



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 1000, 1003, 1005, 1006, and 1007

[Docket No. FR 5861-P-01]

RIN 2577-AC96

Equal Access to Housing in HUD's Native American and Native Hawaiian Programs – Regardless of Sexual Orientation or Gender Identity

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise regulations for HUD's Native American and Native Hawaiian programs to incorporate existing rules that require HUD programs to be open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. Since HUD promulgated the "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" final rule in February, 2012, HUD has required that HUD-assisted and HUD-insured housing be made available in accordance with program eligibility requirements and without regard to sexual orientation, gender identity, or marital status, and has generally prohibited inquiries into sexual orientation or gender identity. In applying these non-discrimination requirements to HUD's Native American and Native Hawaiian programs, this proposed rule would further the Federal goal of providing decent housing and a suitable living environment for all.

DATES: Comments due: **[INSERT DATE 60 DAYS AFTER 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 with speech or hearing 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: [Contact Name to be Inserted], Office of Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 5206, Washington, DC 20410-8000; telephone number 202-708-2333 (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. Background

On February 3, 2012, HUD published in the Federal Register, at 77 FR 5662, a final rule titled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” (the Equal Access Rule) in order to address evidence that lesbian, gay, bisexual, and transgender (LGBT) individuals and families do not have equal access to housing, and to promote the federal goal of providing decent housing and a suitable living environment for all.¹ The Equal Access Rule requires that housing assisted or insured by HUD be made available to individuals and families without regard to actual or perceived sexual orientation, gender identity, or marital status. Additionally, the rule prohibits owners and administrators of HUD-assisted or HUD-insured housing, approved lenders in an 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. The prohibition on

¹ See Section 2 of the Housing Act of 1949 at 42 U.S.C. 1441 (Congressional Declaration of National Housing Policy).

inquiries regarding sexual orientation or gender identity does not prohibit individuals from voluntarily self-identifying sexual orientation or gender identity, and it provides a limited exception for lawful inquiries of an applicant's or occupant's sex where the housing provided or to be provided is temporary, emergency shelter with shared sleeping areas or bathrooms, or to determine the number of bedrooms to which a household may be entitled. These protections are now codified at 24 CFR 5.105(a)(2). The Equal Access Rule also provides definitions for the terms sexual orientation and gender identity, and revises the definition for the term family at § 5.403, which applies broadly unless otherwise provided in the regulations for a specific HUD program. In addition, the Equal Access Rule made revisions to specific HUD programs. See 24 CFR part 200 – Introduction to FHA Programs, revisions to sections defining family, determining income adequacy, and applying the definition of family; 24 CFR part 570 – Community Development Block Grants, revisions to the section defining family and household; 24 CFR part 574 – Housing Opportunities for Persons with AIDS, revision to the section defining family; 24 CFR part 891 – Supportive Housing For the Elderly and Persons with Disabilities, revision to the definition of family; and 24 CFR part 892 – Section 8 Tenant-Based Assistance: Housing Choice Voucher Program, revisions to the sections defining family, eligibility, and targeting.

In publishing the Equal Access Rule, HUD noted that establishment of the equal access policy in HUD's Native American programs would be undertaken by separate rulemaking. (See 77 FR 5662, at footnote 3.) Since implementing the Equal Access Rule, it has been HUD's intention to apply the same non-discrimination requirements to HUD's Native American and Native Hawaiian programs, after undergoing tribal consultation to solicit feedback on this proposal.

Since the publication of the Equal Access Rule, the Federal Government has continued to broaden protections for LGBT individuals and families where Federal funding is involved. For example, the Violence Against Women Reauthorization Act of 2013 (VAWA) includes a provision that prohibits discrimination based on gender identity and sexual orientation by recipients of VAWA funds or assistance administered by the U.S. Department of Justice's Office on Violence Against Women. Additionally, on July 21, 2014, President Obama signed Executive Order 13672, titled, "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity," which prohibits the Federal Government and Federal contractors from discriminating on the basis of sexual orientation or gender identity.²

As discussed in the preamble to the January 24, 2011, proposed Equal Access Rule, at 76 FR 4194, and in the preamble to the final Equal Access Rule, the Federal government has a goal of providing everyone in the United States with a decent and suitable place to live. In furtherance of this, HUD has a responsibility to ensure that all who are otherwise eligible to participate in HUD programs will not be excluded based on sexual orientation, gender identity, or marital status, which are irrelevant to eligibility for or participation in those programs. By applying the core protections of the Equal Access Rule to HUD's Native American and Native Hawaiian programs, HUD will conform with its own precedent of equal access, as well as other Federal precedent, to ensure that Federal funds are not used to exclude persons from Federally-assisted programs because of sexual orientation, gender identity, or marital status. Applying the Equal Access Rule to HUD's Native American and Native Hawaiian programs will also ensure consistency where there is an overlap between HUD's Native American and Native Hawaiian

² See <http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf>.

programs and other HUD programs, which are already subject to the requirements in the Equal Access Rule.

II. This Proposed Rule

With tribal consultation completed, as explained below in Section III, HUD is proposing to amend regulations for its Native American and Native Hawaiian programs so that they conform to the Equal Access Rule. The regulations would require that access be provided without regard to actual or perceived sexual orientation, gender identity, or marital status in housing assisted or insured under these programs. The proposed rule would add the equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2) to the Native American and Native Hawaiian programs identified below. HUD's rule at 24 CFR 5.105(a)(2) incorporates the definitions of "sexual orientation" and "gender identity" provided in § 5.100, and these definitions will apply to the Native American and Native Hawaiian programs. This proposed rule would not change the definition of "family" for Native American and Native Hawaiian programs. At the final rule stage, HUD intends to make conforming amendments to § 5.105(a)(2) to make explicit that the requirements in § 5.105(a)(2) apply to housing with loans guaranteed or insured under one of HUD's Native American or Native Hawaiian housing programs and not only the FHA mortgage insurance program.

Specifically, this proposed rule would amend HUD's regulations for Native American Housing Activities, at 24 CFR part 1000; Community Development Block Grants for Indian Tribes and Alaska Native Villages, at 24 CFR part 1003; the Section 184 Indian Home Loan Guarantee Program, at 24 CFR part 1005; the Native Hawaiian Housing Block Grant Program, at 24 CFR part 1006; and Section 184A Loan Guarantees For Native Hawaiian Housing, at 24 CFR part 1007 to incorporate the § 5.105(a)(2) requirements.

On November 20, 2015, HUD published in the Federal Register, at 80 FR 72642, a proposed rule titled “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” (the CPD Equal Access Rule), which would amend certain provisions of § 5.105(a)(2). While the CPD Equal Access Rule would not amend the Equal Access Rule’s requirement that access be provided without regard to actual or perceived sexual orientation, gender identity, or marital status in HUD-assisted or HUD-insured housing, the CPD Equal Access Rule is proposing changes to 24 CFR 5.105(a)(2) and to the definition of “gender identity” in 24 CFR 5.100, which this rule is seeking to adopt for Native American and Native Hawaiian programs. If the CPD Equal Access Rule and this rule both become final, the changes proposed in the CPD Equal Access Rule would apply to the Native American and Native Hawaiian programs.

Specifically, the proposed rule seeks to remove the prohibition of inquiries at §5.105(a)(2)(ii), which HUD believes may hinder a provider from making an appropriate placement decision with regard to transgender individuals and other persons who do not identify with the sex they were assigned at birth. For this reason, the CPD Equal Access Rule proposes to remove the prohibition of inquiries. It is not HUD’s intent, however, to now permit recipients or subrecipients to ask questions in order to seek information that could be used for discriminatory purposes. The CPD Equal Access Rule is also proposing to amend the definition of gender identity in §5.100, which currently provides that “Gender identity means actual or perceived gender-related characteristics.” The new definition would more clearly reflect the difference between actual and perceived gender identity. The definition of gender identity would now 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.”

III. Tribal Consultation

HUD's policy is to consult with Indian tribes early in the rulemaking process on matters that have tribal implications. Accordingly, on January 28, 2015, HUD sent letters to Tribal leaders informing them of the nature of the forthcoming rule and soliciting comments. The deadline for comments under this informal consultation was February 27, 2015. HUD received one response to the consultation letter from a tribally designated housing entity, which said it opposed the proposed rule.

HUD received a second response on behalf of a housing development and management organization that states that section 106(b)(2)(A) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)(25 U.S.C. 4166(b)(2)(A)) requires HUD to use negotiated rulemaking in order to amend NAHASDA regulations.. The letter also stated that the rule should not prohibit tribes from considering marital status in making eligibility determinations for housing assisted or insured by HUD because tribes have authority to govern domestic relations of their members. This letter also asked for more specificity on the rule and more ways to participate in the consultation process. The requirement to undertake negotiated rulemaking pertains to regulations that implement NAHASDA statutory requirements. This rule pertains to nondiscrimination requirements and does not pertain to regulations that implement NAHASDA statutory requirements.

The entities that submitted comments in response to the consultation letter, and all other tribes and interested parties now have the opportunity to provide further comments on this proposed rule, and HUD welcomes such comments.

IV. Findings and Certifications

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. This proposed rule does not impose any new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of this proposed rule is to ensure equal access to HUD's Native American and Native Hawaiian programs, regardless of sexual orientation or gender identity. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

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

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 would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 1000

Aged, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Reporting and recordkeeping requirements.

24 CFR Part 1005

Indians, Loan programs-Indians, Reporting and recordkeeping requirements.

24 CFR Part 1006

Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Hawaiian Natives, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 1007

Hawaiian Natives, Loan programs-housing and community development, Loan programs-Indians, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR parts 1000, 1003, 1005, 1006, and 1007, as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

1. The authority citation for 24 CFR part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

2. In § 1000.12, add paragraph (e) to read as follows:

§ 1000.12 What nondiscrimination requirements are applicable?

* * * * *

(e) The equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2).

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

3. The authority citation for 24 CFR part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

4. In § 1003.601, add paragraph (c) to read as follows:

§ 1003.601 Nondiscrimination.

* * * * *

(c) A grantee shall comply with the equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2).

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

5. The authority citation for 24 CFR part 1005 continues to read as follows:

Authority: 12 U.S.C. 1715z-13a; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

6. Add § 1005.115 to read as follows:

§ 1005.115 Equal Access

The equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2) apply to this part.

PART 1006—NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

7. The authority citation for 24 CFR part 1006 continues to read as follows:

Authority: 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 3535(d).

8. Amend § 1006.355 to read as follows:

a. The undesignated paragraph is revised and designated as paragraph (a);

b. Redesignate paragraphs (a), (b), and (c) as paragraphs (a)(1), (a)(2), and (a)(3);

c. Redesignate paragraphs (c)(1) and (c)(2) as paragraphs (a)(3)(i) and (a)(3)(ii); and

d. Add paragraph (a)(4)

§ 1006.355 Nondiscrimination requirements.

(a) Program eligibility under the Act and this part may be restricted to Native Hawaiians. Subject to the preceding sentence, no person may be discriminated against on the basis of race,

color, national origin, religion, sex, familial status, or disability, or excluded from program eligibility because of actual or perceived sexual orientation, gender identity, or marital status.

The following nondiscrimination requirements are applicable to the use of NHHBG funds:

* * * * *

(4) The equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2).

(b) [RESERVED]

**PART 1007—SECTION 184A LOAN GUARANTEES FOR NATIVE HAWAIIAN
HOUSING**

9. The authority citation for 24 CFR part 1007 continues to read as follows:

Authority: 12 U.S.C. 1715z-13b; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

10. Amend § 1007.45 to revise the heading, designate the undesignated paragraph as paragraph (a), and add paragraph (b) to read as follows:

§ 1007.45 Nondiscrimination

(a) * * *

(b) The equal access to HUD-assisted or insured housing requirements in 24 CFR 5.105(a)(2) apply to this part.

Dated: March 30, 2016.

Lourdes Castro Ramirez,
*Principal Deputy Assistant Secretary for
Public and Indian Housing.*

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