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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR-5863-P-01]
RIN 2506-AC40

Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: As the Nation's housing agency, HUD administers programs designed to meet the goal of ensuring decent housing and a suitable living environment for all. In furtherance of this goal, in February 2012, HUD promulgated a final rule entitled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" (Equal Access Rule), which requires that HUD-assisted and HUD-insured housing be made available without regard to actual or perceived sexual orientation, gender identity, or marital status, and which generally prohibits inquiries into sexual orientation or gender identity for the purpose of determining eligibility for such housing or otherwise making such housing available. HUD's Equal Access Rule provides a limited exception for inquiries about the sex of an individual to determine eligibility for housing provided or to be provided to the individual when the housing is a temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms, or for inquiries made for the purpose of determining the number of bedrooms to which a household may be entitled. At that time, HUD decided not to set national policy regarding how transgender persons would be accommodated in temporary, emergency shelters that involve shared sleeping quarters or shared bathing facilities, but instead decided to monitor and review its programs to determine if transgender individuals

had greater access to temporary, emergency shelters as a result of the rule or if additional guidance or a national policy was warranted. HUD also committed to review the prohibition on inquiries contained in the Equal Access Rule. HUD has now monitored and reviewed its programs and, based on that review, is proposing this rule to require recipients and subrecipients of assistance from HUD's Office of Community Planning and Development (CPD), as well as owners, operators, and managers of shelters, buildings, and other facilities and providers of services covered by CPD's programs, to provide transgender persons and other persons who do not identify with the sex they were assigned at birth with access to programs, benefits, services, and accommodations in accordance with their gender identity. This proposed rule would also amend the definition of "gender identity" included in HUD's Equal Access Rule so the definition more clearly reflects the difference between actual and perceived gender identity. Finally, HUD has completed its review of the inquiries provision, and the proposed rule would eliminate the Equal Access Rule's current prohibition on inquiries related to sexual orientation or gender identity, while maintaining the prohibition against discrimination on those bases.

DATES: *Comment Date:* [**Insert date 60 days from the date of publication in the Federal Register**].

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

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

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

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

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

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

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

downloading at 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, Washington, DC 20410-7000; telephone number 202-708-4300 (this is not a toll-free number). Persons who are deaf or hard of hearing and persons with speech impairments can access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION

I. Background

In order to address evidence of arbitrary exclusion of lesbian, gay, bisexual, and transgender individuals (LGBT) and their families from housing opportunities, HUD published its Equal Access Rule in the Federal Register on February 3, 2012, at 77 FR 5662. The Equal Access Rule, codified primarily at 24 CFR 5.100 and 5.105(a)(2) and in applicable program regulations, defines the terms sexual orientation and gender identity, at 24 CFR 5.100, and requires, at 24 CFR 5.105(a)(2), that housing assisted or insured by HUD be made available to individuals and families without regard to an individual's actual or perceived sexual orientation, gender identity, or marital status. Certain other rules governing HUD housing programs were revised to clarify that all otherwise eligible families, regardless of sexual orientation, gender identity, or marital status of any member, have the opportunity to participate in HUD programs. The 2012 rule also revised 24 CFR 203.33(b) by adding sexual orientation and gender identity, in addition to marital status, to the characteristics that an FHA-certified lender may not take into consideration in determining the adequacy of a mortgagor's income.

Further, § 5.105(a)(2)(ii) prohibits owners and administrators of HUD-assisted or HUD-insured housing, approved lenders in a Federal Housing Administration (FHA) mortgage insurance program, and any other recipients or subrecipients of HUD funds from inquiring about sexual orientation or gender identity to determine eligibility for HUD-assisted or HUD-insured housing or otherwise make such housing available. The prohibition on inquiries regarding sexual orientation or gender identity does not prohibit individuals from voluntarily self-identifying sexual orientation or gender identity. Further, the rule provides a limited exception for inquiries about the sex of an individual to determine eligibility for housing provided or to be provided in temporary, emergency shelters with shared sleeping areas or bathrooms, or to determine the number of bedrooms to which a household may be entitled.

In response to public comments recommending that HUD-assisted programs accommodate individuals in accordance with their gender identity, HUD stated in the preamble to the Equal Access Rule that it was not adopting a national policy on the placement of transgender persons in temporary, emergency shelters with shared sleeping quarters or shared bathing facilities at that time, but would instead monitor its programs to determine whether additional guidance or a national policy was needed to ensure equal access. In response to comments on the permissibility of inquiries about an individual's sex, HUD stated in the preamble to the Equal Access Rule that HUD would monitor its programs and review the prohibition on inquiries to determine whether additional guidance was necessary to provide transgender individuals with equal access to shelters and other housing. The Fair Housing Act¹ prohibits discrimination in the sale, rental, making unavailable, or

¹ 42 U.S.C. 3601 et seq. The Fair Housing Act contains no exemptions that permit covered housing to be sex-

financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, and national origin, and thus prohibits making housing unavailable to a person because of that person's sex. However, temporary, emergency shelters and other buildings and facilities that are not covered by the Fair Housing Act² because they provide short-term, temporary accommodations may provide sex-segregated accommodations, when the buildings and facilities have physical limitations or configurations that require shared sleeping quarters or shared bathing facilities.³

Since the publication of the Equal Access Rule, HUD has conducted further review on the issue of transgender individuals' access to temporary, emergency shelters and other facilities with physical limitations or configurations that require shared sleeping quarters or bathing facilities, both in terms of individual cases and evidence from broader research. In this regard, HUD and the U.S. Interagency Council on Homelessness conducted a listening session on LGBT issues at the National Alliance to End Homelessness's 2012 National Conference on Ending Homelessness, where homeless service providers reported that, if given the choice between a shelter designated for their assigned birth sex or sleeping on the streets, many transgender shelter-seekers would choose the streets.⁴ One participant reported that, in her community, transgender women are excluded from the women's shelter, and

segregated. *See* 42 U.S.C. 3603(b) (limited exemptions for sales of certain single-family homes and for rooms or units in certain owner-occupied dwellings), sec. 3607 (exemptions for private clubs and religious organizations).

² An emergency shelter and other building and facility that would not qualify as dwellings under the Fair Housing Act are not subject to the Act's prohibition against sex discrimination and thus may be permitted by statute to be sex-segregated.

³ For purposes of this proposed rule, shared sleeping quarters or shared bathing facilities are those that do not accommodate privacy. For example, a single user bathing facility with a lock on the door accommodates privacy, so it is not a "shared bathing facility" for purposes of the Equal Access Rule or this proposed rule.

⁴ See http://usich.gov/blog/hud_usich_hears_from_you_understanding_the_needs_of_the_lgbt_homeless_popul.

conditions for them are so dangerous at the men's shelter that the shelter forces them to try to disguise their gender identity. HUD has also investigated several cases in which transgender persons have not been provided equal access to housing as required by the Equal Access Rule or have faced discrimination under the Fair Housing Act because of nonconformance with gender stereotypes.

National research indicates that these denials of access are a common occurrence. According to one major national survey on the experiences of transgender persons, nearly half (47 percent) of all transgender respondents who accessed shelters left those shelters because of the treatment they received there — choosing the street over the abuse and indignity they experienced in the shelters.⁵ This survey further reported that 25 percent of transgender individuals who stayed in shelters were physically assaulted, and 22 percent were sexually assaulted, by another resident or shelter staff.⁶

The experiences of homeless transgender youth, specifically, have also been documented, with similar findings of lack of access to housing and services. While research suggests that transgender youth represent less than one percent of the youth in the United States,⁷ a disproportionately high 6.8 percent of youth living on the streets identify as transgender.⁸ In addition, a report detailing case studies of runaway and homeless youth found that transgender youth were particularly at risk of emotional distress resulting from discrimination or harassment because of gender identity and supported establishing clear

⁵ Jamie M. Grant Et Al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality, 118 (2011).

⁶ See Jamie M. Grant Et Al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality, footnote 5 at 117-18 (2011).

⁷ Hannah Hussey, *Beyond 4 walls and a Roof: Addressing Homelessness Among Transgender Youth*, Center for American Progress, 4 (2015).

⁸ Administration for Children and Families, *Street Outreach Program: Data Collection Project Executive Summary* (U.S. Department of Health and Human Services, 2014).

nondiscrimination and antiharassment policies relating to gender identity. With respect to facilities with shared sleeping or bathing areas, the policies recommended include addressing the needs of transgender persons and other persons who do not identify with the sex assigned to the individual at birth.⁹ A recent report on experiences of homeless LGBT youth also calls for the creation of safe and supportive protocols for housing and placement specific to transgender individuals and individuals who do not conform with gender stereotypes.¹⁰

HUD has also reviewed steps that other Federal agencies have taken since the Equal Access Rule was promulgated in February 2012 to provide equal access for transgender persons and other persons who do not conform with gender stereotypes.

U.S. Department of Justice Guidance. On April 9, 2014, the Office for Civil Rights, Office of Justice Programs, at the U.S. Department of Justice (DOJ) published guidance entitled “Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013”¹¹ (VAWA 2013 FAQ). VAWA 2013 authorizes certain grants administered by DOJ, including grants to provide housing assistance for survivors of domestic violence. VAWA 2013 also imposes a new grant condition that prohibits discrimination by recipients of such grants on the basis of sexual orientation and gender identity. The VAWA 2013 FAQ, which is not applicable to HUD-assisted housing,¹² addresses how a recipient of DOJ funds can operate a single-sex facility funded through VAWA and not discriminate on the basis of gender identity. The DOJ guidance states:

⁹ Andrew Burwick Et Al, Identifying and Serving LGBTQ Youth: Case Studies of Runaway and Homeless Youth Program Grantees, Mathematica Policy Research and the Williams Institute, 19 (2014).

¹⁰ Meredith Dank Et Al, Surviving the streets of New York: Experiences of LGBTQ youth, YMSM, and YSWW Engaged in Survival Sex. Urban Institute, 70 (2015).

¹¹ The guidance can be found at <http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-va-wa.pdf>.

¹² Unlike HUD program statutes, which do not authorize single-sex housing, VAWA 2013 specifically authorizes funding for single-sex shelters in certain narrowly defined circumstances.

A recipient that operates a sex-segregated or sex-specific program should assign a beneficiary¹³ to the group or service which corresponds to the gender with which the beneficiary identifies, with the following considerations. In deciding how to house a victim, a recipient that provides sex-segregated housing may consider on a case-by-case basis whether a particular housing assignment would ensure the victim's health and safety. A victim's own views with respect to personal safety deserve serious consideration. The recipient should ensure that its services do not isolate or segregate victims based upon actual or perceived gender identity. A recipient may not make a determination about services for one beneficiary based on the complaints of another beneficiary when those complaints are based on gender identity.

For the purpose of assigning a beneficiary to sex-segregated or sex-specific services, best practices dictate that the recipient should ask a transgender beneficiary which group or service the beneficiary wishes to join. The recipient may not, however, ask questions about the beneficiary's anatomy or medical history or make burdensome demands for identity documents.¹⁴

U.S. Department of Education Guidance. Similarly, on December 1, 2014, the U.S. Department of Education's Office for Civil Rights issued guidance providing that "under Title IX [of the Education Amendments of 1972, which prohibits discrimination based on sex], a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."¹⁵

¹³ The beneficiary is the individual seeking services from the recipient or service provider.

¹⁴ See Department of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013 (Apr. 9, 2013), FAQ 14, *available at* <http://www.ovw.usdoj.gov/docs/faqs-ngc-vawa.pdf>.

¹⁵ The guidance can be found at <http://www.ed.gov/ocr/docs/faqs-title-ix-single-sex-201412.pdf>. In this guidance the Department of Education considers discrimination based on gender identity as a form of sex discrimination. The guidance states, in relevant part: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." See also the Department of Education's guidance, "Questions and Answers on Title IX and Sexual Violence," which makes clear that sexual violence against transgender students is a form of sex discrimination prohibited by Title IX. The guidance can be found at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. In addition to this guidance, the Department of Labor, Office of Job Corps, issued guidance ensuring equal access and opportunity for transgender applicants and students in the Job Corps Program; see "Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program" issued May 1, 2015, *available at* <https://supportservices.jobcorps.gov/health/PINotices.aspx>.

Given HUD's mission to provide equal housing opportunities for all, and the significant violence, harassment, and discrimination faced by transgender individuals and other persons who do not identify with the sex they were assigned at birth in attempting to access programs, benefits, services, and accommodations, HUD has a responsibility to provide leadership in establishing a policy for HUD's community development programs that addresses these serious concerns. After considering the feedback from HUD recipients and subrecipients, the experiences of the beneficiaries of HUD's community development programs who have been denied access because of their gender identity, research on transgender discrimination in shelter settings, and the actions taken by other Federal agencies to address access to programs, benefits, services, and accommodations in accordance with an individual's gender identity, CPD released Notice CPD-015-02, "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities," applicable to the Housing Opportunities for Persons with AIDS, Emergency Solutions Grants, and Continuum of Care programs, on February 20, 2015.¹⁶ This guidance states:

HUD assumes that a recipient or subrecipient ("provider") that makes decisions about eligibility for or placement into single-sex emergency shelters or other facilities will place a potential client (or current client seeking a new assignment) in a shelter or facility that corresponds to the gender with which the person identifies, taking health and safety concerns into consideration. A client's or potential client's own views with respect to personal health and safety should be given serious consideration in making the placement. For instance, if the potential client requests to be placed based on his or her sex assigned at birth, HUD assumes that the provider will place the individual in accordance with that request, consistent with health, safety, and privacy concerns. HUD assumes that a provider will not make an assignment or re-assignment based on complaints of another person when the sole stated basis of the complaint is a client or potential client's non-conformance with gender stereotypes.¹⁷

¹⁶ See <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

¹⁷ See <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for->

CPD's guidance also outlines best practices for appropriate and inappropriate inquiries related to sex, and states that where a provider is uncertain of the client's sex or gender identity, the provider informs the client or potential client that the agency provides shelter based on the individual's gender identity. The guidance further states that there generally is no legitimate reason for the provider to request documentation of a person's sex in order to determine appropriate placement, nor should the provider have any basis to deny access to a single-sex emergency shelter or facility solely because the provider possesses identity documents indicating a sex different than the client's or potential client's gender identity. Further, the provider may not ask questions or otherwise seek information or documentation concerning the person's anatomy or medical history, nor consider a client ineligible for an emergency shelter or other facility because the client's appearance or behavior does not conform with gender stereotypes. In addition, the guidance provides examples of steps that providers may take to address safety or privacy concerns, and says that providers should train staff on adhering to this guidance.¹⁸

II. This Proposed Rule

To adopt requirements consistent with the guidance recently published by HUD, HUD is proposing to add in 24 CFR part 5 a new section that would require recipients and subrecipients of assistance under the HOME Investment Partnerships program, Community Development Block Grant program, Housing Opportunities for Persons with AIDS program, Emergency Solutions Grants program, and the Continuum of Care program, as well as owners, operators, and managers of shelters and other buildings and facilities and providers

Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf.

¹⁸ See <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

of services funded in whole or in part by any of these programs, to provide equal access to programs, benefits, services, and accommodations in accordance with an individual's gender identity. If the proposed rule becomes a final rule, the final rule would be effective upon receipt of assistance after the effective date of the final rule. Nothing in this proposed rule is meant to prevent necessary and appropriate steps to address any fraudulent attempts to access services or legitimate safety concerns that may arise in any shelter, building, or facility covered by this rule.

Prior to discussing the requirements that would be established in this section, it is important to clarify which individuals would be covered by the protections of this new section. While some individuals refer to themselves as transgender, other persons who do not identify with the sex they were assigned at birth may use other terms to describe themselves. For this reason, the proposed rule seeks to ensure that all individuals, regardless of the terms they use to describe themselves, are afforded equal access to programs, benefits, services, and accommodations in accordance with their gender identity.

The following requirements would be established by this proposed rule:

§ 5.100 -- Revised definition of gender identity.

HUD is proposing to amend the definition of gender identity in § 5.100, which currently provides that "Gender identity means actual or perceived gender-related characteristics." This definition of gender identity, which was adopted by HUD in its 2012 Equal Access Rule for purposes of ensuring equal access in HUD-assisted and HUD-insured housing, is the same definition that was used in the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. 249. While this definition is effective for purposes of prosecuting hate crimes, HUD has concluded that it would be more effective for

purposes of ensuring equal access to HUD programs to separate the definitions of actual and perceived gender identity. The Department is therefore proposing to amend the definition of gender identity to read as follows: “Gender identity means the gender with which a person identifies, regardless of the sex assigned to that person at birth. Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth.” Perceived gender identity may differ from the identity with which a person identifies.

§ 5.106-- Providing access in accordance with an individual’s gender identity in community planning and development programs.

HUD proposes to add a new § 5.106, which would contain equal access provisions specifically tailored to HUD’s community development programs. This proposed new provision would be placed after the more general equal access provisions applicable to all HUD housing programs, added in 2012 to § 5.105.

Section *5.106(a)* would identify the programs covered by the new § 5.106. Section 5.106 would apply to recipients and subrecipients of assistance under the HOME Investment Partnerships program (24 CFR part 92), Community Development Block Grant program (24 CFR part 570), Housing Opportunities for Persons with AIDS program (24 CFR part 574), Emergency Solutions Grants program (24 CFR part 576), or Continuum of Care program (24 CFR part 578), as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any of these programs.

Section *5.106 (b)* is the operative provision in § 5.106. Under this subsection, a recipient, subrecipient, or provider would be required to establish, amend, or maintain

program admissions, occupancy, and operating policies and procedures, including policies and procedures to protect individuals' privacy and security, so that equal access is provided to individuals based on their gender identity. This requirement includes tenant selection and admission preferences. The provision also requires that services, benefits, and accommodations be provided in a manner that affords equal access to the individual's family.¹⁹

Section 5.106(c) addresses temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require shared sleeping quarters or shared bathing facilities. This section requires that the placement and accommodation of individuals in such facilities that are permitted to be single-sex because they are not covered by the Fair Housing Act must be made in accordance with the individual's gender identity.

The only exception to the requirement to accommodate and serve a person in accordance with the individual's gender identity is that the recipient, subrecipient, owner, operator, manager, or provider may consider, on a case-by-case basis, whether a particular housing assignment would ensure health and safety. It is prohibited for such a determination to be based solely on a person's actual or perceived gender identity or on complaints of other shelter residents when those complaints are based on actual or perceived gender identity. It is likewise prohibited to deny appropriate placement based on a perceived threat to health or safety that can be mitigated some other less burdensome way (e.g., providing the transgender shelter seeker the option to use single-use bathing facilities).

Section 5.106(d) requires that when such a determination is made, the recipient,

¹⁹ As noted above, the Fair Housing Act prohibits familial status discrimination. Accordingly, housing providers covered by the Fair Housing Act may not discriminate based on familial status unless the housing meets statutory and regulatory requirements for housing for older persons. 42 U.S.C. 3607(b); 24 CFR part 100, subpart E.

subrecipient, owner, operator, manager, or provider is required to provide either (1) equivalent alternative accommodation, benefits, and services or (2) a referral to a comparable alternative program that meets the needs of the individual. HUD expects the recipient, subrecipient, owner, operator, manager, or provider to refer the individual to a comparable alternative program that can more appropriately mitigate or eliminate the safety risk and that has available accommodations, or offer the individual equivalent alternative accommodation (e.g., a hotel or motel voucher), benefits, and services. HUD anticipates that the use of this limited exception for the provision of equivalent alternative accommodations, benefits, and services or referral to a comparable alternative program would be rare, since it would not apply unless the facts and circumstances demonstrated a nondiscriminatory risk to health or safety that could not be eliminated or appropriately mitigated by policy adjustments and physical modifications to buildings and facilities.

Section 5.106 (e) requires that records of case-by-case determinations must be kept by the recipient, subrecipient, owner, operator, manager, or provider, including when the determination is made that an individual cannot safely be served in accordance with the individual's gender identity. Where an alternative placement is made, recipients, subrecipients, owners, operators, managers, or providers must thoroughly document the reasons for that placement, in accordance with the recordkeeping requirements established in this subsection. Further, the recordkeeping section proposes that when a referral is made, the recipient, subrecipient, owner, operator, manager, or provider documents the facts and circumstances regarding the referral and whether the individual and the individual's family, in instances where the individual presents with a family, has been admitted and accommodated.

§ 5.105(a)(2)(ii)-- Removal of prohibited inquiries.

In the preamble to HUD's 2012 Equal Access Rule, HUD stated that it would review the prohibition of inquiries in § 5.105(a)(2)(ii) following monitoring of the application of this provision in HUD programs. As discussed earlier in this preamble, CPD released Notice CPD-015-02 "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities," applicable to the Housing Opportunities for Persons with AIDS, Emergency Solutions Grants, and Continuum of Care programs, on February 20, 2015,²⁰ which provided that HUD expected recipients, subrecipients, and providers to accommodate individuals in accordance with the individual's gender identity. The guidance states that where a provider is uncertain of the client's sex or gender identity and that information matters for the determination of placement, the provider informs the client or potential client that the agency provides shelter based on the individual's gender identity. HUD now believes, however, that the prohibition of inquiries at § 5.105(a)(2)(ii) may hinder a provider from making an appropriate placement decision for fear of violating the rule. For this reason, HUD is proposing to remove the prohibition of inquiries.

HUD's intent in proposing removal of § 5.105(a)(2)(ii) is not to now permit recipients or subrecipients to ask questions in order to seek information that could be used for discriminatory purposes. Rather, HUD is proposing removal because § 5.105(a)(2)(ii) has raised several legitimate questions about implementation. Removal of § 5.105(a)(2)(ii) would allow shelters and other facilities with physical limitations or configurations that require shared sleeping quarters or shared bathing facilities to ask the individual's gender identity, and it would permit inquiries of the individual's gender identity and sexual

²⁰ See <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

orientation to determine the number of bedrooms to which a household is entitled. Removal of § 5.105(a)(2)(ii) also reaffirms that HUD permits mechanisms for voluntary and anonymous reporting of sexual orientation or gender identity for compliance with data collection requirements of State and local governments or Federal assistance programs.

III. Findings and Certifications

Regulatory Review – Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order.

This proposed rule is consistent with Administration policy, as has been noted in the preamble by citing to policy already implemented by the U.S Department of Education, the U.S. Department of Justice, the U.S. Department of Labor, and the CPD guidance already implemented by HUD. This proposed rule clarifies how facilities funded by CPD that have shared sleeping quarters or shared bathing facilities comply with the requirement that equal access be provided to programs, buildings, facilities, services, benefits, and accommodations in accordance with the individual's gender identity. This clarification should provide benefits to clients accessing CPD-funded, temporary, emergency shelters and other buildings

and facilities by assuring all clients receive equal access, and will benefit the CPD-funded facilities by making compliance with HUD's equal access requirements easier.

In this proposed rule, HUD recognizes a limited exception to accommodating individuals in accordance with the individual's gender identity when a recipient, subrecipient, owner, operator, manager, or provider identifies a legitimate safety risk that cannot be eliminated or appropriately mitigated and makes a written case-by-case analysis. The written case-by-case analysis only applies when the benefits, services, and accommodations are not being provided to an individual in accordance with the individual's gender identity. The written case-by-case analysis benefits the client accessing the services and the recipient, subrecipient, owner, operator, manager, or provider by keeping a record of when a legitimate safety risk is identified. The recipient, subrecipient, owner, operator, manager, or provider must also undertake reasonable efforts to ensure that equivalent alternative accommodations are provided or refer the individual to a comparable alternative program that will meet the individual's needs. This proposed rule also seeks to amend the definition of gender identity in § 5.100 to clarify the difference between actual and perceived gender identity, which would be necessary if proposed § 5.106 is adopted. This proposed rule also would eliminate the prohibition on inquiries relating to sexual orientation or gender identity in § 5.105(a)(2)(ii). Both of these proposed changes would make it easier for recipients, subrecipients, owners, operators, managers, and providers of programs, buildings, and facilities funded by CPD programs to comply with the requirements of existing § 5.105(a)(2)(i) and proposed § 5.106. An estimate of the cost of recording and retaining that written case-by-case analysis, in the limited situations in which it may apply, is discussed in the Paperwork Reduction Act section of this proposed rule.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals who are deaf or hard of hearing and individuals with speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Approximately 4,000 providers participating in the CPD programs covered by this rule are small organizations, but the number of entities that would address the accommodation needs addressed by this rule is much lower. The benefit of this proposed rule is to ensure equal access to CPD programs, facilities, services, benefits, and accommodations. The rule does require organizations to make a written case-by-case analysis and referral in limited situations. Although HUD does not have any way to determine the number of written case-by-case analyses or referrals that will occur in any one year, HUD does not believe that costs will be significant for small service providers and estimates it will take a provider 15 minutes per case-by-case analysis and referral. HUD invites interested parties to provide data with which HUD can formulate better estimates of the compliance costs associated with the written notice and referral requirements of this proposed rule. Accordingly, for the foregoing reasons, the undersigned

certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this proposed rule would not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives and the principles in Executive Order 13559, as described in this preamble.

Paperwork Reduction Act

The proposed rule requires CPD programs to include a written case-by-case analysis and make referrals. This rule also requires the retention of records to show that the case-by-case analysis was followed and referral requirements in this rulemaking have been met. HUD estimates that a case-by-case analysis and referral will be required infrequently given that the case-by-case analysis is only necessary when the provider is not providing accommodations to an individual in accordance with the gender with which an individual identifies because there is a legitimate safety risk that cannot be eliminated or appropriately mitigated. HUD estimates that only 0.05 percent of facilities that are covered by this proposed regulation will need to make a written case-by-case analysis and referral, and estimates it will take an individual 15 minutes to complete the case-by-case analysis and referral. This estimate includes the time required to write down the basis for the analysis, identify service providers that provide similar services, and make the referral.

The information collection requirements for the CPD's HOME Investment Partnerships program, Community Development Block Grant program (State and entitlement), Housing Opportunities for Persons with AIDS program, Emergency Solutions Grants program, or Continuum of Care program impacted by this rule have been approved by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned

OMB control numbers 2506-0171, 2506-0085, 2506-0077, 2506-0133, 2506-0089, and 2506-0199. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number. The existing forms will be changed to include the new recordkeeping requirement added by this proposed rule.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information.

(3) Enhance the quality, utility, and clarity of the information to be collected.

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

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposed rule by name and docket number (FR-5583-P-01) and must be sent to:

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

and

Reports Liaison Officer
Office of Housing
Department of Housing and Urban Development
451 7th Street, SW, Room 9128
Washington, DC 20410

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

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

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

preempt state law within the meaning of the Executive order.

Unfunded Mandates Reform Act

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

List of Subjects in 24 CFR Part 5

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

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109-115, 119 Stat. 2936, and Sec. 607, Pub. L. 109-162, 119 Stat. 3051.

2. In § 5.100, revise the definition for “Gender identity” to read as follows:

§ 5.100 Definitions.

* * * * *

Gender identity means the gender with which a person identifies, regardless of the sex assigned to that person at birth. *Perceived gender identity* means the gender with which a person is perceived to identify based on that person's appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth.

* * * * *

§ 5.105 [Amended]

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

4. Add § 5.106 to read as follows:

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

(a) Applicability. This section applies to recipients and subrecipients of assistance under the HOME Investment Partnerships program (24 CFR part 92), Community Development Block Grant program (24 CFR part 570), Housing Opportunities for Persons with AIDS program (24 CFR part 574), Emergency Solutions Grants program (24 CFR part 576), or Continuum of Care program (24 CFR part 578), as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any of these programs.

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

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

(2) Individuals are placed, served, and accommodated in accordance with the individual's gender identity.

(c) Placement and accommodation in facilities with shared sleeping quarters or shared bathing facilities. Placement and accommodation of individuals in shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with the individual's gender identity. Under narrow circumstances, a written case-by-case determination can be made as to whether an alternative accommodation is necessary to ensure health and safety. It shall be prohibited for such a determination to be based solely on a person's actual or perceived gender identity, the complaints of other clients, beneficiaries, or employees when those complaints are based on actual or perceived gender identity, or on an actual or perceived threat to health or safety that can be mitigated in some other way that is less burdensome. In order to avoid unwarranted denials of placement in accordance with an individual's gender identity, decisions to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated.

(d) Referrals. In any instance in which a case-by-case determination is made under paragraph (c) of this section, the recipient, subrecipient, owner, operator, manager, or provider shall ensure that an opportunity to access equivalent alternative accommodations, benefits, and services is provided or shall refer the individual to a comparable alternative

program with availability that will meet the individual's needs.

(e) Documentation and record retention. Providers shall document and maintain records of compliance with the requirements in paragraphs (b), (c), and (d) of this section for a period of 5 years, including but not limited to:

(1) The specific facts, circumstances, and reasoning relied upon in any case-by-case determination that results in an alternative admission, accommodation, benefit, or service to an individual or their family;

(2) The facts and circumstances regarding the opportunities to access alternative accommodations that are provided to an individual and their families by the recipient, subrecipient, owner, operator, manager, or provider; and

(3) The facts, circumstances, and outcomes regarding each referral of an individual and their family to a comparable alternative program, including information regarding the benefits, services, and accommodations received.

Dated: October 23, 2015.

Julián Castro,
Secretary

[FR-5863-P-01]

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