HUD include this requirement, or are there other ways that HUD could, in the final rule, facilitate better coordination between CoCs and Con Plan jurisdictions to ensure that their plans establish closely aligned and complementary goals to end homelessness?

5. Process for Making Subawards (§§ 91.220(l)(4)(iii) and 91.320(k)(3)(iii)):

HUD received comments from numerous respondents recommending that HUD require ESG recipients to describe how they will use performance data to select subrecipients. Based on these comments, HUD is considering including language in the final rule that would implement this suggestion, and seeks comments on what impact this would have on ESG recipients. For those recipients that currently select subrecipients based on performance data, HUD seeks feedback about processes currently used, including any specific performance indicators. Additionally, HUD seeks comment on whether there are any further requirements that HUD should include related to selecting subrecipients based on performance to help recipients implement this proposed requirement.

6. Written Standards for ESG Recipients (§ 91.220(l)(4) and § 91.320(k)(3), and § 576.400(e)): See section II.C.14 of this Notice for more detail.

7. HUD Approval of Action Plans (§ 91.500): HUD is considering amending the list of examples of substantially incomplete Action Plans at § 91.500(b), to include plans which do not reflect a jurisdiction's actual allocation amounts for that year. HUD envisions that this would also cover situations in which a jurisdiction submits a proposed plan on which it has conducted citizen participation, which neither reflects actual allocation amounts nor contains contingency language on how the jurisdiction will adjust its plan to reflect actual amounts. (See also the discussions of §§ 91.15 and 91.115, and §570.200 in sections II.B.1 and II.B.2 of this Notice, respectively.)

8. Performance Reports Related to Homelessness for ESG Recipients (§ 91.520(g)): HUD proposes to require that ESG recipients and subrecipients use HMIS (except those subrecipients that are prohibited from doing so under VAWA) in compliance with the forthcoming HMIS rule,

to collect and report on data in the Consolidated Annual Performance Evaluation Report (CAPER), as specified by HUD, and seeks comments on this proposal.

C. Request for comment on Emergency Solutions Grants Program regulations (24 CFR part 576)

1. Emphasis on Rapid Re-housing: HUD has been encouraging ESG recipients to spend more of their funds on rapid re-housing, since it is often a cost-effective way to make a significant impact on homelessness in a community and help achieve the national goal of ending homelessness. HUD is considering ways to continue this policy, and seeks feedback on what requirements and/or incentives could be established in the final rule for recipients to focus more on rapid re-housing, or whether HUD should simply continue to encourage this focus through guidance.

HUD received several comments recommending that HUD limit the amount of funds that an ESG recipient can spend on homelessness prevention activities. However, HUD cannot place a cap on homelessness prevention activities without a statutory change. Instead, HUD seeks creative ways to encourage more rapid re-housing–possibly through the final rule. For example, if a recipient intended to spend funds on homelessness prevention, HUD could require the recipient to justify, in the Consolidated Plan, how meeting the needs of persons at risk of homelessness is more effective at ending homelessness (without this justification, the Consolidated Plan would be determined substantially incomplete and could not be approved). Another option could be to establish performance measures and link the local CoC application scoring to ESG recipients' achievement of those measures. Another option could be to require only the rent reasonableness standard for rapid re-housing activities, but require both the Fair Market Rent (FMR) and rent reasonableness standard for homelessness prevention activities.

HUD seeks comments on whether to adopt these or suggestions for other methods to increase the amount of funds recipients spend on rapid re-housing activities.

2. Street Outreach and Emergency Shelter Components (§ 576.101 and § 576.102):

a. Essential services under the Emergency Shelter Component (§ 576.102(a)). The interim rule states that ESG funds may be used for costs of providing essential services to individuals and families in an emergency shelter. HUD has received feedback that this could be interpreted in two different ways:

(1) Only individuals and families who spent the prior night in an emergency shelter can receive ESG-funded essential services, no matter where those services are provided; or

(2) Anyone who meets the homeless definition can receive essential services, as long as the services are provided in the emergency shelter.

HUD proposes to clarify who can receive essential services under the Emergency Shelter component—including in day shelters—by changing the language as follows (proposed portions italicized):

> "ESG funds may be used for costs of providing essential services to homeless families and individuals *as follows:*
>
> *(a) When provided in an emergency shelter, the services may be provided to persons:*
>
> *(i) who meet the criteria described in paragraph (1) of the homeless definition, and*
>
> *(ii) who are either staying in that emergency shelter, or who are sleeping on the street or another place described in paragraph (1) of the homeless definition (excluding those in transitional housing) and are referred to services by an emergency shelter, and*

(b) When provided in a facility that is not an emergency shelter, the services may be provided only to persons meet the criteria described in paragraph (1) of the homeless definition (excluding those in transitional housing) and who are referred to services by an emergency shelter. "

In other words, if an individual or family meets Category 1 of the homeless definition (excluding those in transitional housing) and is staying in an overnight or day shelter, they can receive eligible essential services in that shelter. Otherwise, if an individual or family meets Category 1 of the homeless definition (excluding those in transitional housing) and is referred by a shelter, they can receive eligible essential services at any provider's location. This change would widen the array of essential services that can be provided to those most in need—expanding the language to allow ESG funds to be used to pay for facility-based essential services to most persons sleeping on the street. HUD would require the referral from an emergency shelter as a linkage to the Emergency Shelter component, under which the services will be provided. HUD would consider this change in order to improve service coordination and also to ensure that the services charged to the grant are necessary and appropriate to the individual or family. HUD wants to encourage, to the extent possible, that non-facility-based services are provided by mainstream programs, not ESG. HUD seeks comment on this proposed change.

b. "Unavailable" and "Inaccessible" Services (§ 576.101(a) and § 576.102(a)). Under the Street Outreach and Emergency Shelter components of the interim rule, ESG funds may only be used for certain essential services "to the extent that other appropriate [emergency health services, emergency mental health services, mental health services, outpatient health services, legal services, substance abuse treatment services] are unavailable or inaccessible within the community." HUD has received questions and comments about this requirement, specifically,

what it means to be "unavailable or inaccessible." HUD had originally included this restriction in order to prioritize ESG funds for housing rather than services that should be available through mainstream systems. However, HUD recognizes that sometimes services are necessary and not provided by any other resource; in these cases, certain essential services are eligible under ESG. HUD is not considering removing this restriction from the regulation in the final rule, but is considering changes to help communities implement the requirement and document compliance. HUD specifically seeks additional comment on:

(1) Whether HUD should define or set a standard for "unavailable" and "inaccessible" within the rule, and if so, what definition or standard would best help recipients and subrecipients implement this requirement?

(2) Whether only one term should be used, and if so, which one and why?

(3) How have recipients and subrecipients implemented this requirement under the interim rule? Have they documented it for each program participant, or generally at the community level, and why? What can HUD learn from these experiences that it should implement in the final rule?

c. Day shelters (§ 576.102(a)). While a shelter that provides temporary daytime accommodations and services can be funded as an emergency shelter under the ESG interim rule, HUD receives questions about day shelters and is therefore considering explicitly stating in the final rule that day shelters are emergency shelters, and specifying the conditions under which a day shelter may receive funding under the Emergency Shelter component, including several requirements to ensure that ESG funds are used for homeless persons most in need. HUD is considering adding the following language at 576.102(a):

> "*A day shelter may be funded as an emergency shelter under this section only if: (1) the shelter's primary purpose is to provide temporary daytime accommodations and services to individuals and families who meet paragraph 1 of the homeless definition in this section (except those in transitional housing); and (2) those persons can stay in the shelter for as many hours as it is open." ESG funds for operating costs in a day shelter may only be incurred to the extent the shelter is used for persons assisted in the shelter who meet the definition of homeless under paragraph (1) (except those in transitional housing), and essential services provided in a day shelter may only be provided to persons meeting the definition of homeless under paragraph (1) (except those in transitional housing).*

HUD seeks comment on the following questions regarding day shelters:

(1) What impact would adding these requirements for day shelters have in your community? For instance, would this require any changes to emergency shelter policies or procedures in your community?

(2) What changes, if any, would need to be made to this provision of the regulation so that your community can fund or continue to fund day shelters with ESG?

(3) Are there any changes to the documentation requirements for program participants in emergency shelters that would be needed for day shelters?

d. Involuntary family separation (§ 576.102(b)). This requirement states that "The age of a child under age 18 must not be used as a basis for denying any family's admission to an emergency shelter that uses ESG funding or services and provides shelter to families with children under age 18." HUD interprets this provision to mean that if a shelter serves any families with children, the shelter must serve all members of a family with children under 18,

regardless of age or gender. HUD is not proposing to change this provision because it is statutory. However, HUD is considering possible regulatory changes that would help recipients and subrecipients implement the statutory provision, and seeks ideas based on actual issues that have occurred in communities.

HUD is also proposing that a shelter must serve all members of the family together if the members of the family so choose (e.g. it may not separate adult men from women and children in a family and serve them on a different floor or in a different building). HUD seeks comments on this proposal.

e. Fees in emergency shelters (§ 576.102). In the past, HUD has allowed emergency shelters to charge reasonable fees for staying in the shelter. HUD is considering revising this policy, in the final rule, to explicitly allow emergency shelters to charge reasonable occupancy fees, but specify that the amount of the fee charged must account for the capacity of the client to afford to pay the fee, and the fee itself cannot be a barrier to occupancy in the shelter, and this fee must be counted as program income. Additionally, HUD will consider adding language prohibiting recipients or subrecipients providing Rapid Re-housing or Homelessness Prevention assistance to charge program participants any costs above any required contribution to rent payments. This change would increase consistency between the requirements of the ESG Program and the CoC Program. HUD seeks comment on these ideas.

f. Minimum Period of Use–Street Outreach component (§ 576.101(b)). The current minimum period of use requirement states: "The recipient or subrecipient must provide services to homeless individuals and families for at least the period during which ESG funds are provided." This language comes from the statute, which requires that the recipient certify, with respect to the Street Outreach and Emergency Shelter components, that it will "provide services

or shelter to homeless individuals and families for the period during which such assistance is provided, without regard to a particular site or structure as long as the same general population is served." HUD is considering clarifying the regulatory language to help recipients and subrecipients understand how to comply with this requirement, as follows: "*The recipient or subrecipient providing the street outreach services must provide the street outreach services to homeless individuals and families for at least as long as that organization is expending ESG funds for street outreach activities.*"

g. Minimum Period of Use–Emergency Shelter component (§ 576.102(c)). HUD seeks comment on the following:

(1) Essential services and shelter operations. Similar to the minimum period of use change being considered under the Street Outreach component, HUD is considering clarifying the language at 576.102(c)(2) as follows (changed language is italicized) to help recipients and subrecipients understand how to comply with this requirement: "Where the recipient or subrecipient uses ESG funds solely for essential services or shelter operations, the recipient or subrecipient must provide services or shelter to homeless individuals and families *for at least as long as it is expending ESG funds for essential services or shelter operations, without regard to a particular* site or structure so long as the site or structure serves the same type of persons originally served with the assistance (e.g. families with children, unaccompanied youth, disabled individuals or victims of domestic violence) or serves homeless persons in the same area where the recipient or subrecipient originally provided the services or shelter."

(2) Renovation. Under the Emergency Shelter component, HUD is proposing the following language at § 576.102(c)(1), to account for partial building renovations and renovations of seasonal shelters (proposed portions italicized): "Each building *or portion of a*

building for which ESG funds are used for renovation must be maintained as a shelter for not less than a period of 3 or 10 years, depending on the type of renovation and the value of the building *or portion of the building being renovated. In the case of a seasonal shelter for which ESG renovation funds were used, it must be operated as a seasonal shelter (e.g., 5 months every year) for 3 or 10 calendar years, as applicable."*

(3) Subrecipient agreement. HUD is considering requiring that the applicable period of use must be stated in the subrecipient agreement.

(4) Requirements that apply during minimum period of use. HUD is considering revising § 576.102(c)(1) and (2) to clarify and expand the requirements that apply during the minimum period of use when emergency shelters expend ESG funds for Operating Costs, Essential Services for a shelter project, or Renovation, as follows (as a reminder, for Operating Costs and Essential Services, the minimum period of use is the period during which the ESG services are provided; for Renovation, it is 3 or 10 years, as applicable):

(i) Each person who stays in the shelter must be homeless as defined under § 576.2;

(ii) Program participant and shelter data must be entered into the local HMIS (or comparable database, as applicable) as required under § 576.400(f);

(iii) The shelter must meet the minimum habitability standards for emergency shelters under § 576.403(b);

(iv) The recipient or subrecipient must maintain records for the shelter and the shelter applicants and program participants as required under § 576.500, including documentation of each program participant's eligibility and homeless status (§ 576.500(b)) and confidentiality requirements for survivors of domestic violence (§ 576.500(x));

(v) The shelter must meet the faith-based activities requirements under § 576.406 and the nondiscrimination requirements and affirmative outreach requirements in § 576.407.

h. Essential Services for Street Outreach, Case Management (§ 576.101(a)(2)) and Emergency Shelter, Case Management (obtaining identification documents) (§ 576.102(a)(1)(i)). HUD is considering explicitly allowing ESG funds to be used to pay for recipient or subrecipient staff time to help program participants obtain identification documents such as birth certificates and social security cards, and for the cost of such documents, if they are necessary to help a program participant obtain public benefits, employment, housing, or other mainstream resources.

i. Local Residency Requirements. HUD is considering establishing a requirement, in the final rule, that recipients must not deny services or shelter funded under the Emergency Shelter and Street Outreach components based on whether or not their last permanent residence was in the jurisdiction. That is, if a person is homeless on the streets of a jurisdiction and is seeking emergency shelter there, they must be able to receive ESG-funded assistance, regardless of whether their last residence was inside or outside of the jurisdiction. HUD seeks comment on this idea, and feedback about any issues that this might raise with the implementation of ESG or communities' efforts to end homelessness.

3. Rapid Re-housing component (defining "rapid" and "as quickly as possible") (§ 576.104): This section states, "ESG funds may be used to provide housing relocation and stabilization services and short- and/or medium-term rental assistance as necessary to help a homeless individual or family move as quickly as possible into permanent housing and achieve stability in that housing." HUD has received questions about what "rapid" and "as quickly as possible" mean in practice, and is considering whether to establish a standard or time limit in

which an individual or family could be rapidly re-housed. HUD is considering the following options: setting the standard at a particular number of days (possibly 7, 30, or some other time limit over 30 days) per individual; setting a standard at an average number of days for an ESG recipient; requiring communities to set a standard based on local data and systems; or continuing the current policy and not setting such a standard. HUD seeks comments on:

(1) Should HUD establish a standard or time limit for rapid re-housing? Why or why not?

(2) If HUD should set such a standard or time limit, what would be an appropriate limit, based on local experiences with rapid re-housing?

(3) If HUD should set a standard at a particular number of days, at what point would the "clock" start–at the initial intake assessment, at the point the program participant is determined eligible and enrolled in the program, or other? Should HUD define it or allow the recipient or subrecipient to define it?

(4) What impact the proposed number of days would have on local program administration. For example, would this conflict with any local goals or other program requirements?

(5) If implemented, what should the consequence be if a recipient or subrecipient does not meet the standard?

4. Housing Relocation and Stabilization Services (§ 576.105):

a. Late fees. HUD is considering explicitly allowing late fees on the program participant's utility and rental payments (other than late fees associated with the 6 months of rental arrears, which are already allowed) and utility reconnection fees for the program

participant to be included as an allowable cost under housing relocation and stabilization services, and seeks comment on this proposal.

b. Court costs (§576.105(b)(4)). HUD is considering allowing, as a legal services activity under §576.105(b)(4), court costs incurred by the landlord during an eviction proceeding as an eligible ESG cost, so long as it is necessary for the program participant to pay them in order to be stabilized in their housing. HUD is considering adding this because payment of this cost may help prevent homelessness for the program participant and it may be an incentive for landlords to work with the program participant. HUD seeks comment on this proposal, specifically:

(1) Should HUD allow a property owner's court costs to be eligible under ESG? Why or why not?

(2) Should HUD allow ESG to be used to pay a property owner's court costs only when a court orders the tenant to pay those costs?

(3) If HUD should allow such costs, how would recipients/subrecipients determine and document that the costs are "necessary" to stabilize a program participant's housing? Should HUD impose any limits on the amount of such costs that may be paid with ESG funds?

c. Trash removal (§ 576.105(a)(5)). HUD is considering including trash removal as an eligible utility cost at § 576.105(a)(5), in part to be consistent with the definition of utility used to calculate gross rent for purposes of FMR, and in part because in some places, particularly rural areas, tenants are required to pay for trash removal. HUD seeks comment on this proposal.

d. Mediation (§ 576.105(b)(3)). Under the interim rule, mediation cannot be used to help eligible individuals and families (including homeless youth) move back into housing they have left, when that might be the best placement for them, and the option they would choose. As

such, HUD is considering adding language at § 576.105(b)(3) to allow ESG funds to pay for mediation services—under both the Rapid Re-housing and Homelessness Prevention components— to help individuals and families move back into their former housing and/or move in with friends or family members, after they have already moved to an emergency shelter, the streets, or another place described in paragraph (1) of the homeless definition or, for homelessness prevention, after the program participant has moved to other, temporary, housing. HUD proposes the following language (italicized language added): "ESG funds may be used pay for mediation between the program participant and the owner or person(s) with whom the program participant is living *or proposes to live, to help the program participant move into, return to, or remain in housing.*" HUD seeks comment on this proposal; specifically:

(1) What impact would this rule change have?

(2) Are there other concerns HUD should be aware of regarding placing individuals and families in such housing situations?

e. Broker fees (§ 576.105(b)(1)). HUD is considering explicitly allowing ESG to pay for fees to real estate agents, or "broker fees," so long as the fee is reasonable and necessary for the household to obtain appropriate permanent housing, by including language at § 576.105(b)(1), Housing Search and Placement activities. HUD seeks comment on this proposal; specifically, is this a necessary cost in order to quickly move individuals and families to permanent housing?

f. Housing Stability Case Management (§576.105(b)(2)). HUD has received numerous questions about the language in the interim rule stating that for ESG housing stability case management, "…assistance cannot exceed 30 days during the period the program participant is seeking permanent housing…" HUD included this provision recognizing that many clients are

enrolled in Rapid Re-housing while residing in shelters, but intentionally limited it, for two main reasons. First, HUD intended this restriction as an incentive to quickly re-house program participants, since any case management over 30 days would have to be paid with non-Federal funds or, if applicable, charged under the Street Outreach component or Emergency Shelter component, which are subject to an expenditure cap. Second, HUD intended that recipients/subrecipients that provide case management to persons in shelter under the Rapid Re-housing program focus on placing these program participants into housing. HUD aims to ensure that recipients/subrecipients are helping program participants obtain housing and not just charging essential services costs for persons in shelter to the Rapid Re-housing component in order to get around the Emergency Shelter/Street Outreach cap. However, HUD recognizes that sometimes it takes longer than 30 days to rapidly re-house a program participant. In addition, one recipient noted that HUD allows the payment of storage fees for up to 3 months under the Rapid Re-housing component and requires monthly case management to be provided during that time, but only allows housing stability case management to be charged to the Rapid Re-housing component for up to 30 days. Therefore, HUD seeks comment on the following questions related to this provision of the rule:

(1) For program participants who are receiving assistance under both the Emergency Shelter and Rapid Re-housing components (i.e., those staying in a shelter and receiving services to get rapidly re-housed), how are recipients/subrecipients currently determining when to charge the case management costs to each component?

(2) Has the 30-day limit on charging housing stability case management to the Rapid Re-housing component had an effect on increasing the rates at which program participants find housing? If not, why not?

(3) If HUD were to change the limit to 90 days, what impact would this have?

(4) If HUD eliminated this restriction, is there a different way to distinguish between housing stability case management and case management under the emergency shelter component, which is subject to the cap?

g. Credit reports (§ 576.105(b)(5) and § 576.105(b)(2)). At § 576.105(b)(5), Credit Repair, and § 576.105(b)(2), Housing Stability Case Management, HUD is considering allowing ESG funds to be used to pay for a credit report for program participants being assisted under the Homelessness Prevention and Rapid Re-housing components, if the program participant has exhausted all opportunities to receive a free credit report in a given year and if the report is necessary to stabilize the individual or family in their current housing or quickly move them to permanent housing. HUD seeks comments from providers' experience on whether this would be a helpful addition to the rule, or whether it would not make a difference if included.

5. Short-Term and Medium-Term Rental Assistance (§ 576.106):

a. Rental assistance in shared housing – general. HUD proposes to clarify in the final rule that ESG funds may be used to provide rental assistance in shared housing. Except for the FMR requirements (established under § 576.106(d)(1) and addressed below), all ESG requirements that apply to rental assistance would apply to rental assistance provided in shared housing. Among other things, these requirements include the following:

- There must be a legally-binding, written lease between the owner and the program participant;
- There must be a rental assistance agreement between the recipient or subrecipient and the owner;
- The housing must meet ESG habitability standards;

- The program participant must meet the eligibility requirements for either Rapid Re-housing or Homelessness Prevention assistance;
- The rental assistance must be provided in accordance with the applicable written standards;
- Rental assistance may not be provided to a program participant who is receiving tenant-based rental assistance, or living in a housing unit receiving project-based rental assistance or operating assistance, through other public sources; and
- The shared housing must meet the rent reasonableness standards.

HUD seeks comments on these ideas; specifically:

(1) Whether HUD should adopt these policies for rental assistance in shared housing, and, if so, any concerns or issues that may arise in implementation;

(2) Suggestions about documentation that HUD should require in order to reduce fraud or ensure that the landlord is not a "support network" that can assist the program participant without rental or financial assistance, such as a family member or friend;

(3) Whether HUD should include all of the above or whether any elements should be added or deleted from the list; and

(4) How could providing ESG rental assistance to individuals and families that share housing work under state or local law? How do recipients/subrecipients currently make this type of arrangement work, especially with respect to a program participant's lease, and if the other renters are not ESG program participants?

b. Rental assistance in shared housing – FMR. With respect to the FMR for shared housing, HUD is considering establishing the following standard: when assisting an individual or family with rental assistance in shared housing, recipients and subrecipients would be required to use an

adjusted FMR that is the household's pro-rata share of the FMR for the shared housing unit size. For example, in the case of a single-person household who will occupy one bedroom in a 4-bedroom house, the FMR used would be the household's pro-rata share of the 4-bedroom FMR (i.e. 1/4 of the 4-bedroom FMR). Note that HUD's ultimate determination on this issue for the final rule will be influenced by the comments received, and the decision made, regarding the related FMR issue discussed below. HUD seeks comment on this idea, or whether there is an alternate calculation that HUD should use for determining the FMR in shared housing.

c. Rent restrictions (Fair Market Rent) (§ 576.106(d)): The ESG interim rule states that "rental assistance cannot be provided unless the rent does not exceed the FMR established by HUD, as provided under 24 CFR part 888, and complies with HUD's standard of rent reasonableness, as established under 24 CFR 982.507." HUD received feedback expressing concern that, unlike the Housing Choice Voucher program, the ESG program uses FMR to limit the units for which rental assistance may be provided, and this does not provide enough flexibility for recipients and subrecipients to quickly find available units. Two of HUD's goals are to ensure that the units for which ESG assistance is provided will be affordable to program participants after the assistance ends, and limit the amount that may be expended on a given household so that more program participants can be assisted. However, HUD is considering alternatives for changes to the final rule to provide recipients and subrecipients with more flexibility in order to quickly find appropriate units. The options HUD is considering to include in the final rule, on which HUD seeks feedback are as follows:

(1) ESG funds could be used to pay rental assistance for units where the rent is at or below the payment standard set by the PHA for the area (i.e. up to the FMR, up to 110 percent of

FMR if that is the PHA's payment standard, or higher if HUD has provided a waiver to the PHA).

(2) ESG funds could be used to pay rental assistance for units where the rent is above FMR, but ESG funds could only be used to pay up to the FMR amount (any amount of rent above the FMR would have to be paid by either the program participant, or the recipient/subrecipient with non-ESG funds). However, HUD is concerned that allowing program participants to pay for the cost of a unit above FMR might disadvantage those who need the ESG assistance most, since it might be easier to find units above the FMR and therefore, those who are more able to contribute to the rent would be more likely to receive ESG assistance. Therefore, HUD also seeks comments as to as the extent of this risk and if there are any requirements that can be put into place to prevent this practice.

(3) ESG could require only the rent reasonableness standard for rapid re-housing, but require both the FMR and rent reasonableness standard for homelessness prevention assistance. This might be one way to both increase flexibility and also encourage recipients and subrecipients to provide more rapid re-housing assistance.

(4) HUD could adopt the standard used in the HOPWA program, described at 24 CFR 574.320(a), which allows recipients (or possibly subrecipients) to establish a rent standard that is no more than the published FMR used for Housing Choice Vouchers or the "HUD-approved community-wide exception rent for the unit size. However, on a unit by unit basis, the [recipient] may increase that amount by up to 10 percent for up to 20 percent of the units assisted."

(5) HUD could maintain the FMR and/or rent reasonableness standards but add in some other type of flexibility–HUD seeks suggestions for additional options.

Note that in all cases HUD is planning to continue to require that the unit at least meet the rent reasonableness standard. Finally, one of HUD's primary concerns is that the program participants be able to remain in the unit after the assistance ends. If HUD included one of the above options to provide more flexibility to recipients and subrecipients by paying higher rents, how could they ensure that the units would remain affordable to program participants without housing assistance?

In addition, HUD is considering only allowing a recipient to pay rent over the FMR if the recipient includes its proposal to do so in the Consolidated Plan/Action Plan. That way, the recipient would be required to obtain and assess citizen feedback as to whether additional flexibility is necessary in its area before being able to pay rents above FMR.

d. Last month's rent, security deposits, and rental arrears (§§ 576.105(a) and 576.106).

(1) HUD is considering re-categorizing "last month's rent" and "security deposit" as rental assistance, rather than housing relocation and stabilization services (financial assistance), because last month's rent is counted in the maximum-allowed 24 months of assistance, which could be confusing. Last month's rent is often paid at the same time as the security deposit, so it might make sense to consider them together. If this change is made, the FMR/rent reasonableness standards and lease and rental assistance agreement requirements would apply when security deposits and last month's rent are used to move a program participant into a unit. HUD will also consider consistency with the CoC Program in making a final decision. HUD seeks comment about this proposal, specifically whether the proposal would reduce confusion and improve administrative ease or whether there are potential negative consequences, and if so, what are they?

(2) HUD is considering explicitly stating that the FMR and rent reasonableness standards apply when rental arrears are being paid for a unit in which the program participant is staying, but not when the rental arrears are being paid for a unit in which the program participant no longer lives or is leaving. HUD seeks comment on this and any potential issues that could arise if HUD were to adopt this policy.

e. Providing subrecipients with discretion to set caps and conditions (§ 576.106(b)). HUD is considering changing the language as follows, to enable subrecipients to set caps on the assistance provided to a household (italicized language added): "Subject to the requirements of this section, the recipient *or subrecipient* may set a maximum amount or percentage of rental assistance that a program participant may receive, a maximum number of months that a program participant may receive rental assistance, or a maximum number of times that a program participant may receive rental assistance. The recipient *or subrecipient* may also require program participants to share in the costs of rent." HUD seeks comments on this; in particular, any concerns that recipients might have with providing subrecipients with this discretion.

f. Rental Assistance Agreement requirements(§ 576.106(e)).

(1) HUD is considering listing the elements that must, at a minimum, be included in the rental assistance agreement. The following two elements are already required in the interim rule, and HUD plans to keep them in the final rule:

- The same payment due date, grace period, and late payment penalty requirements as the program participant's lease; and
- A provision requiring the owner to give the recipient/subrecipient a copy of any notice to the program participant to vacate the housing unit, or any complaint used

under state or local law to commence an eviction action against the program participant.

HUD seeks comment on which, if any, of the following new requirements to include, and seeks suggestions on any others that should be required:

- The term of the assistance (e.g., number months for which it is being provided);
- The type of assistance being provided (e.g., tenant- or project-based rental assistance, rental arrears);
- The amount of funds to be paid by the recipient/subrecipient and the amount to be paid by the tenant;
- the address of the property for which payments are being made; and
- the signature and date of both the recipient/subrecipient representative and the property owner.

(2) The interim rule states that "a recipient or subrecipient may make rental assistance payments only to an owner with whom the recipient or subrecipient has entered into a rental assistance agreement." HUD proposes to specify in the final rule that when ESG Rapid Re-housing assistance, either project-based or tenant-based, is used to assist a program participant to move into housing owned by a recipient or subrecipient, a rental assistance agreement is not required. However, under this proposal, the organization would be required to document and maintain on file the elements required to be included in a rental assistance agreement. HUD seeks comment on this proposal.

g. Lease (§ 576.106(g)). HUD is proposing to add the following requirement to the lease provision of the ESG final rule, for tenant-based rental assistance (it currently only applies to PBRA), and seeks comments on this proposal: "*The program participant's lease must not*

condition the term of occupancy on the provision of rental assistance payments or the household's participation in the ESG program."

h. Using ESG funds for an unoccupied unit. HUD is considering allowing ESG recipients to choose to continue to assist a current program participant with ESG funds, in tenant- or project-based rental assistance, when a program participant is in an institution (such as a hospital or jail) during a portion of the time they are receiving ESG assistance. If implemented, ESG funds could be used for up to 90 days while that program participant is in the institution. However, if the recipient/subrecipient has knowledge that the program participant will not exit the institution before 90 days (e.g., if the program participant's jail sentence is for longer than 90 days), then the month in which the program participant enters the institution is the last month for which ESG funds may be used for the program participant's unit. This change would ensure consistency with the CoC Program. HUD seeks comment on this proposal.

i. Advance payments of rental assistance (§576.105(a)(3)). HUD is considering prohibiting payments of rental assistance to a property owner for more than 1 month at a time in advance (except when providing an advance payment of the last month's rent under section §576.105(a)(3)), and seeks comments on this idea.

j. Subleasing. Under the interim rule, subleasing–that is, the person or organization that holds the primary lease with the owner enters into a lease with an individual to rent the unit–is not allowed, for either tenant-based or project-based rental assistance. If HUD allowed subleasing in the final rule:

(1) Would this allow recipients to more effectively serve program participants?

(2) Would it make a significant difference for program participants? In what ways would it help them?

(3) What language could HUD include in the final rule that would ensure that (a) program participants' rights are protected, and (b) the appropriate payments are made to the owner?

k. Tenant-based rental assistance (TBRA) (§576.106(h)). HUD has received numerous questions about whether recipients may provide ESG assistance outside their Con Plan jurisdiction, allow program participants to move outside their jurisdiction, or limit assistance to residents of the jurisdiction. HUD is considering changing the language at §576.106(h)(2) to specify the circumstances under which any of the options listed above may be carried out. HUD is considering the following revisions, and seeks comment on them:

(1) Under ESG TBRA, the program participant must be able to choose the unit in which they will live, with the following specifications:

(i) The recipient may allow a program participant to choose a unit outside of the recipient's jurisdictional boundaries, may limit TBRA to the recipient's jurisdictional boundaries, or, when necessary to facilitate the coordination of supportive services, may limit TBRA to a designated geographic area that encompasses, overlaps, or falls within the recipient's jurisdictional boundaries.

(ii) Unless otherwise specified by the recipient, a unit of general purpose local government that administers TBRA as a subrecipient may allow a program participant to choose a unit outside of the local government's jurisdictional boundaries, may limit TBRA to the local government's jurisdictional boundaries, or, when necessary to facilitate the coordination of supportive services, may limit TBRA to a designated geographic area—such as the CoC's geographic area–that encompasses, overlaps, or falls within the recipient's jurisdictional boundaries.

(iii) Unless prohibited by the recipient, a private nonprofit organization that administers TBRA as a subrecipient may allow a program participant to choose a unit outside of the recipient's jurisdictional boundaries or, when necessary to facilitate the coordination or provision of services, may limit TBRA to a designated geographic area—such as the CoC's geographic area or a smaller area within the recipient's jurisdiction—that encompasses, overlaps, or falls within the recipient's jurisdictional boundaries.

(2) The amount or type of assistance cannot be conditioned on the program participant moving outside the jurisdiction's boundaries (that is, a recipient or subrecipient may not require that a program participant move outside the jurisdiction in order to receive the rental assistance).

(3) HUD is considering establishing a requirement, in the final rule, that recipients must not deny ESG Rapid Re-housing assistance to homeless individuals and families based on whether or not their last permanent residence was in the recipient's jurisdiction. That is, if a person is homeless on the streets or in an emergency shelter in a jurisdiction and is seeking ESG-funded Rapid Re-housing assistance, they must be able to be assessed for, and, if eligible, receive, ESG Rapid Re-housing assistance, regardless of whether their last residence was inside or outside of the jurisdiction. HUD seeks comment on this idea, and feedback about any issues that this might raise with the implementation of ESG or communities' efforts to end homelessness.

l. Project-based rental assistance (PBRA) (§ 576.106(i)). HUD received many comments about how to implement PBRA for the Rapid Re-housing and Homelessness Prevention components. HUD recognizes that using ESG funds to provide PBRA for these types of assistance is challenging; however, including PBRA as an option for recipients and subrecipients to use when providing assistance is statutorily required. Therefore, HUD is

looking for ways to further align the rule with TBRA and eliminate some of the burdensome requirements. However, at its core, PBRA is a different type of housing solution and carries with it special considerations. Below are issues related to PBRA about which HUD is considering revisions to the rule and on which HUD seeks additional public comment. HUD welcomes other suggestions on ways to improve the administration of PBRA as well.

(1) HUD is considering defining "project-based rental assistance" as follows: "Project-based rental assistance, for purposes of the ESG program, means rental assistance that a recipient or subrecipient provides for individuals or families who live in a specific housing development or unit, and the assistance is attached to the development or unit."

(2) Some commenters recommended that HUD remove the 1-year lease requirement and allow for a lease like TBRA with a flexible term. HUD is considering adopting this recommendation, but seeks additional comment on potential impacts that this policy would have.

(3) The interim rule, at § 576.106(i)(4), provides that if the project-based rental assistance payments are terminated for a particular program participant, the household may stay in its unit (subject to the terms of the lease) and the rental assistance may be moved to another unit in the same building. HUD is considering allowing the assistance to be transferred to another unit in a different building in the same development, and seeks comment on this idea, particularly whether it would increase flexibility.

6. Administrative Activities (§ 576.108) & Indirect Costs (§ 576.109):

a. Training. For § 576.108(a)(2), HUD is considering changing the language in the final rule to allow ESG to pay for the costs of a subrecipient to attend a training provided by the recipient on ESG, and more clearly establish the limits of the training allowed under ESG, as

follows: "Eligible training costs include the costs of providing training on ESG requirements and attending HUD-sponsored, *HUD-approved, or recipient-sponsored* ESG training."

b. Other comments. HUD seeks other feedback regarding changes it should make for the final rule about eligible Administrative costs and indirect costs. However, note that the 7.5 percent cap on Administrative costs is statutory and therefore HUD is prohibited from changing it. Also, HUD must also comply with the OMB requirements on cost principles when making any changes to the language.

7. Submission Requirements and Grant Approval (Joint Agreements) (§576.200): MAP-21 included a provision allowing the following: "A metropolitan city and an urban county that each receive an allocation under such title IV [of the McKinney-Vento Homeless Assistance Act] and are located within a geographic area that is covered by a single continuum of care may jointly request the Secretary of Housing and Urban Development to permit the urban county or the metropolitan city, as agreed to by such county and city, to receive and administer their combined allocations under a single grant." In the final rule, HUD is considering establishing the requirements for recipients to request a joint allocation of ESG funds, and seeks comment on the following ideas:

a. Coordination with CDBG. A jurisdiction may *only* enter into a joint agreement with another jurisdiction for ESG if it will also have a joint agreement with that jurisdiction for CDBG for the same program year. Also, under the CDBG program, only a single metropolitan city and urban county may enter into a joint agreement; therefore, this limitation would apply to ESG as well. That is, only a metropolitan city and urban county that each receives an ESG allocation, which are located within a geographic area that is covered by a single CoC and which receive a joint allocation for CDBG, may enter into joint agreements.

b. Timing of the joint agreement. The first time the jurisdictions enter into a joint agreement, the entities may enter into a joint agreement for any program year (that is, they would not have to wait until the next time the urban county requalifies as an urban county to enter into a joint agreement). However, the duration of the agreement must be until the next time the urban county requalifies as an urban county (currently this occurs every 3 years).

c. Lead entity responsibilities. The recipients must select a "lead entity" for the joint grant, which must be the lead entity for CDBG. The responsibilities of the lead entity are as follows:

(1) The lead entity, as the ESG recipient, assumes full responsibility for the execution of the ESG program under 24 CFR part 576, with respect to the Consolidated Plan requirements at 24 CFR part 91, and with respect to the joint grant. HUD will hold the lead entity accountable for the accomplishment of the ESG program, for following its Consolidated Plan, the grant agreement, and for ensuring that actions necessary for such accomplishment are taken by all subrecipients; and

(2) The lead entity is required to submit the ESG portions of the Action Plan and the CAPER for the entire geographic area encompassed by the joint agreement.

d. Cooperation agreement. The jurisdictions must execute a legally binding "cooperation agreement" that establishes each recipient's desire to combine their grant allocations and administer a joint ESG program, establishes which government will be the lead entity, identifies and authorizes the lead entity to act in a representative capacity for the other government for the purposes of the joint ESG program, and provides that the lead entity assumes overall responsibility for ensuring the joint ESG program is carried out in compliance with the requirements of 24 CFR part 576.

e. Requirements of the joint request. The lead entity must submit the joint request to HUD before the entities start their Consolidated Plan in the eCon Planning Suite (this is because a single identification is required in the system). At a minimum, the joint request must include:

(1) A letter from the lead entity that identifies which governments seek to combine their grant allocations and administer a joint ESG program for their jurisdictions and indicates which federal fiscal year(s) grants the governments seek to combine;

(2) A copy of the cooperation agreement; and

(3) Documentation that shows the lead entity has sufficient authority and administrative capacity to administer the joint grant on behalf of the other government (if the joint agreement arrangement requires the lead entity to provide assistance outside its jurisdiction, the lead entity may want to consider including this in the documentation, specifically).

f. Approval of the joint request. A joint request will be deemed approved unless HUD notifies the city and the county otherwise within 45 days following submission of the joint request.

g. Consolidated Plan requirements.

(1) The metropolitan city and urban county must align their Consolidated Plan program years (done via the process at §91.10).

(2) For the program year that the jurisdictions enter into a joint agreement, HUD is reviewing whether to require the lead entity to submit a new Consolidated Plan (because the former Consolidated Plan would no longer reflect the correct recipient and information). However, in the case that entities enter into a joint agreement in the middle of an urban county requalification period, this would not "restart the clock" for that time period.

i. Grant amount total. When two or more entities enter into a cooperation agreement and sign a joint grant agreement with HUD, the grant amount is the sum of the amounts authorized for the individual ESG recipients.

j. ESG subrecipient. An urban county or metropolitan city that has entered into a joint agreement under the ESG program is permitted to apply to the state for ESG funds, if the state allows.

8. Matching Requirement (§576.201):

HUD has received numerous questions seeking clarifications on the match requirements. HUD is carefully reviewing whether and how to amend and clarify this section, with the goal of helping recipients better understand the match requirement and be able to meet it. HUD seeks comment on the following ideas:

a. Additional sources of matching contributions. HUD received a comment requesting that HUD reconsider §576.201(c)(1), in which all matching contributions must meet all requirements that apply to the ESG funds provided by HUD..." HUD is considering adding exceptions to this rule–that is, HUD is considering providing a list of activities that are not eligible to be paid for with ESG funds but could be used as match, because they are technically eligible according to the statute, but not by rule. This list would include costs such as: training costs for ESG recipients/subrecipients at ESG-related (but not HUD-sponsored) conferences such as those hosted by the National Alliance to End Homelessness or the Council of State Community Development Agencies (COSCDA); or the cash value of *donated* household furnishings and furniture for program participants to help establish them in housing, which can contribute to stability. HUD seeks comment on this proposal and suggestions for other items to include on this list.

b. Cash match. HUD is considering additional ways to enable subrecipients to contribute match to the recipient's program to meet the matching requirement. Section 416 of the McKinney-Vento Homeless Assistance Act states that recipients are "required to supplement the [ESG funding]… with an equal amount of funds from sources other than [ESG]." HUD has interpreted this requirement to mean that the matching funds must be contributed to and used to support the recipient's ESG program. Any policy designed to improve flexibility must meet this statutory requirement. Given this restriction, HUD seeks feedback and ideas for ways to clarify or expand the current regulatory language to improve recipients' ability to meet the matching requirement. One possible scenario HUD is considering changing the regulation to allow is where a subrecipient conducts two (or more) ESG-eligible activities—for example, emergency shelter and rapid re-housing—but only has an agreement with the recipient to receive ESG funds for one—for example, rapid re-housing. HUD is considering changing the rule to allow the funds spent on emergency shelter activities (in this example) to be used to meet the matching requirement, if the activity is conducted in accordance with all ESG requirements and if the recipient includes this emergency shelter activity as a part of the recipient's overall program design (e.g. in the Action Plan and CAPER). HUD might even consider requiring it to be included in the subrecipient's funding agreement, but seeks comment on whether this would be too burdensome. Would this be helpful? Are there any other issues HUD should consider in determining whether and how to change this policy?

c. Noncash contributions (depreciation of donated buildings) (§ 576.201(d)(2)). The interim rule does not allow the depreciation of the value of a donated building to be used as match, because currently, for donated buildings, match only includes the purchase value of the building in the year it was donated. HUD is considering allowing depreciation of donated

buildings to be used as a source of in-kind match in the final rule, by changing the language at §576.201(d)(2) to the following:

> "*For equipment and buildings donated by a third party, the recipient may count as match either the property's fair market value or the depreciation amounts that would otherwise be allowable costs. The fair market value must be independently appraised when the recipient or subrecipient receives title. This value may only be divided and counted as match for fiscal year grants that are active when the property is first used in an ESG activity or project. If a property's fair market value is counted as match, the property's depreciation amounts cannot be counted as match or allowable costs for any federal grant. Annual depreciation amounts must be determined in a manner consistent with Generally Accepted Accounting Principles (GAAP) and may be counted as match for those fiscal year grants for which the amounts would be allowable costs under the applicable cost principles, provided that those amounts are never charged to any Federal grant.*"

d. Memorandum of understanding for noncash services as match. For noncash services (e.g., volunteer services), HUD is also considering adopting the CoC Program requirement (at § 578.73(c)(3)), requiring a memorandum of understanding between the recipient or subrecipient and the third party that will provide the services. This would provide for consistency with the CoC Program and also ensure that the amounts used as match are consistently applied.

e. When to count matching funds. HUD proposes to clarify that the matching funds are counted as match for the ESG program when the allowable cost is incurred, or, for in-kind

match, when the donated service is actually provided to the recipient/subrecipient or the donation is used for the program.

f. Other programs as match for ESG. Sometimes, other programs cannot be used as match for ESG because their requirements conflict with ESG requirements. For example, HOME TBRA funds may be used for more than 24 months, whereas ESG funds are capped at 24 months of assistance (also, HOME TBRA funds must not require services, whereas ESG requires monthly case management under the interim rule – see section II.C.15.b. of this Notice). In the final rule, HUD is considering specifying that when HOME TBRA, or any program where the program time limit may be extended beyond 24 months, is used as match for the ESG Program funds, any renewal to extend that other program's assistance beyond 24 months would not invalidate its use as match for ESG for up to 24 months. In other words, the ESG recipient would be able to count as match the HOME TBRA funds that meet all of the ESG requirements for up to 24 months (if the case management requirement is removed, as discussed below), but not count any funds expended beyond that time period. HUD seeks comment on this idea.

9. Obligation, Expenditure, and Payment Requirements (§ 576.203(a)(i)):

a. State as HMIS lead. To account for situations where the state is the HMIS lead, HUD is considering augmenting the state obligation requirement, as follows: "*With respect to funds for HMIS: if the state is the HMIS lead, this requirement may be met by a procurement contract or written designation of a department within the state government to directly carry out HMIS activities*."

b. Exceptions. HUD is considering adding an exception to § 576.203, to allow HUD to grant a recipient an extension of up to 3 months for the obligation requirements and up to 12 months for the expenditure deadline, for good cause.

c. Subrecipient agreements. HUD is considering establishing, in the final rule, minimum elements that must be included in any subrecipient agreement. Although 2 CFR part 200 includes certain elements that must be provided to subrecipients at the time of the award (at 2 CFR part 200.331), the ESG rule contains more specific language about the ESG requirements that apply to subrecipients and language that must be included in the subrecipient agreement (such as any written standards the recipient requires the subrecipient to develop), so it might be helpful to include them all in one place. HUD seeks comment on whether it would be most helpful to include the minimum required elements for a subrecipient agreement in the regulation (e.g. to improve ease of recipients for monitoring their subrecipients and/or reduce burden for recipients), or whether to instead issue guidance, such as a sample subrecipient agreement.

10. Pre-Award Costs (§ 576.204): HUD is reviewing whether to explicitly allow pre-award costs in the final rule, and to describe requirements that must be met before charging them to the grant. HUD is considering including the following language:

> "*ESG recipients may use grant funds to pay pre-award costs incurred on or after the recipient's program year start date, under the following conditions:*
>
> (*1) The costs and corresponding activities must comply with the requirements under this part (including the environmental review requirements in section §576.407(d)); and*
>
> (*2) Before incurring pre-award costs, the recipient must describe the corresponding activities in its proposed action plan and satisfy the recipient's citizen participation plan requirements addressing §91.105(b) (for local governments and territories) or §91.115(b) (for states).*"

11. Reallocations (§§ 576.301, 576.302, and 576.303):

a. Timeframe for substantial amendments (§576.301(c), §576.302(c), and §576.303(d)). HUD is considering lengthening the time allowed for a recipient to submit a substantial amendment to its Consolidated Plan when the recipient has received reallocated funds, from 45 days after the date of notification to 60 or 90 days after the date of notification, or even allowing state recipients to reallocate the funds within its normal Consolidated Plan allocation process. This would allow recipients to have more time and flexibility to align the substantial amendment and funds with the following year's Consolidated Plan/Action Plan. HUD seeks comment on this proposal.

b. Reallocation of State ESG funds (§576.302). HUD is also considering changes to the process when a State declines its ESG allocation, which is described at §576.302. HUD seeks comment on the following two options:

(1) Remove the paragraph at §576.302(a)(2), which requires HUD to make ESG funds available to all of the non-urban counties in a state. HUD is considering this change because it believes it might be administratively infeasible for a number of reasons, including that each of the non-urban counties would be required to develop and submit an abbreviated Consolidated Plan that meets HUD's requirements. It is likely that the metropolitan cities and urban counties that already receive an allocation of CDBG funds are those best suited for, and capable of, administering the ESG program; or

(2) Change the requirement so that the funds declined by a state are distributed by formula to other state recipients.

c. Reallocation of local government ESG funds (§576.301(d)). HUD is considering the following change related to reallocation of grant funds returned by a metropolitan city or an urban county, under §576.301(d) (changed or added sections italicized):

"The same requirements that apply to grant funds allocated under §576.3 apply to grant funds reallocated under this section, except that the state must distribute:

(1) Funds returned by metropolitan cities:

(i) First, to private nonprofit organizations operating in the metropolitan city's jurisdiction;

(ii) If funds remain, to private nonprofit organizations and units of general purpose local government located throughout the state; and

(2) Funds returned by urban counties:

(i) First, to private nonprofit organizations and units of general purpose local government within the county, excluding metropolitan cities that receive ESG funds and governments that are part of the urban county;

(ii) Next, to metropolitan cities within the county that receive ESG funds; then

(iii) If funds remain, to private nonprofit organizations and units of general purpose local government located throughout the state, *excluding governments that are part of the urban county*.

12. Area-Wide Systems Coordination Requirements – Consultation and Coordination (§91.100(a)(2) and (d), §91.110(b) and (e), §576.400(a), (b), and (c)):

a. ESG recipient Consultation with Continuums of Care. HUD recognizes that for some ESG recipients, such as states that must coordinate with many CoCs and metropolitan cities/urban counties that must coordinate with regional CoCs, the requirements in this section of

the regulation can present a challenge. However, HUD believes that this consultation process is critical for the ESG recipient to be able to plan for the best use of resources in the relevant area(s). HUD has received many questions about how ESG recipients should consult with the CoC(s) to meet the current requirements effectively. Based on these questions, HUD seeks general comment on the following questions to inform the inclusion of any additional consultation requirements in the final rule:

(1) The practices and processes that recipients and CoCs have used to meet the consultation requirements and feedback, positive and negative, based on local experiences with the consultation process. HUD seeks constructive suggestions on how to improve local consultation, particularly through changes to the final rule.

(2) HUD received a comment that it may be particularly difficult for ESG recipients to consult and coordinate with Balance of State CoCs. HUD is interested in hearing from other state recipients on whether they are experiencing a similar challenge. HUD also seeks comment on whether there are any requirements that could be added or removed from the interim rule to alleviate this issue.

(3) With respect to reallocation of funds under § 576.301, HUD is considering adding a stronger role for CoCs, in particular to help decide where the funds should be allocated. HUD is considering requiring that a state ESG recipient consult with the CoC covering the jurisdiction that returned the funds, and, if funds remain after the state distributed funds in accordance with §576.301(d)(1), then the state must consult with CoCs covering other areas of the state in which it proposes to distribute the funds in accordance with § 576.301(d)(2). HUD seeks comment on this potential requirement.

(4) Should HUD specify different standards for consultation for different types or sizes of jurisdictions? For example, when the metropolitan city's or urban county's jurisdiction covers the exact geographic area as the CoC, HUD could require monthly consultation; for a county-based CoC with more than one ESG recipient, HUD could require consultation four times per year with each ESG recipient; for a state ESG recipient that includes multiple CoCs, HUD could require a lower level of consultation. HUD seeks feedback on this concept.

(5) Should HUD require an MOU between the CoC and the Consolidated Plan jurisdiction detailing how they will collaborate?

b. Defining "consultation," "coordinating," and "integrating." HUD received several comments requesting a definition of "consultation" with CoCs (§ 576.400(a)), examples of "coordinating and integrating" ESG-funded activities with other programs targeted to homeless people in the area covered by the CoC (§576.400(b)) and with mainstream resources for which homeless and persons at risk of homelessness might be eligible (§ 576.400(c)). Therefore, HUD seeks comment on the following questions:

(1) Should definitions of "consultation," "coordinating," and "integrating" be included in HUD's regulations in 24 CFR part 91 and/or 24 CFR part 576? Considering the manner in which your jurisdiction currently consults, coordinates, and integrates, what should the definition(s) include? HUD is particularly interested in how an ESG recipient whose jurisdiction is incorporated into multiple CoCs' geographic areas, especially states, meets these requirements and what sort of definition would work best for these recipients.

(2) Instead of establishing one definition, HUD could require jurisdictions to define these terms themselves in their Consolidated Plan, and meet their own requirements. Would

jurisdictions prefer this option? HUD specifically requests examples of definitions that jurisdictions would implement.

(3) Should HUD set a different standard for states? If so, how should it be different?

c. Improving collaboration between ESG recipients and CoCs. HUD is considering a change to the CoC Program interim rule and the ESG interim rule that would require all CoC boards to include a member from at least one Emergency Solutions Grants program (ESG) recipient's staff located within the CoC's geographic area. HUD would consider this change in order to promote meaningful collaboration between CoCs and ESG recipients. For states and other recipients whose jurisdictions cover more than one CoC, this might mean that a representative of the recipient would be required to be on multiple CoC boards. When a CoC's geographic area contains multiple ESG recipients' jurisdictions, it might mean that not all ESG recipients will be required to be on the CoC's board. However, when asked to participate on the CoC's board, ESG recipients would be required to participate. Ultimately, it is the responsibility of the CoC to develop a process for selecting the board. HUD is requesting comment on this proposed requirement for ESG recipients, including potential challenges. Ensuring that ESG recipients are coordinating closely with the CoC is important to HUD; therefore, in communities where ESG recipients and/or CoCs do not believe that this requirement is feasible, HUD asks commenters to provide suggestions for how ESG recipients can be involved in the CoC at one of the core decision-making levels.

d. Consulting with tribal groups. HUD received several comments requesting that HUD include tribal groups as a part of the required consultation process. Should HUD require consultation with tribal groups to the extent that the recipient intends to fund organizations serving people or activities on tribal lands?

e. Requiring coordination with CoC and Rural Housing Stability Programs (§576.400(b)). HUD proposes to add the CoC and Rural Housing Stability Programs to the list of "other targeted homeless services" with which ESG recipients must coordinate, at §576.400(b).

f. Other feedback. In general, with respect to the consultation and coordination requirements:

(1) HUD seeks suggestions about particular provisions of the regulation that could be added or removed to assist with implementation and to make the process more useful for jurisdictions and CoCs.

(2) HUD also seeks feedback about current experiences with the consultation requirements, including what processes and procedures recipients are currently using to meet the requirements, how well these are working in the community, and whether there are specific impediments with the current consultation requirements.

13. Area-Wide Systems Coordination Requirements – Coordinated Assessment (§ 576.400(d)): HUD received numerous comments on the coordinated assessment requirement in the first public comment period, particularly related to what costs are eligible and how to charge them to the ESG grant. HUD is considering addressing these issues in guidance or including clarifications in the final rule. In addition, HUD intends to change the term "coordinated assessment" to "coordinated entry" in both the ESG and CoC final rules, and therefore uses the term "coordinated entry" in this Notice. However, HUD has also received questions about the following issues, and seeks comment as to whether any changes should be made in the final rule with respect to these questions:

a. Coordinated entry for walk-ins. How would coordinated entry work under circumstances where the recipient or subrecipient conducts intake based on who walks in–for example, legal services provided on site at a courthouse? Are there special considerations for such instances that HUD should consider in the final rule?

b. Coordinated entry and Street Outreach. Section 576.400(d): HUD is considering changing § 576.400(d) to clarify that that use of the coordinated entry is not required when providing services under the Street Outreach component. However, the use of coordinated entry will continue to be required by recipients and subrecipients of all other forms of ESG assistance.

14. Area-Wide Systems Coordination Requirements – Written Standards for ESG Recipients (§§ 91.220(l)(4) and 91.320(k)(3), and 576.400(e)): In its Action Plan, each ESG recipient must establish and consistently apply, or, if it is a state, elect to require that its subrecipients establish and consistently apply, written standards for providing ESG assistance, in accordance with § 91.320(k)(3) for states and § 91.220(l)(4) for metropolitan cities and urban counties and territories. HUD seeks comment on the following questions related to the required written standards:

a. When subrecipients receive ESG funds from multiple recipients. An ESG recipient or subrecipient could be subject to differing, or even conflicting, written standards. For example, this could occur when a nonprofit subrecipient receives ESG funds from both a state and local government and is subject to two sets of written standards. HUD seeks comments on recipient and subrecipient experiences with multiple funding sources and complying with conflicting written standards. Specifically:

(1) What have recipients and subrecipients done to resolve any conflicts or prevent confusion?

(2) Has this been a significant issue? Should HUD address this issue in the final rule, and if so, how? One option could be for HUD to require the local (metropolitan city or urban county) recipient's standards to supersede the state's standards when there is a conflict. What issues might arise if HUD were to establish this requirement?

b. Asset policy. Under the former Homelessness Prevention and Rapid Re-Housing Program (HPRP), HUD recommended that grantees and subgrantees develop policies to evaluate a household's assets, as a part of considering the full array of "resources and support networks" available to a program participant. HUD also recommended that this policy be consistent throughout the CoC. Under the ESG written standards, HUD is considering requiring recipients to develop such a policy regarding the treatment of assets, in order to more consistently and completely assess a household's resources during the initial and reevaluation for Homelessness Prevention and reevaluations for Rapid Re-housing assistance. HUD seeks comment on local experiences with this under HPRP and whether adding this as a requirement in the written standards would help provide consistency in assessing resources and assets during the initial evaluation and reevaluations for ESG assistance.

c. Written standards for subrecipients of local governments. In order to provide a greater amount of local flexibility in limiting and prioritizing eligibility for ESG assistance, HUD is considering allowing ESG recipients that are local governments and territories to pass the requirement to establish written standards down to their subrecipients, similar to the regulation for states at §§91.320(k)(3) and 576.400(e)(2).

d. Other feedback. HUD will carefully consider the written standards to be included in the final rule, and seeks feedback about the current written standards, based on recipient and subrecipient experiences. Specifically:

(1) How have the existing written standards helped the recipient or subrecipient design and run its ESG program?

(2) Are there other written standards that HUD should be require? Are there any that are not useful?

(3) Are there any where a slight clarification in the language would help recipients understand and implement the requirement more effectively?

e. Written standards for projects. If HUD were to adopt the definition of "project" proposed earlier in this Notice, HUD would consider allowing written standards to be established at the project level. The purpose of doing this would be to improve the ease of administering the program, for recipients and subrecipients. For example, if an emergency shelter project consists of more than one emergency shelter buildings, allowing a recipient – or even a subrecipient – to establish written standards at the project level may be administratively easier. HUD seeks comment on whether this would be helpful, or whether there might be any problems with adopting written standards at the project level.

f. Limiting eligibility and targeting ESG assistance. HUD proposes to specify, in the final rule (either in the written standards at § 576.400(e) or at § 576.407), when and how recipients and subrecipients may establish stricter criteria for eligibility and target assistance to particular groups and subpopulations of homeless persons. Under the interim rule, the recipient, or subrecipient, under limited circumstances, may only allow targeting or limiting of eligibility via the written standards; if not included with sufficient specificity, subrecipients may not target program participants or impose stricter eligibility criteria. For example, a project designed for homeless veterans and their families must serve homeless persons who are not veterans unless the applicable written standards explicitly authorize that project or project type to limit eligibility

to veterans and their families. HUD seeks to make this process simpler, and establish clearer guidelines. HUD is considering allowing subrecipients to target and set stricter eligibility criteria with the approval of the recipient–without requiring that the policy be included in the written standards–or allowing the recipient to establish a policy for targeting or setting stricter eligibility criteria for all subrecipients in the written standards.

Specifically, HUD seeks comment on the following questions regarding the requirements at § 576.400(e) related to establishing stricter eligibility criteria or prioritizing ESG assistance:

(1) At what level should decisions about targeting and eligibility for homelessness prevention and rapid re-housing be made–the recipient level, the CoC level, the subrecipient level, or some combination? Have the existing requirements to include such decisions in the applicable written standards created an impediment to the recipient's or subrecipient's flexibility? If so, how?

(2) Likewise, at what level should decisions about emergency shelter and street outreach be made–the local government recipient level, the CoC level, the subrecipient level, or some combination?

(3) Is it burdensome for recipients to include specific policies for setting stricter eligibility criteria or targeting assistance in their written standards in the Action Plan?

(4) What impact would these proposed policies have on the program participants?

(5) HUD welcomes other feedback and thoughts about the targeting/eligibility proposal described above.

15. Evaluation of Program Participant Eligibility and Needs (§ 576.401):

a. Initial evaluations (§ 576.401(a)). HUD is reviewing whether to distinguish between an initial evaluation under the Street Outreach and Emergency Shelter components and an initial

evaluation under the Homelessness Prevention and Rapid Re-housing components. Specifically, HUD is considering providing that, while an initial evaluation will still be required under Street Outreach and Emergency Shelter, the recipient/subrecipient will not be required to determine "the amount and type of assistance the individual or family needs to regain stability in permanent housing" as a part of the evaluation for assistance. HUD seeks feedback as to whether this would be helpful, or if any important information could be lost if HUD does not require this.

b. Housing stability case management requirements (§ 576.401(e)(i)). The interim rule requirements for monthly meetings with a case manager and developing a housing stability case plan are intended to help ensure that the ESG-funded emergency, short-, or medium-term assistance will be effective in assisting program participants regain long-term housing stability and avoid relapses into homelessness. It also has the effect of emphasizing that ESG is intended to serve those who are most in need of the assistance. Finally, it helps recipients ensure that they are spending scarce ESG funds on program participants that are still in the units. However, HUD received many comments about this requirement, and has also determined that this case management requirement prevents recipients and subrecipients from using HOME TBRA funds as match for ESG because services must not be mandatory when providing HOME TBRA assistance. HUD seeks additional comment on the following questions:

(1) HUD requests that recipients/subrecipients inform HUD about their experiences with these requirements; for example, how does your organization fulfill these requirements? If HUD were to clarify in the final rule that a meeting by phone or videoconference would suffice (which is allowed now but not explicit in the rule), does that make a difference? If HUD were to allow the monthly meeting to simply consist of a brief check-in or follow-up with the program participant (but still be charged as a case management activity), would that help?

(2) If HUD should change the requirement, what would be a more preferable case management requirement? For example, HUD could change the language to require program participants to meet with a case manager "at a frequency appropriate to the client's needs." What might be the positive and negative effects of making this change?

(3) Are these requirements effective in assisting the program participants to achieve stability? Do they encourage recipients/subrecipients to serve those who are most in need? If not, then knowing that the intended purpose of case management is to ensure that the ESG-funded emergency, short- or medium-term assistance will be effective in helping program participants regain long-term housing stability and avoid relapses into homelessness, is there a requirement that could be added–instead of case management–that would meet the intended purpose, but not require recipients or subrecipients to conduct monthly case management?

16. Shelter and Housing Standards (§ 576.403): HUD received significant feedback and comment about the "habitability standards," and seeks comments on the following proposals:

a. Essential services only (emergency shelters). Under the interim rule, if a shelter only receives ESG funds for essential services costs, it is not currently required to meet the minimum standards for emergency shelters at § 576.403(a). HUD is reviewing whether to require an emergency shelter to meet these minimum standards if the emergency shelter receives ESG funding for essential services. This would include emergency shelters, including day shelters that receive non-ESG funds for operating expenses but use ESG for the provision of essential services to persons in the shelter. It would not include a subrecipient that receives ESG for essential services only but is not an emergency shelter (e.g., a legal services provider).

b. Housing Relocation and Stabilization Services only (Homelessness Prevention assistance to remain in unit). HUD is considering removing the requirement that a unit must

meet the minimum habitability standards for permanent housing when homelessness prevention assistance, under § 576.105(b) (services only), is used to help a program participant remain in the unit. Alternatively, HUD could allow ESG funds to be used to help a program participant remain in their unit for a short time (up to 30 days) before an inspection is performed. In this case, if the unit does not meet the habitability standards at the time of inspection, recipients/subrecipients would be prohibited from using any additional ESG assistance to help the program participant remain in their unit; however, ESG funds could be used to help the program participant move to a new unit. HUD seeks comment on these two options.

c. Housing Quality Standards. Some recipients might prefer to use HUD's Housing Quality Standards (HQS) instead of the ESG habitability standards; however, HQS is less stringent in the areas of fire safety and interior air quality, which is why it cannot be used to meet the habitability standards under the interim rule. However, HUD recognizes that HQS is the standard used for other HUD programs, and allowing it to be used may reduce the burden of meeting this requirement for some recipients and subrecipients. Therefore, for the final rule, HUD is considering explicitly allowing a certification that a particular permanent housing unit meets HQS to qualify as meeting the minimum standards for permanent housing under ESG.

17. Conflicts of Interest (§ 576.404):

a. Organizational conflicts of interest (§ 576.404(a)). Based on experiences with HPRP, HUD included a provision in the ESG interim rule that was intended to ensure that recipients or subrecipients would not "feather their own nests"–that is, steer program participants into housing that they own or only serve those that are already in housing that they own. This provision, at § 576.404(a), states: "No subrecipient may, with respect to individuals or families occupying housing owned by the subrecipient, or a parent or subsidiary of the subrecipient, carry

out the initial evaluation required under § 576.401 or administer homelessness prevention assistance under § 576.103." With respect to this conflict of interest provision:

(1) HUD is considering including recipients in this conflict of interest requirement. Based on recipient/subrecipient experiences, is this an issue that warrants concern?

(2) For rapid re-housing only, HUD is considering removing this provision altogether. That is, HUD could allow recipients/subrecipients to rapidly re-house "Category 1" homeless program participants into housing that they or their parent/subsidiary organization owns, because in some cases, these providers might be some of the most well-suited in the community to provide the assistance that persons being rapidly re-housed need. Are there any potential issues with this? Should HUD leave the requirement in place as-is, to prevent potential steering or conflicts of interest?

(3) For homelessness prevention assistance and rapid re-housing assistance (if HUD retains the conflict of interest requirement for rapid re-housing), HUD is considering adding a provision to prohibit recipients/subrecipients from providing housing search and placement services to assist program participants to move into housing that the recipient/subrecipient owns. HUD seeks comment on this idea.

b. Individual conflicts of interest (§ 576.404(b)). It is generally HUD's policy under its homeless programs to prohibit personal conflicts of interest. For example, if a city staff member makes decisions about grants and also sits on the board of directors of a potential subrecipient, this should be a conflict of interest that requires an exception from HUD. This was omitted from the ESG interim rule; HUD is considering including this provision in the final rule. HUD seeks comment on how significant an issue this type of conflict of interest is, based on the experience

of recipients, subrecipients, and other stakeholders in the community, and whether HUD should prohibit it without requiring an exception.

18. Other Federal Requirements – Limiting Eligibility and Targeting (§ 576.407): The emergency shelter or housing may be limited to a specific subpopulation so long as the recipient/subrecipient does not discriminate against any protected class under federal nondiscrimination laws in 24 CFR 5.105 (e.g., the housing may be limited to homeless veterans and their families, victims of domestic violence and their families, or chronically homeless persons and families), and does comply with the nondiscrimination and equal access requirements under 24 CFR 5.109, and § 576.406. HUD seeks comment on the following policies proposed for inclusion in the final rule, for permanent housing and for emergency shelters:

a. Rapid Re-housing and Homelessness Prevention. A project[4] may limit eligibility to or provide a preference to subpopulations of individuals and families who are homeless or at risk of homelessness and need the specialized services offered by the project (e.g., substance abuse addiction treatment, domestic violence services, or a high intensity package designed to meet the needs of hard-to-reach homeless persons). While the project may offer services for a particular type of disability, no otherwise eligible individuals with disabilities or families including an individual with a disability, who may benefit from the services provided, may be excluded on the grounds that they do not have a particular disability.

b. Emergency shelters. Recipients and subrecipients may exclusively serve a particular homeless subpopulation in emergency shelter if the shelter addresses a need identified by the recipient and meets one of the following conditions:

[4] Here, HUD is using the word "project" as it is proposed above in this Notice. If HUD ultimately adopts a different definition or term based on public comments received, HUD will adjust this provision accordingly.

(1) The emergency shelter may be limited to one sex where it consists of a single structure with shared bedrooms or bathing facilities such that the considerations of personal privacy and the physical limitations of the configuration of the emergency shelter make it appropriate for the shelter to be limited to one sex;

(2) The shelter may be limited to families with children, but if it serves families with children, it must serve all families with children (it may not separate based on the age of a child under 18, regardless of gender);

(3) If the shelter serves at least one family with a child under the age of 18, the shelter may exclude registered sex offenders and persons with a criminal record that includes a violent crime from the project so long as the child is served in the shelter; and

(4) An emergency shelter may limit admission to or provide a preference to subpopulations of homeless individuals and families who need the specialized services provided (e.g., substance abuse addiction treatment programs; victim service providers that serve both men and women; veterans and their families). While the shelter may offer services for a particular type of disability, no otherwise eligible individuals with disabilities or families including an individual with a disability, who may benefit from the services provided, may be excluded on the grounds that they do not have a particular disability.

19. Recordkeeping and Reporting Requirements (§ 576.500):

a. At risk of homelessness (§ 576.500(c)(1)(iv)). Under the "at risk of homelessness" recordkeeping requirements at § 576.500(c)(1)(iv), HUD is considering including, in the final rule, specific documentation standards for each of the seven conditions that would be required for a program participant to qualify for assistance under this definition. Note that HUD will

consider comments received here with the other comments requested on this characteristic earlier in this document. The changes are as follows:

(A) Has moved because of economic reasons two or more times during the 60 days immediately preceding the application for homelessness prevention assistance. Acceptable documentation includes, but is not limited to*: Certification by the individual or head of household and any available supporting documentation that the individual or family moved two or more times during the 60-day period immediately preceding the date of application for homeless assistance, and that the reasons for the moves were economic. Such supporting documentation could include:*

(1) For documentation of "two or more moves:" Recorded statements or records obtained from each owner, renter, or provider of housing in which the individual or family resided; proof of address and dates of residency at two or more locations, such as a utility bill or lease;

(2) For documentation of "economic reasons:" Other third-party verification to document that the reasons for the moves were economic, including notifications of job termination or reduction in hours, documentation of different jobs in different locations (e.g., migratory workers), or job applications; bills and statements, such as utility bills or medical bills, demonstrating a sudden increase in expenses; bank statements demonstrating that the household could not afford rent; or, where such statements or records are unobtainable, a written record of the intake worker's due diligence in attempting to obtain these statements or records.

(B) Is living in the home of another because of economic hardship. Acceptable documentation includes, but is not limited to: *Certification by the individual or head of household and any available supporting documentation that the individual or family is living in the home of another because of economic hardship. Such supporting documentation could*

include: written/recorded statements or records obtained from the owner or renter in which the individual or family resides and proof of homeownership or the lease by that owner or renter; other third-party verification to document that the reasons the individual or family is living there is because of economic hardship, including notifications of job termination or reduction in hours, or job applications, bills and statements, such as utility bills or medical bills, demonstrating a sudden increase in expenses, bank statements demonstrating that the household could not afford rent; or, where these statements or records are unobtainable, a written record of the intake worker's due diligence in attempting to obtain these statements or records.

(C) Has been notified in writing that their right to occupy their current housing or living situation will be terminated within 21 days after the date of application for assistance. Acceptable documentation is:

(1) For living arrangements where there is a written or oral lease agreement under states law: A court order resulting from an eviction action that requires the individual or family to leave their residence within 21 days after the date of their application for homeless assistance; or the equivalent notice under applicable state law; or

(2) For informal living arrangements, staying with a family or friend (i.e., "love evictions"): An oral statement by the individual or head of household that the owner or renter of the housing in which they currently reside will not allow them to stay for more than 21 days after the date of application for homeless assistance. The intake worker must record the statement and certify that it was found credible. To be found credible, the oral statement must either:

(i) be verified by the owner or renter of the housing in which the individual or family resides at the time of application for homeless assistance and documented by a written

certification by the owner or renter or by the intake worker's recording of the owner or renter's oral statement; or

(ii) if the intake worker is unable to contact the owner or renter, be documented by a written certification by the intake worker of their diligence in attempting to obtain the owner or renter's verification and the written certification by the individual or head of household seeking assistance that their statement was true and complete.

(D) Lives in a hotel or motel and the cost of the hotel or motel stay is not paid by charitable organizations or by Federal State, or local government programs for low-income individuals. Acceptable documentation includes, but is not limited to: *Certification by the individual or head of household and any available supporting documentation that the individual or family is living in a hotel or motel not paid by a charitable organization or government program, such as receipts from the motel/hotel or a written statement from the motel/hotel management; or, where these statements or records are unobtainable, a written record of the intake worker's due diligence in attempting to obtain these statements or records.*

(E) Lives in a single-room occupancy or efficiency apartment unit in which there reside more than two persons or lives in a larger housing unit in which there reside more than 1.5 persons per room, as defined by the U.S. Census Bureau. Acceptable documentation includes, but is not limited to: *Certification by the individual or head of household and any available supporting documentation that the individual or family is living in a severely overcrowded situation, such a written statement from the intake worker who visited the unit and witnessed the severely overcrowded unit or evidence thereof.*

(F) Is exiting a publicly funded institution, or system of care. Acceptable documentation is: *Certification by the individual or head of household and any available*

supporting documentation that the individual or family is exiting a publicly-funded institution or system of care. Such documentation could include: Discharge paperwork or a written or oral referral from a social worker, case manager, or other appropriate official of the institution, stating the beginning and end dates of the time residing in the institution. All oral statements must be recorded by the intake worker; or, where these statements or records are unobtainable, a written record of the intake worker's due diligence in attempting to obtain these statements or records.

(G) Otherwise lives in housing that has characteristics associated with instability and an increased risk of homelessness, as identified in the recipient's approved Consolidated Plan. Acceptable documentation includes, but is not limited to: *A statement, in the approved Consolidated Plan/Annual Action Plan, identifying these characteristics, and available supporting documentation that the individual or family is living in housing that has characteristics associated with instability and an increased risk of homelessness, which must follow HUD's order of priority for documentation: third-party documentation first, intake worker observations second, and certification from the person seeking assistance third.*

b. Determinations of ineligibility – Street Outreach (§576.500(d)). HUD is proposing that for the Street Outreach component, HUD will not require recipients/subrecipients to keep documentation of the reason(s) for determinations of ineligibility, in order to reduce a recordkeeping burden. HUD seeks comment on any issues that may arise if this requirement is eliminated.

c. Maintenance of effort recordkeeping requirement (§ 576.500(l)). The interim rule states: "The recipient and its subrecipients that are units of general purpose local government must keep records to demonstrate compliance with the maintenance of effort requirement,

including records of the unit of the general purpose local government's annual budgets and sources of funding for street outreach and emergency shelter services." This might be an overly burdensome recordkeeping requirement for recipients and subrecipients that are in compliance with this requirement—that is, how does a local government demonstrate that it is not using ESG funds to replace other local government funds? Therefore, HUD is considering removing this from the recordkeeping section. HUD would continue to monitor to ensure that recipients are meeting the requirements of § 576.101(c); this change would simply eliminate a difficult and potentially ineffective recordkeeping requirement. HUD seeks comment on this idea.

d. Records of services and assistance provided (§ 576.500(l)). Currently, only recipients are required to "keep records of the types of essential services, rental assistance, and housing stabilization and relocation services provided under the recipient's program, and the amounts spent on these services and assistance." HUD is considering adding "and subrecipients" to this recordkeeping requirement, and seeks comment on whether this change would be burdensome or useful.

e. Period of record retention (§ 576.500(y)(2) and (3)). Under the interim rule, records for major renovation or conversion must be retained until 10 years after the date ESG funds are first obligated, but the minimum period of use requirements, at § 576.102(c)(1), begin at the date of first occupancy after the completed renovation. HUD is considering whether to change the record retention requirements so that they are the same as the "minimum period of use" requirements in § 576.102(c), as follows: "*Where ESG funds are used for the renovation or conversion of an emergency shelter, the records must be retained for a period that is not less than the minimum period of use*." HUD seeks comment on this proposal.

20. Recipient Sanctions (§ 576.501(c)): Under the interim rule, at § 576.501(c), when a recipient reallocates or reprograms ESG funds as a part of subrecipient sanctions, these funds must be expended by the same deadline as all other funds. HUD is considering removing this expenditure requirement to provide recipients, especially states, with additional flexibility in situations where a subrecipient compliance issue or other impediment causes delays in the recipient's ability to expend all of the funds by the 24-month deadline. HUD seeks comment on this proposal.

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