This document is scheduled to be published in the
Federal Register on 07/16/2015 and available online at
http://federalregister.gov/a/2015-17032, and on **FDsys.gov**

Billing Code 4210-67

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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

[Docket No. FR-5173-F-04]

RIN 2501-AD33

Affirmatively Furthering Fair Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: Through this final rule, HUD provides HUD program participants with an approach to more effectively and efficiently incorporate into their planning processes the duty to affirmatively further the purposes and policies of the Fair Housing Act, which is title VIII of the Civil Rights Act of 1968. The Fair Housing Act not only prohibits discrimination but, in conjunction with other statutes, directs HUD's program participants to take significant actions to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster inclusive communities that are free from discrimination. The approach to affirmatively furthering fair housing carried out by HUD program participants prior to this rule, which involved an analysis of impediments to fair housing choice and a certification that the program participant will affirmatively further fair housing, has not been as effective as originally envisioned. This rule refines the prior approach by replacing the analysis

of impediments with a fair housing assessment that should better inform program participants' planning processes with a view toward better aiding HUD program participants to fulfill this statutory obligation.

Through this rule, HUD commits to provide states, local governments, public housing agencies (PHAs), the communities they serve, and the general public, to the fullest extent possible, with local and regional data on integrated and segregated living patterns, racially or ethnically concentrated areas of poverty, the location of certain publicly supported housing, access to opportunity afforded by key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act. Through the availability of such data and available local data and knowledge, the approach provided by this rule is intended to make program participants better able to evaluate their present environment to assess fair housing issues such as segregation, conditions that restrict fair housing choice, and disparities in access to housing and opportunity, identify the factors that primarily contribute to the creation or perpetuation of fair housing issues, and establish fair housing priorities and goals.

DATES: Effective Date: [Insert date 30 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: George D. Williams, Sr., Deputy Assistant Secretary for Policy, Legislatives Initiatives and Outreach, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW, Room 5246, Washington, DC 20410; telephone number 866-234-2689 (toll-free) or 202-402-1432 (local). Individuals who are deaf or hard of hearing and individuals with speech impairments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Purpose of the Regulatory Action

From its inception, the Fair Housing Act (and subsequent laws reaffirming its principles) has not only prohibited discrimination in housing related activities and transactions but has also provided, through the duty to affirmatively further fair housing (AFFH), for meaningful actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing. Prior to this rule, HUD directed participants in certain HUD programs to affirmatively further fair housing by undertaking an analysis of impediments (AI) that was generally not submitted to or reviewed by HUD. This approach required program participants, based on general guidance from HUD, to identify impediments to fair housing choice within their jurisdiction, plan, and take appropriate actions to overcome the effects of any impediments, and maintain records of such efforts. Informed by lessons learned in localities across the country, and with program participants, civil rights advocates, other stakeholders, and the U.S. Government Accountability Office all commenting to HUD that the AI approach was not as effective as originally envisioned, in 2013 HUD initiated the rulemaking process to propose a new and more effective approach for program participants to use in assessing the fair housing issues and factors in their jurisdictions and regions and for establishing fair housing priorities and goals to address them.

The approach proposed by HUD in 2013, and adopted in this final rule, with revisions made in response to public comments, strengthens the process for program participants' assessments of fair housing issues and contributing factors and for the establishment of fair housing goals and priorities by requiring use of an Assessment Tool, providing data to program

participants related to certain key fair housing issues, and instituting a process in which HUD reviews program participants' assessments, prioritization, and goal setting. While the statutory duty to affirmatively further fair housing requires program participants to take actions to affirmatively further fair housing, this final rule (as was the case in the proposed rule) does not mandate specific outcomes for the planning process. Instead, recognizing the importance of local decisionmaking, the new approach establishes basic parameters to help guide public sector housing and community development planning and investment decisions in being better informed about fair housing concerns and consequently help program participants to be better positioned to fulfill their obligation to affirmatively further fair housing.

Summary of Legal Authority

The Fair Housing Act (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619) declares that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." See 42 U.S.C. 3601. Accordingly, the Fair Housing Act prohibits, among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of "race, color, religion, sex, familial status,[1] national origin, or handicap."[2] See 42 U.S.C. 3604 and 3605. Section 808(d) of the Fair Housing Act requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing. See 42 U.S.C. 3608. Section 808(e)(5) of the Fair Housing

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

[2] Although the Fair Housing Act was amended in 1988 to extend civil rights protections to persons with "handicaps," the term "disability" is more commonly used and accepted today to refer to an individual's physical or mental impairment that is protected under federal civil rights laws, the record of such an impairment, and being regarded as having such an impairment. For this reason, except where quoting from the Fair Housing Act, this preamble and final rule use the term "disability."

Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner affirmatively furthering the policies of the Fair Housing Act.

Summary of the Major Provisions of the Rule

The Affirmatively Furthering Fair Housing (AFFH) regulations promulgated by this final rule:

a. Replace the AI with a more effective and standardized Assessment of Fair Housing (AFH) through which program participants identify and evaluate fair housing issues, and factors contributing to fair housing issues (contributing factors);
b. Improve fair housing assessment, planning, and decisionmaking by HUD providing data that program participants must consider in their assessments of fair housing — designed to aid program participants in establishing fair housing goals to address these issues and contributing factors;
c. Incorporate, explicitly, fair housing planning into existing planning processes, the consolidated plan and PHA Plan, which, in turn, incorporate fair housing priorities and goals more effectively into housing, and community development decisionmaking;
d. Encourage and facilitate regional approaches to address fair housing issues, including collaboration across jurisdictions and PHAs; and
e. Provide an opportunity for the public, including individuals historically excluded because of characteristics protected by the Fair Housing Act, to provide input about fair housing issues, goals, priorities, and the most appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of the new assessment of fair housing process.

This new approach is designed to empower program participants and to foster the diversity and strength of communities by overcoming historic patterns of segregation, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs consistent with the policies and protections of the Fair Housing Act. The rule also seeks to assist program participants in reducing disparities in housing choice and access to housing and opportunity based on race, color, religion, sex, familial status, national origin, or disability, thereby expanding economic opportunity and enhancing the quality of life.

Summary of Benefits and Costs

HUD believes that the rule, through its improvements to the fair housing planning process, has the potential for substantial benefit not only for program participants but also for the communities they serve and the United States as a whole. The new approach put in place by this rule is designed to improve the fair housing planning process by providing better data and greater clarity to the steps that program participants must undertake to assess fair housing issues and contributing factors and establish fair housing priorities and goals to address them. The fair housing issues, contributing factors, goals, and priorities identified through this process will be available to help inform program participants' investments and other decisionmaking, including their use of HUD funds and other resources. These improvements should yield increased compliance with fair housing and civil rights laws and fewer instances of litigation pertaining to the failure to affirmatively further fair housing. Through this rule, HUD commits to provide states, local governments, PHAs, the communities they serve, and the general public, to the fullest extent possible, with local and regional data on patterns of integration and segregation, racially or ethnically concentrated areas of poverty, access to housing and key community assets that afford opportunity, and disproportionate housing needs based on characteristics protected by

the Fair Housing Act. From these data, program participants should be better able to evaluate their present environment to assess fair housing issues, identify the significant contributing factors that account for those issues, set forth fair housing priorities and goals, and document these activities.

As detailed in the Regulatory Impact Analysis (found at www.regulations.gov under the docket number 5173-F-03-RIA), HUD does not expect a large aggregate change in compliance costs for program participants as a result of the proposed rule. Currently, HUD program participants are required to conduct an AI to fair housing choice, take appropriate actions to overcome the effects of identified impediments, and maintain records relating to the duty to affirmatively further fair housing. An increased emphasis on affirmatively furthering fair housing within the planning process may increase compliance costs for some program participants, but this final rule, as provided in Section III of this preamble, has strived to mitigate the increase of such costs. The net change in burden for specific local entities will depend on the extent to which they have been complying with the planning process already in place. The local entities that have been diligent in completing rigorous AIs may experience a net decrease in administrative burden as a result of the revised process. Program participants are currently required also to engage in outreach and collect data in order to meet the obligation to affirmatively further fair housing. As more fully addressed in the Regulatory Impact Analysis that accompanies this rule, HUD estimates compliance costs to program participants of $25 million annually, as well as resource costs to HUD of $9 million annually.

The rule covers program participants that are subject to a great diversity of local conditions and economic and social contexts, as well as differences in the demographics of populations, housing needs, and community investments. The rule provides for program

participants to supplement data provided by HUD with available local data and knowledge and requires them to undertake the analysis of this information to identify barriers to fair housing. Also, the rule affords program participants considerable choice and flexibility in formulating goals and priorities to achieve fair housing outcomes and establishing the metrics that will be used to monitor and document progress. The precise outcomes of the proposed AFH planning process are uncertain, but the rule will enable each jurisdiction to plan meaningfully.

II. Background

A. Legal Authority

HUD's July 2013 proposed rule fully set out the legal basis for HUD's authority to issue regulations implementing the obligation to affirmatively further fair housing, but HUD believes it is important to restate such authority in this final rule.

The Fair Housing Act (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619), enacted into law on April 11, 1968, declares that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." See 42 U.S.C. 3601. Accordingly, the Fair Housing Act prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of race, color, religion, sex, familial status, national origin, or handicap. See 42 U.S.C. 3601 et seq. In addition to prohibiting discrimination, the Fair Housing Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner to affirmatively further the policies of the Fair Housing Act. Section 808(d) of the Fair Housing Act (42 U.S.C. 3608(d)) directs other Federal agencies "to administer their programs . . . relating to housing and urban development . . . in a manner affirmatively to further" the policies of the Fair Housing Act, and to "cooperate with the Secretary" in this effort.

The Fair Housing Act's provisions related to "affirmatively … further[ing]" fair housing, contained in sections 3608(d) and (e) include more than the Act's anti-discrimination mandates. NAACP, Boston Chapter v. HUD, 817 F.2d 149 (1st Cir. 1987); see, e.g., Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).When the Fair Housing Act was originally enacted in 1968 and amended in 1988, major portions of the statute involved the prohibition of discriminatory activities (whether undertaken with a discriminatory purpose or with a discriminatory impact) and how private litigants and the government could enforce these provisions

In section 3608(d) of the Fair Housing Act, however, Congress went further by mandating that "programs and activities relating to housing and urban development" be administered "in a manner affirmatively to further the purposes of this subchapter." This is not only a mandate to refrain from discrimination but a mandate to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied. Congress has repeatedly reinforced this mandate, requiring in the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and the Quality Housing and Work Responsibility Act of 1998, that covered HUD program participants certify, as a condition of receiving Federal funds, that they will affirmatively further fair housing. See 42 U.S.C. 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).[3]

[3] Section 104(b)(2) of the Housing and Community Development Act (HCD Act) (42 U.S.C. 5304(b)(2)) requires that, to receive a grant, the state or local government must certify that it will affirmatively further fair housing. Section 106(d)(7)(B) of the HCD Act (42 U.S.C. 5306(d)(7)(B)) requires a local government that receives a grant from a state to certify that it will affirmatively further fair housing. The Cranston-Gonzalez National Affordable Housing Act (NAHA) (42 U.S.C. 12704 et seq.) provides in section 105 (42 U.S.C. 12705) that states and local governments that receive certain grants from HUD must develop a comprehensive housing affordability strategy to identify their overall needs for affordable and supportive housing for the ensuing 5 years, including housing for homeless persons, and outline their strategy to address those needs. As part of this comprehensive planning process,

In examining the legislative history of the Fair Housing Act and related statutes, courts have found that the purpose of the affirmatively furthering fair housing mandate is to ensure that recipients of Federal housing and urban development funds and other Federal funds do more than simply not discriminate: recipients also must take actions to address segregation and related barriers for groups with characteristics protected by the Act, as often reflected in racially or ethnically concentrated areas of poverty. The U.S. Supreme Court, in one of the first Fair Housing Act cases it decided, referenced the Act's cosponsor, Senator Walter F. Mondale, in noting that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).[4] The Act recognized that "where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions." 114 Cong. Rec. 2276- 2707 (1968). As the First Circuit has explained, section 3608(d) and the legislative history of the Act show that Congress intended that "HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." NAACP, Boston Chapter v. HUD, 817 F.2d at 154; See also Otero 484 F. 2d at 1134 (section 3608(d) requires that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunity the Act was designed to combat").

---

section 105(b)(15) of NAHA (42 U.S.C. 12705(b)(15)) requires that these program participants certify that they will affirmatively further fair housing. The Quality Housing and Work Responsibility Act of 1998 (QHWRA), enacted into law on October 21, 1998, substantially modified the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) (1937 Act), and the 1937 Act was more recently amended by the Housing and Economic Recovery Act of 2008, Pub. L. 110-289 (HERA). QHWRA introduced formal planning processes for PHAs – a 5-Year Plan and an Annual Plan. The required contents of the Annual Plan included a certification by the PHA that the PHA will, among other things, affirmatively further fair housing.

[4] Reflecting the era in which it was enacted, the Fair Housing Act's legislative history and early court decisions refer to "ghettos" when discussing racially concentrated areas of poverty.

The Act itself does not define the precise scope of the affirmatively furthering fair housing obligation for HUD's program participants. Over the years, courts have provided some guidance for this task. In the first appellate decision interpreting section 3608, for example, the U.S. Court of Appeals for the Third Circuit emphasized the importance of racial and socioeconomic data to ensure that "the agency's judgment was an informed one" based on an institutionalized method to assess site selection and related issues. Shannon, 436 F.2d at 821-22. In multiple other decisions, courts have set forth how the section applies to specific policies and practices of HUD program participants. See, e.g., Otero, 484 F.2d at 1132-37; Langlois v. Abington Hous. Auth., 207 F.3d 43 (1st Cir. 2000); U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty., 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

In addition to the statutes and court cases emphasizing the requirement of recipients of Federal housing and urban development funds and other Federal funds to affirmatively further fair housing, executive orders have also addressed the importance of complying with this requirement.[5]

B. HUD's July 19, 2013, Proposed Rule

On July 19, 2013, at 78 FR 43710, HUD published its proposed rule that described the new assessment of fair housing (AFH) process that would replace the AI. As stated in the July 19, 2013, rule, HUD proposed a process that should aid program participants to more effectively carry out the obligation to affirmatively further fair housing by more directly linking the

[5] Executive Order 12892, entitled "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," issued January 17, 1994, vests primary authority in the Secretary of HUD for all federal executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner that furthers the purposes of the Fair Housing Act. Executive Order 12898, entitled "Executive Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," issued on February 11, 1994, declares that Federal agencies shall make it part of their mission to achieve environmental justice "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

identification of fair housing issues, prioritization, and goal setting to housing and community development planning processes currently undertaken by program participants and that is required as a condition of their receipt of HUD funds.

At the jurisdictional planning level, HUD requires program participants receiving Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Solutions Grants (ESG), and Housing Opportunities for Persons With AIDS (HOPWA) formula funding to undertake an analysis to identify impediments to fair housing choice within the jurisdiction and take appropriate actions to overcome the effects of any impediments, and keep records on such efforts. See §§ 91.225(a)(1), 91.325(a)(1).[6] Similarly, PHAs must commit, as part of their planning process for PHA Plans and any plans incorporated therein, to examine their programs or proposed programs, identify any impediments to fair housing choice within those programs, address those impediments in a reasonable fashion in view of the resources available, work with jurisdictions to implement any of the jurisdiction's initiatives to affirmatively further fair housing that require PHA involvement, maintain records reflecting those analyses and actions, and operate programs in a manner that is consistent with the applicable jurisdiction's consolidated plan. See §§ 903.7(o), 903.15.

Over the past several years, HUD reviewed the efficacy of these mechanisms to fulfill the affirmatively furthering fair housing mandate and concluded that the AI process could be improved to make it a more meaningful tool to integrate fair housing into program participants' planning efforts. HUD issued its Fair Housing Planning Guide (Planning Guide) in 1996 to provide extensive guidance on how to affirmatively further fair housing. However, HUD has

[6] For these programs, the consolidated plan is intended as the program participant's comprehensive mechanism to gather relevant housing data, detail housing, homelessness, and community development strategies, and commit to specific actions. These are then updated through annual action plans.

not, in a systematic manner, offered to its program participants the data in HUD's possession that may better help them frame their fair housing analysis, and HUD generally did not require AIs to be submitted to HUD for review.

These observations are reinforced by a recent report by the U.S. Government Accountability Office (GAO) entitled "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, Sept. 14, 2010. See http://www.gao.gov/new.items/d10905.pdf (GAO Report). In this report, the GAO found that there has been uneven attention paid to the AI by local communities in part because sufficient guidance and clarity were viewed as lacking. Specifically, GAO stated that it found that "HUD's limited regulatory requirements and oversight" contributed to many HUD program participants placing a "low priority on ensuring that their AIs serve as effective planning tools."[7] In its recommendations, GAO emphasized that HUD could assist program participants by providing more effective guidance and technical assistance and the data necessary to prepare fair housing plans.

Stemming from substantial interaction with program participants and advocates, and in light of the GAO Report, HUD concluded that the current AI process was not well integrated into the planning efforts for expenditure of funds made by HUD program participants. HUD recognized that many program participants actively grapple with how issues involving race, national origin, disability, and other fair housing issues do and should influence grant decisions as part of housing and community development planning. HUD found that program participants often turned to outside consultants to collect data and conduct the analysis, but that program participants had little incentive or awareness to use this analysis as part of the investments and

[7] The GAO noted that close to 30 percent of the grantees from whom GAO sought documentation had outdated AIs and that almost 5 percent of the grantees were unable to provide AIs when requested.

other decisions they made as part of the consolidated plan or PHA Plan processes. HUD further concluded that, in a time of limited resources, HUD could do more to support program participants in the process, especially through the provision of data, meaningful technical assistance, and additional guidance. All these findings led HUD to the decision to offer a new approach of linking fair housing issue identification, prioritization, and goal setting with program participants' traditional planning processes related to housing and community development.

To more effectively carry out its affirmatively furthering fair housing obligation, in the July 19, 2013, rule, HUD proposed a new AFH process to replace the AI process. As provided in the proposed rule, the new AFH process involved the following key features: (1) a new fair housing assessment tool; (2) the provision of nationally uniform data that would be the predicate for and would help frame program participants' assessment activities; (3) meaningful and focused direction regarding the purpose of the AFH and the standards by which it would be evaluated; (4) a more direct link between the AFH and subsequent program participant planning documents—the consolidated plan and the PHA Plan—that would tie fair housing planning into the priority setting, commitment of resources, and specification of activities to be undertaken; and (5) a new HUD review procedure based on clear standards that would facilitate the provision of technical assistance and reinforce the value and importance of fair housing planning activities.

As provided in the proposed rule, the new AFH process would be established in regulations in 24 CFR part 5, subpart A, with conforming amendments provided in the following regulations: 24 CFR part 91 (Consolidated Submission for Community Planning and Development Programs); 24 CFR part 92 (HOME Investment Partnerships Program); 24 CFR part 570 (Community Development Block Grants); 24 CFR part 574 (Housing Opportunities for Persons With AIDS); 24 CFR part 576 (Emergency Solutions Grants Program); and 24 CFR part

903 (Public Housing Agency Plans).

A more detailed discussion of HUD's July 19, 2013, proposed rule, including the specific AFH regulations and conforming amendments proposed, can be found at 79 FR 43716 through 43723. HUD refers interested parties to the preamble to the proposed rule for a detailed discussion of the proposed AFH process and the reasons for HUD's proposal of the features and elements of the new AFH process.

C. Proposed Assessment Tool

On September 26, 2014, at 79 FR 57949, HUD published in the Federal Register, the proposed "Assessment Tool" to be used by program participants to evaluate fair housing choice in their jurisdictions, to identify barriers to fair housing choice at the local and regional levels, and to set fair housing goals to overcome such barriers and advance fair housing choice. HUD published the proposed Assessment Tool for a period of 60 days in accordance with HUD's July 19, 2013, proposed rule, and in accordance with the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

HUD appreciates the comments submitted on the proposed Assessment Tool, and will follow the September 2014 notice with a second notice soliciting comment for another 30-day period, as required by the Paperwork Reduction Act, and advise of changes made to the proposed Assessment Tool in response to the initial 60-day solicitation of comment.

In addition, it is important to note that the burden imposed by the Assessment Tool and additional Assessment Tools issued by HUD must, in accordance with the Paperwork Reduction Act, be renewed for approval by the Office of Management and Budget (OMB) every 3 years, at which point, the opportunity is also presented to assess whether the Assessment Tool is aiding fair housing planning as intended by this rule

D. Solicitation of Comment on Proposed Staggered Submission of AFH

On January 15, 2015, at 80 FR 2062, HUD published in the Federal Register a document reopening the public comment period on the issue of providing a later submission deadline for certain entities. In this document, HUD advised that it was considering providing certain HUD program participants — States, Insular Areas, qualified PHAs, jurisdictions receiving a small CDBG grant — with the option of submitting their first AFH at a date later than would otherwise be required for program participants that are neither States, Insular Areas, qualified PHAs, nor grantees receiving a small CDBG grant, as proposed to be defined by the January 15, 2015, document.

For PHAs, section 2702 of title II of the Housing and Economic Recovery Act (HERA)[8] introduced a definition of "qualified PHAs" to exempt such PHAs, that is, PHAs that have a combined total of 550 or fewer public housing units and section 8 vouchers, are not designated as troubled under section 6(j)(2) of the 1937 Act, and do not have a failing score under the Section Eight Management Assessment Program (SEMAP) during the prior 12 months, from the burden of preparing and submitting an annual PHA Plan. Given that Congress has determined that qualified PHAs should have reduced administrative burdens, HUD proposed that it is appropriate to provide these agencies with more time to submit their first AFH.

With respect to small CDBG grants, there is no statutory definition on which HUD can rely as is the case for qualified PHAs. However, as noted in the January 15, 2015, document, in HUD's Congressional Justifications issued in support of HUD's Fiscal Years (FYs) 2013 and 2014 budget requests, HUD proposed to establish a minimum grant threshold of approximately $350,000, based on a percentage of the CDBG formula appropriation. Therefore, HUD proposed,

[8] Pub. L. 110–289, 122 Stat. 2654, approved July 30, 2008, see 122 Stat. 2863.

similar to qualified PHAs, to delay the submission date of the first AFH for entitlement jurisdictions receiving a grant of 0.0125 percent of the CDBG formula appropriation or less.

With respect to States and Insular Areas, HUD advised that it decided to design a separate Assessment Tool for States and Insular Areas. HUD agreed with commenters responding to the Assessment Tool, published on September 26, 2014, that a separate Assessment Tool for States and Insular Areas would address commenters' concerns about the AFH approach being better suited for entitlement jurisdictions. HUD also advised that the separate Assessment Tool will not be provided for public comment as part of the second statutorily required public comment period on the Assessment Tool published on September 26, 2014. Rather, HUD will have the Assessment Tool for States and Insular Areas separately undergo the full notice and comment process (a 60-day notice and a 30-day notice) under the Paperwork Reduction Act, and this decision automatically means a later first AFH submission deadline for States and Insular areas.

Although not part of the January 15, 2015, document, in the preamble to the Assessment Tool published on September 26, 2014, HUD advised that the draft Assessment Tool for which public comment was sought is the Assessment Tool designed for use by entitlement jurisdictions and for joint submissions by entitlement jurisdictions and for PHAs where the entitlement jurisdiction is chosen as the lead entity. HUD clarified that the Assessment Tool is not the tool that will be used by regionally collaborating entitlement jurisdictions or PHAs that will not be making a joint submission, nor will it be used by States and Insular Areas. In brief, HUD committed to provide a separate Assessment Tool for PHAs. HUD also advised of its intention to develop program-specific participant Assessment Tools to be available for public comment at the time that HUD publishes the first Assessment Tool for its additional 30 days of public

comment. HUD since decided to have the State and PHA Assessment Tools undergo the full notice and comment process under the Paperwork Reduction Act (a 60-day notice and a 30-day notice).

In response to the January 15, 2015, document HUD received 21 public comments. The majority of public commenters were supportive of a delayed submission of the first AFH for States, Insular Areas, qualified PHAs, and jurisdictions receiving small CDBG grants. Commenters, however, differed on where to draw the threshold for a small CDBG. Commenters suggested that the threshold should be drawn at $ 1 million. A commenter, commenting on the percentage that HUD proposed, suggested a percentage cutoff of 0.018 percent rather than HUD's suggested percentage of 0.0125. The commenter explained that this threshold would bring the cutoff to approximately $500,000, and at that level, administrative funds can be up to $100,000, an increase from $70,000, which is the amount that would be available to entitlement jurisdictions receiving $348,875 – the amount under the HUD-proposed threshold. The public comments received in response to the January 15, 2015, document can be found at the following website: http://www.regulations.gov/#!docketDetail;D=HUD-2015-0009.

After consideration of the comments on the CDBG threshold, HUD has decided to set the threshold for a small CDBG grant at a FY 2015 grant of $500,000 or less. HUD believes that this dollar threshold is appropriate for providing a delayed first AFH submission for certain CDBG grantees. Therefore, as a result of HUD's January 15, 2015, proposal and in consideration of comments responding to that proposal, States, Insular Areas, qualified PHAs, and CDBG grantees receiving an FY 2015 CDBG grant of $500,000 or less will have a delayed first-AFH submission deadline, as will all PHAs, even those that are not qualified PHAs. For PHAs, the first AFH submission deadline will be based on when the PHA Assessment Tool has been

approved by OMB – following HUD undertaking the notice and comment process required by the Paperwork Reduction Act – and announced by HUD as available for use.

III. Overview of Final Rule – Key Changes Made at Final Rule Stage

In the proposed rule, HUD solicited public comment on the new AFH process and included 19 issues for which HUD specifically solicited comment. In Section IV of this preamble, HUD provides a summary of the significant comments raised by the public comments and provides HUD's response to these issues. HUD received more than 1,000 public comments on the July 19, 2013, proposed rule. HUD appreciates all the questions raised, and suggestions and recommendations made by the public commenters. After review and consideration of the public comments and upon further consideration of issues by HUD, the following highlights key clarifications and changes made by HUD in this final rule.

The final rule:

- Clarifies that HUD supports a balanced approach to affirmatively furthering fair housing by revising the "Purpose" section of the rule and the definition of "affirmatively furthering fair housing." Also, HUD has created a new provision listing goals and priorities a program participant may take to affirmatively further fair housing, which may include, but are not limited to, place-based solutions and options to increase mobility for protected classes. (See §§ 5.150, 5.152, and 5.154.)
- Replaces the term "proactive steps" in the definition of "affirmatively furthering fair housing" with the term "meaningful actions" and defines "meaningful actions." (See § 5.152.)
- Revises the definition of "Assessment Tool" to advise that the tool is not solely a single form or template, but refers to any form or template issued by HUD as an Assessment

Tool for the AFH and includes instructions. The definition makes clear that HUD may issue different Assessment Tools for different types of program participants.

- Clarifies, through the addition of a new § 5.151, that implementation of the new AFH process commences for a program participant when the Assessment Tool designated for use by the program participant has been approved by OMB, and the availability for use of such Assessment Tool is published in the Federal Register.
- Adds a definition of "data" to collectively refer to "HUD-provided data" and "local data," both of which terms are also defined. (See § 5.152.)
- Replaces the term "determinant" with a more plain language term –"fair housing contributing factor" or simply "contributing factor." (See § 5.152.)
- Adds a definition of "disability." (See § 5.152.)
- Clarifies when disproportionate housing needs exist by revising the definition of "disproportionate housing needs." (See § 5.152.)
- Revises the definitions of "fair housing choice" and "fair housing issue" by removing outdated terminology (i.e., "handicap") and making certain additional clarifying changes. (See § 5.152.)
- Adds a definition of "geographic area" which refers to the area of analysis of a program participant that may be a jurisdiction, region, state, Core-Based Statistical Area (CBSA), or another applicable area, depending on the area served by the program participant. (See § 5.152.)
- Adds a definition of "housing programs serving specified populations" to clarify that participation in HUD and Federal housing programs serving specified populations does not present a fair housing issue of segregation, provided that such programs comply with

the program regulations and applicable Federal civil rights statutes and regulations. (See § 5.152.)

- Revises the definition of "integration" to provide greater clarity as to the meaning of this term. (See § 5.152.)
- Adds a definition of "local knowledge" based on and consistent with the description of such term in the Assessment Tool. (See § 5.152.)
- Revises the definition of "segregation" to provide greater clarity. (See § 5.152.)
- Adds a definition of "qualified PHA." (See § 5.152.)
- Revises and clarifies how the analysis of data and the identification of fair housing priorities and goals should be undertaken, including emphasizing that the program participant is responsible for establishing appropriate priorities and goals. (See § 5.154(d).)
- Clarifies that although regionally collaborating program participants need not be contiguous and may cross state boundaries, regionally collaborating program participants should be located within the same CBSA, as defined by OMB at the time of submission of the regional AFH, but HUD allows for exceptions. (See § 5.156.)
- Emphasizes that "acceptance" of an AFH means only that, for purposes of administering HUD program funding, HUD has determined that the program participant has provided an AFH that meets the required elements. Acceptance does not mean that the program participant has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Fair Housing Act; or has complied with other civil rights laws and regulations. (See § 5.162.)
- Provides a staggered submission deadline for AFHs; that is, the rule specifies the order of

submission by which program participants will submit their first AFH. The rule provides that entitlement jurisdictions receiving an FY 2015 CDBG grant of $500,000 or less, States, Insular Areas, and PHAs will submit their first AFH in the second stage of submission, or at such time as the Assessment Tool specifically applicable to one of these program participants has been approved by OMB and announced by HUD as available for use. The Assessment Tool specifically applicable to a program participant will specify the first-AFH submission deadline, and will ensure the same level of transition as provided for entitlement jurisdictions, which will be the first program participants to submit an AFH. (See § 5.160(a).)

- Allows PHAs, whether submitting an AFH as part of participation with their consolidated plan program participants, other PHAs, or on their own, to submit an AFH every 5 years, imposing on PHAs similar requirements to those placed on jurisdictions subject to the consolidated plan requirements. (See §§ 5.160 and 903.15.)
- Provides that a program participant that undertook a Regional AI in connection with a grant awarded under HUD's FY 2010 or 2011 Sustainable Communities Competition is not required to undertake an AFH for the first AFH submission stage. (See § 5.160(a).)
- Clarifies the conditions under which HUD may not accept an AFH, and provides examples of an AFH that is substantially incomplete with respect to the fair housing assessment, and examples of an AFH that is inconsistent with fair housing and civil rights requirements; and emphasizes that HUD will work with program participants to achieve an AFH that is accepted. (See § 5.162.)
- Provides greater flexibility to program participants in determining when a program participant must revise an AFH, and specifies conditions when HUD may intervene and

require a program participant to revise an AFH, but also provides program participants with the opportunity to disagree with HUD's determination. HUD also expands the time frame in which to revise an AFH. (See § 5.164.)

- Revises for PHAs the three options provided in the proposed rule by which a PHA may conduct and submit an AFH. (See § 903.15.)
- Adds a new "certification" provision, which clarifies that program participants must certify that they will affirmatively further fair housing when required by statutes and regulations governing their programs, and provides that challenges to the certifications will follow the procedures for consolidated plan program participants in 24 CFR part 91 and for PHA Plan program participants in 24 CFR part 903, as revised in this final rule. (See § 5.166.)
- Moves fair housing-related material from § 903.2(d) to § 903.15(d).

In addition to these changes, HUD also corrected editorial and technical errors identified by the commenters. HUD believes that these changes, more fully discussed below, respond to commenters' requests that they be given more clarity, more flexibility, and more time in fair housing planning.

IV. Public Comments and HUD's Response to Public Comments

A. The Public Comments Generally

HUD received over 1,000 public comments, including duplicate mass mailings, resulting in approximately 885 unique public submissions covering a wide range of issues. Comments came from a wide variety of entities, including PHAs, other housing providers, organizations representative of housing providers, governmental jurisdictions and agencies, civil rights organizations, tenant and other housing advocacy organizations, and individuals. All public

comments can be viewed at http://www.regulations.gov/#!docketDetail;D=HUD-2013-0066.

Many commenters expressed outright support for HUD's proposal, without suggesting any changes and requesting that HUD proceed to implement as quickly as possible. Commenters who expressed general support for the rule stated that the rule was a step toward increased opportunity in housing, and that the rule would assist in attaining the goals of the Fair Housing Act.

Many commenters, however, also expressed outright opposition to the rule, stating that HUD's proposal was without legal foundation, that it was an intrusion on affairs that should be handled by local jurisdictions for a variety of reasons, and that the proposal constituted social engineering.

The majority of commenters, whether supportive of HUD's proposal or opposed, provided thoughtful comments for HUD's consideration, advising how the proposal would work better with certain changes, or advising why the proposal would not work and why HUD should withdraw the proposal completely or go back to the drawing board, so to speak. With respect to this latter theme, several commenters expressed support for the new AFH process but requested that HUD give the new approach more thought and reopen the public comment period on the proposed rule, implement the new approach as a pilot first, issue a second proposed rule, or issue an interim rule, which would provide the opportunity for another round of comments.

While commenters raised a wide variety of issues concerning HUD's proposal, the following highlights comments and concerns shared by many commenters:

- HUD's proposal lacked a balanced approach; that is, HUD's proposal seemed to discourage, if not implicitly prohibit, continued investment of Federal resources in areas of racial or ethnic concentration of poverty;

- HUD's proposal lacked reference to benchmarks and outcomes so that HUD and the public could determine a program participant's progress in affirmatively furthering fair housing in accordance with the participant's assessment of fair housing;
- HUD's proposal was not clear on the standards of review of an AFH;
- HUD's proposed new AFH approach is too burdensome, duplicating actions already required by the consolidated plan and PHA Plan;
- HUD lacks the capacity to effectively carry out its responsibilities under the proposal;
- HUD's proposal is an intrusion on the affairs and responsibilities of local governments, and opens the door to the Federal Government determining zoning, the placement of infrastructure, and other local services;
- HUD's proposal does not take into consideration the unique status of States, which have no control over local governments, and consequently, the AFH should only apply to entitlement jurisdictions;
- HUD must carefully screen the accuracy of data to be provided by HUD because prior experience in other programs has shown that the data are not always reliable;
- HUD's proposal is an expansion of the Fair Housing Act, which does not require an assessment of such nonhousing elements as transportation, employment, education, and similar elements; and
- HUD needs to clarify the process it will use when a program participant does not have an AFH that has been accepted, as well as the consequences.

Again, HUD appreciates the time that commenters took to provide helpful information and valuable suggestions. As can be seen by HUD's promulgation of this final rule, HUD decided to proceed to the final rule stage and put in place the new AFH approach. However, as

provided in the overview of changes made at the final rule stage, program participants and other interested members of the public can see the many changes that HUD made in response to public comments, and how specific concerns were addressed in these final regulations.

In the following section of the preamble, HUD addresses the public comments.

B. Specific Public Comments

1. Balanced Approach

Comment: Proposed rule appears to prohibit program participants from using Federal resources in neighborhoods of concentrated poverty. A substantial number of commenters who expressed support for the rule stated that the proposed rule did not provide a balanced approach to investment of Federal resources. Commenters stated that the proposed rule appeared to solely emphasize mobility as the means to affirmatively further fair housing and, by such emphasis, the rule devalued the strategy of making investments in neighborhoods with racially/ethnically concentrated areas of poverty (RCAPs/ECAPs). They stated that the proposed rule could be read to prohibit the use of resources in neighborhoods with such concentrations. Commenters stated that the proposed rule, if implemented without change, would have the unintentional effect of shifting resources away from low-income communities of color, and threaten targeted revitalization and stabilization investments in such neighborhoods if jurisdictions misinterpreted the goals of deconcentration and reducing disparities in access to assets, and focused only on mobility at the expense of existing neighborhood assets. Commenters stated that the final rule must clarify that program participants are expected to employ both strategies — (1) to stabilize and revitalize neighborhoods that constitute RCAPs/ECAPs, and (2) enhance mobility and expand access to existing community assets. Commenters stated that these should not be competing priorities. Some commenters also expressed concern that the proposed rule language

might be interpreted to only allow preservation of existing affordable housing if it was also part of a more intensive area-wide redevelopment strategy.

Commenters stated that older people and persons with disabilities, in particular, may have difficulty maintaining their homes and are very vulnerable to being institutionalized if they are displaced. Other commenters stated that RCAPs/ECAPs are often near transit and therefore ripe for gentrification and, while gentrification can be a positive outcome at times, gentrification can also lead to isolation of low-income families and a further decrease in socioeconomic opportunities. The commenters stated that there needs to be recognition in the rule that it is important to retain the character of communities while investing more resources in the area rather than attempting to remove people who have cultural, ethnic and historical connections to their neighborhoods.

Commenters recommended that HUD should, in § 5.150, which addresses the purpose of the rule, change the "or" to "and" in the last sentence. Some commenters also stated that the definition of "affirmatively furthering fair housing" also needs to explicitly include improvement and preservation of subsidized housing. Other commenters stated that the rule should explicitly state development on public housing sites is consistent with the obligation to affirmatively further fair housing.

HUD Response: The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law. Under HUD's rule, program participants will identify fair housing issues and contributing factors, prioritize contributing factors (giving highest priority to those factors that limit or deny fair housing choice or access to opportunity or negatively impact fair housing or civil rights compliance), and propose goals to address them. Program participants have latitude, if they so choose, to prioritize their goals and

strategies in the local decisionmaking process based on the information, data and analysis in the AFH.

HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing. Examples of such strategies include investments that will improve conditions and thereby reduce disparities in access to opportunity between impacted neighborhoods and the rest of the city or efforts to maintain and preserve the existing affordable rental housing stock, including HUD-assisted housing, to address a jurisdiction's fair housing issues. Preservation activities such as the Rental Assistance Demonstration (RAD) or the Choice Neighborhoods Initiative may be a part of such a strategy.

There could be issues, however, with strategies that rely solely on investment in areas with high racial or ethnic concentrations of low-income residents to the exclusion of providing access to affordable housing outside of those areas. For example, in areas with a history of segregation, if a program participant has the ability to create opportunities outside of the segregated, low-income areas but declines to do so in favor of place-based strategies, there could be a legitimate claim that HUD and its program participants were acting to preclude a choice of neighborhoods to historically segregated groups, as well as failing to affirmatively further fair housing as required by the Fair Housing Act.

A balanced approach would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing

outcomes such as reducing disproportionate housing needs, transforming RCAPs/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high-performing schools, transportation, and jobs.

In addition, place-based and mobility strategies need not be mutually exclusive; for instance, a regional AFH could conclude that additional affordable housing is needed in higher opportunity areas and thus new construction should be incentivized in those places. At the same time, while such efforts are being implemented, preserving the existing affordable rental stock can also still be a priority based on the fair housing issues identified in the AFH, which may include the disproportionate housing needs analysis in the AFH or the need to avoid displacement of assisted residents from areas that may be experiencing economic improvement. Program participants have latitude to adjust their goals, priorities, and strategies in the local decisionmaking process based on the information, data and analysis in the AFH, so long as the goals, priorities, strategies, and actions affirmatively further fair housing.

Rule changes and clarifications. To help clarify these issues, in this final rule HUD revises the purpose section (§ 5.150) and the definition of "affirmatively furthering fair housing" (§ 5.152) to clarify that HUD supports a balanced approach to affirmatively furthering fair housing. In this final rule, HUD has added a new provision describing potential actions or strategies a program participant may take, which is inclusive of both place-based solutions and options to preserve existing affordable housing. Strategies can include increasing mobility for members of protected classes to provide greater access to opportunity. (§ 5.154(d)(5).)

HUD also revises the definition of "affirmatively furthering fair housing" in this final rule by replacing the term "proactive steps" with the term "meaningful actions." At the proposed rule stage, commenters requested that HUD ensure that "proactive steps" would not be

interpreted in a manner that conflicted with the well-established case law under the Fair Housing Act that defines the contours of the affirmatively furthering fair housing mandate. Upon further review, HUD found that the term "proactive" has various meanings and does not have a body of case law applying the term in the civil rights context. For this reason, HUD replaces "proactive steps" with "meaningful actions," a concept used by the Supreme Court in civil rights case law and used by Federal agencies in explaining civil rights requirements.[9] With such case law foundation, "meaningful actions" provides greater clarity on the actions that program participants are expected to take in carrying out their duty to affirmatively further fair housing. Additionally, in contrast to "proactive," which may convey only a future-oriented approach, the term "meaningful actions" encompasses actions to either address historic or current fair housing problems, or both, as well as proactively responding to anticipated fair housing problems. (§ 5.152.)

To provide further clarity, HUD defines the term meaningful actions to mean those significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity. (§ 5.152.)

Comment: Not all segregation is equal or negative. Commenters stated that some housing segregation may be self-imposed, especially among newly arrived immigrant populations. The commenters requested that HUD study the dynamics of segregation besides

[9] See e.g., Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, August 11, 2000; Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 FR 41455-41472 (June 18, 2002); The Department of Housing and Urban Development, Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons 72 FR 2732 – 2754 (January 22, 2007); Alexander v. Choate, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985); Lau v. Nichols, 414 U.S. 563 (U.S. 1974); United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 563 F.3d 257, 268 (7th Cir. 2009).

referencing traditional studies and their assumptions so that policies derived from the new AFH process do not have unintended consequences and adversely affect the protected classes that we are all trying to assist.

HUD Response: Individuals are free to choose where they prefer to live. The Fair Housing Act does not prohibit individuals from choosing where they wish to live, but it does prohibit policies and actions by covered entities and individuals that deny choice or access to housing or opportunity through the segregation of persons protected by the Fair Housing Act.

A key purpose of the Fair Housing Act is to create open residential communities in which individuals may choose where they prefer to live without regard to race, color, national origin, disability, and other characteristics protected by the Act. HUD is familiar with the research on immigrant communities and recognizes that there are complex social dynamics at work in different parts of the nation. The purpose of the AFH is to help identify potential fair housing related issues, including factors that limit or deny individuals or groups with a full range of housing options and choices on the basis of being in a protected class as defined by the Fair Housing Act.

In response to these and similar comments, HUD has made several changes to the regulatory text.

Rule Changes. The definition of "affirmatively furthering fair housing" in § 5.152 in this final rule revises language from the proposed rule that included the phrase, "to end racially or ethnically concentrated areas of poverty," to "transforming . . . [those areas] into areas of opportunity." This final rule also makes several clarifications in § 5.154, which addresses the "Assessment of Fair Housing." Revised § 5.154(d)(4)(ii) provides that the AFH must identify significant contributing factors, prioritize such factors, and justify the prioritization of the

contributing factors that will be addressed in the program participant's fair housing goals. In prioritizing contributing factors, program participants shall give highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance.

2. Competing with Other HUD Priorities

Comment: The proposed rule competes with other HUD policies and directives. Commenters stated that HUD's proposed rule competes with other HUD policies and directives. Commenters stated that, in recent years, HUD has sought to make several policy changes that would limit the ability of program participants to affirmatively further fair housing and these policies include reducing the power of flat rents to incentivize mixed-income communities in public housing, proposing to limit CDBG eligibility for higher-income communities, and decreasing fair market rents that create higher rent burdens for voucher holders. The commenters stated that these policies lower the quality of housing and increase concentration of voucher-assisted households in developments and neighborhoods with higher concentration of poverty. Some commenters also expressed concern that the provisions on segregation may inadvertently prohibit currently authorized program activities that serve specific populations, including the elderly, persons with disabilities and the homeless, or may appear to create a barrier to capital reinvestment or preservation of existing affordable housing if it is located in an area that meets the rule's definitions of segregation or racially or ethnically concentrated areas of poverty.

HUD Response: As discussed under the "Legal Authority" section of the preamble to this final rule, program participants that receive assistance from HUD under the programs covered by this final rule have statutory obligations to affirmatively further fair housing, apart

from the obligation imposed by the Fair Housing Act itself. They also must comply with the authorizing statutes governing the programs in which they participate, as well as the regulations implementing those statutes. Complying with both types of obligations is a condition of receiving Federal financial assistance from HUD, and the obligations are not inconsistent with each other.

To confirm there is no inconsistency, HUD has made key changes in this final rule, especially by adding a new definition of "housing programs serving specified populations," as noted in Section III of this preamble. The final rule also adopts amended language in the "Purpose "and "strategies and actions" sections (§§ 5.150 and 5.154) that addresses preservation of affordable housing.

While the final rule encourages local governments to confront historic siting issues through public and assisted housing, the final rule also recognizes the critical role and inherent value in the existing stock of long-term affordable housing. The nation is in the midst of a rental housing crisis, with over 7.5 million very low-income families facing worst case housing needs for affordable housing, meaning they either pay more than half their incomes for rent or live in severely inadequate housing conditions. This figure that does not include an additional estimated 580,000 to 1.42 million persons experiencing homelessness or an additional millions of low-income homeowners also facing exorbitant often unaffordable housing costs.[10]

---

[10] For the worst case housing needs estimate, see: HUD, Office of Policy Development and Research, "Worst Case Housing Needs: 2015 Report to Congress - Executive Summary" (January 2015). http://www.huduser.org/portal/publications/affhsg/wc_HsgNeeds15.html.
For estimates on homelessness, see: HUD, "The 2014 Annual Homeless Assessment Report (AHAR) to Congress (October 2014) (for Point in Time estimate of 578,000 people who were homeless on any given night in January 2014). https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf.
and HUD, "2013 Annual Homeless Assessment Report: Part 2 - Estimates of Homelessness in the U.S." (February 2015) (Throughout the course of the year in 2013, an estimated 1.42 million people used a homeless shelter at some point). https://www.hudexchange.info/onecpd/assets/File/2013-AHAR-Part-2-Section-1.pdf.

Rule change and clarification. HUD clarifies that participation in HUD and other Federal programs that serve specified populations is not inconsistent with the duty to affirmatively further fair housing, through the added definition of "housing programs serving specified populations" and in new language to the definition of "segregation," both added in this final rule. (See § 5.152.)

Comment: The rule conflicts with HUD programs such as those providing designated housing for seniors and persons with disabilities. Commenters stated that the proposed rule's direction to PHAs to design their tenant selection and admission policies and development activities to reduce concentrations of tenants with disabilities conflicts with HUD programs carried out by PHAs and other program participants that provide transitional housing, permanent supportive housing, and other housing restricted to elderly persons or to nonelderly persons with disabilities, including those having experienced homelessness, which often require recipients to live in close proximity so that services can be provided in a coordinated and cost-effective manner. A commenter requested that HUD add an explicit statement in the final rule that participants in HUD program and other Federal programs that provide services to elderly persons, persons with disabilities, or other specified populations, are not violating their obligation to affirmatively further fair housing.

HUD Response: In its recent Statement on the Role of Housing in Advancing the Goals of *Olmstead* (*Olmstead* Statement or Statement), HUD discussed at length the interaction between the civil rights related duties to provide housing for persons with disabilities in the most integrated setting appropriate to their needs, as mandated by section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and the HUD programs that are authorized to

provide housing serving specified populations.[11] HUD encourages program participants and members of the public to read this Statement carefully. The Statement clearly presents how the legal requirements of civil rights statutes requiring persons with disabilities to be served in integrated settings are appropriately addressed in the context of HUD housing programs that are permitted to serve populations consisting exclusively or primarily of persons with disabilities. These programs are authorized by program statute or executive order or when a different or separate setting is the only one that will provide persons with disabilities with housing that affords them an equal opportunity for the housing to be effective, consistent with HUD's section 504 regulations at 24 CFR 8.4(b)(1)(iv).

To address the concerns in this rule, consistent with the guidance provided in its *Olmstead* Statement, HUD has added a definition of "housing programs serving specified populations" in § 5.152 that explicitly states that participation in these programs does not present a fair housing issue of segregation , provided that such programs are administered to comply with program regulations and applicable civil rights requirements. Housing programs serving specified populations are HUD and Federal housing programs, including designation in programs, as applicable, such as HUD's Supportive Housing for the Elderly, Supportive Housing for Persons with Disabilities, homeless assistance programs under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301, et seq.), and housing designated under section 7 of the United States Housing Act of 1937 (42 U.S.C. 1437e) that: (1) serve specific identified populations; and (2) comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs), the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing, section 504 of the

[11] See http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf.

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

A violation would occur, however, if the programs are administered in a manner in which they do not comply with applicable civil rights laws. For example, a program participant providing housing for individuals with disabilities may not refuse to serve individuals who are deaf or hard of hearing because of the cost of interpreters. Because the example would provide different services based on type of disability, such a limitation is prohibited by civil rights statutes and regulations. However, as long as the program is administered and operated in accordance with program requirements and civil rights statutes and regulations, participation does not present a fair housing issue.

By adding such a definition, HUD seeks to assure current and prospective program participants that utilize Federal housing programs, including HUD or other Federal agency programs (such as the housing programs of the U.S. Department of Veterans Affairs or the U.S. Department of Agriculture's Rural Housing Service housing programs) to serve specific populations does not violate this rule's provisions related to the definition of "segregation" or the general duty to affirmatively further fair housing. Participation in these Federally funded programs is encouraged, as is coordination of programs together to support housing options for specific groups, including the homeless and persons with disabilities.

HUD's *Olmstead* Statement discusses these legal requirements and the resulting trend of shifting service delivery from a medical, institutional model designed for the efficiency of the provider to a model emphasizing personal choice and the provision of services in integrated settings where individuals with disabilities can live and interact with persons without disabilities to the fullest extent possible. As set forth in HUD's *Olmstead* Statement, HUD encourages

providers of housing for persons with disabilities to explore various housing models and the needs of their communities. While HUD encourages these efforts, HUD reiterates the legal authority of providers of housing to persons with disabilities to develop and operate project-based or single-site supportive housing projects both as permanent supportive housing for the homeless and for individuals with disabilities as authorized by the statutes and regulations that govern the housing, so long as such operation is consistent with civil rights laws and regulations, including section 504 of the Rehabilitation Act of 1973 and HUD's regulations at 24 CFR part 8.

Rule change. This final rule adds a definition of "Housing programs serving specified populations" in § 5.152, as described above.

3. Scope of AFFH

a. Scope of AFFH Obligation

Comment: HUD's definition of affirmatively furthering fair housing should be changed. Commenters stated that what constitutes affirmatively fair housing has never fully been defined by Congress or HUD, and they supported HUD's effort to create such a definition. Commenters stated that although they support HUD's efforts, HUD's definition expands affirmatively furthering fair housing to include access to nonhousing elements, such as transportation, employment, education, and other community facilities, extends the protections of the Fair Housing Act to non-protected classes through a prohibition on racially or ethnically concentrated areas of poverty.

Commenters stated that access to community resources is very important, and often has an impact on neighborhoods, their residents, and quality of life; however, it is not covered by the Fair Housing Act, and is, therefore beyond the scope of the protections of the Fair Housing Act.

Other commenters stated that HUD's duty is to ensure that historical segregation has

been remedied, and that HUD's rule which goes beyond this duty is unnecessary and contrary to the legislative intent. Commenters stated that HUD has no constitutional authority to practice social engineering, especially at the expense of taxpayers, local or state governments, and the general population.

Commenters stated that while the rule's focus on disparities in access to community assets is noble, the requirement to reduce these disparities for the classes protected under the Fair Housing Act has little to do with affirmatively furthering fair housing. Commenters stated that they have sometimes seen public school systems willing to take the steps needed to help achieve stable integrated neighborhoods (and the public schools play a major role in perpetuating housing segregation), but reducing disparities without integrating the schools is reminiscent of the separate but equal doctrine.

Commenters stated that even more removed from affirmatively furthering fair housing are such issues as recreational facilities and programs, social service programs, parks, roads, street lighting, trash collection, street cleaning, crime prevention, and police protection activities which the commenters stated were also in the 1995 HUD Fair Housing Planning Guide. Commenters stated that recipients have largely left these peripheral issues out of their analyses of impediments (AIs) for good reasons because they have little, if nothing, to do with affirmatively furthering fair housing and addressing them would make the cost of conducting an AI (and AFH) soar.

Commenters recommended that HUD issue a more narrowly tailored definition of "affirmatively furthering fair housing" and remove nonhousing subjects from the list of elements to be addressed in the Assessments of Fair Housing. The commenters stated that at the same time, they encourage HUD, outside of the rulemaking process to continue to work with housing

authorities and other interested parties to increase funding for and to make available resources that will increase access of groups with characteristics protected by the Fair Housing Act as well as low-income families to transportation, employment, education and other community facilities.

In contrast to these commenters, other commenters commended HUD for its definition of "affirmatively furthering fair housing" in the proposed rule and, as stated by the commenters, HUD's clarification that affirmatively furthering fair housing means expanding access to important community assets and resources that have an impact on the quality of life for residents. Commenters stated that HUD has taken a very important step towards achieving Congress' vision about how the Fair Housing Act should be a tool for creating equal opportunity. Commenters stated that HUD's rule is consistent with the Fair Housing Act, at 42 U.S.C. 3608, and as interpreted by the Federal courts in a series of landmark decisions. The commenters stated that the statutory duty to affirmatively further fair housing was recognized by the appellate court in N.A.A.C.P Boston Chapter v. HUD, 817 F.2d 149, 155 (1st Cir. 1987), which held that the Fair Housing Act obligated HUD "[to] do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."

HUD Response: HUD's final rule is a fair housing planning rule, which is designed to help program participants fulfill their statutory obligation to affirmatively further fair housing. HUD developed the AFH as a mechanism to enable program participants to more effectively identify and address fair housing issues and contributing factors. Because housing units are part of a community and do not exist in a vacuum, an important component of fair housing planning is to assess why families and individuals favor specific neighborhoods in which to reside and whether there is a lack of opportunity to live in such neighborhoods for groups of persons based

on race, color, national origin, disability, and other characteristics protected by the Fair Housing Act. HUD's Assessment Tool, which includes a section on community assets and exposure to adverse community factors, is meant to aid program participants in determining if and where conditions exist that may restrict fair housing choice and access to opportunity. In order for program participants to identify such conditions, which constitute fair housing issues, access to opportunity warrants consideration in the overall analysis performed in preparing an AFH. The Assessment Tool guides program participants in considering access to public transportation, quality schools and jobs, exposure to poverty, environmental health hazards, and the location of deteriorated or abandoned properties when identifying where fair housing issues may exist. Following this analysis, the program participants are to set goals consistent with fair housing and civil rights requirements to overcome those issues within their respective geographic area, determined, by the program participant, to be priority fair housing issues. Such an analysis and prioritization of goals is consistent with the intent of the Fair Housing Act and Fair Housing Act case law. Courts have found that the purpose of the affirmatively furthering fair housing mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: it obligates them to take meaningful actions to address segregation and related barriers for those protected by the Act, particularly as reflected in racially or ethnically concentrated areas of poverty.[12]

Comment: In the AFFH rule, HUD takes the analysis of disparate impact one step further. Commenters stated that HUD is inappropriately using the disparate impact theory as the basis for its AFFH rule. Commenters stated that statutes that create disparate impact liability use different

[12] See discussion in the July 19, 2013, proposed rule at 78 FR 43712, N.A.A.C.P. Boston Chapter v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987), Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).

language – such as language proscribing actions that "adversely affect" an individual because of his or her membership in a protected group – to focus on the effect of the action on the individual rather than on the motivation for the action. Commenters stated that unlike such statutes, the text of the Fair Housing Act does not prohibit practices that result in a disparate impact in the absence of discriminatory intent. Commenters stated that by its plain terms, section 3604 of the Fair Housing Act prohibits only intentional discrimination. Commenters stated that HUD's rule contemplates an analysis that goes well beyond the finding of any specific intent to discriminate. Commenters stated that HUD's rule contemplates massive plans that take into account statistical analyses of race, gender, land use, facilities, siting and a variety of other contributing factors, and HUD does not require an analysis to show that any discrimination against a member of a protected class was intentional, but rather the entire contemplation of HUD's rule is that through careful planning in advance and carefully implemented restrictions on actions of participants (albeit benign actions), HUD can decide how best to avoid actions that might have a discriminatory impact on one or more protected groups.

Commenters stated that whether HUD's extensive planning exercise, which commenters claim overrides local laws, rules and practices, is wise or should be the law of the land is perhaps a legitimate subject for debate, but that debate should occur within the legislative body that establishes the laws, not in a proposed regulation of an agency of the executive branch that has been created to administer the laws, not create them. HUD must be bound by the terms of the Fair Housing Act, and that act does not authorize the use of disparate impact analysis as the basis for a finding of discrimination.

HUD Response: The basis for HUD's AFFH rule is the Fair Housing Act and certain other statutory provisions, specifically the Housing and Community and Development Act of

1974 and the U.S. Housing Act of 1937, that require HUD programs to be administered in a manner that affirmatively furthers fair housing. This means that HUD has the statutory authority to ensure that participants in HUD-funded programs not only refrain from discrimination, but also take meaningful actions to increase fair housing choice and access to opportunity and combat discrimination.

Pursuant to its authority under the Fair Housing Act, HUD has long directed program participants to undertake an assessment of fair housing issues – previously under the AI approach, and following the effective date of this rule, under the new AFH approach. The intent of both planning processes (previously the AI and now the AFH) is to help program participants determine whether programs and activities restrict fair housing choice and access to opportunity, and, if so, develop a plan for addressing these restrictions.

In response to comments asserting that the Fair Housing Act does not recognize disparate impact liability, the Supreme Court recently ruled that the Fair Housing Act prohibits discrimination caused by policies or practices that have an unjustified disparate impact because of race, color, religion, sex, familial status, national origin, or disability. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project, No. 13-1371, 2015 U.S. LEXIS 4249 (June 25, 2015). In that decision, the Supreme Court also acknowledged "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society." (See case cited at page 42.)

b. Scope of AFFH Coverage – Populations

Comment: Poverty is not a protected class. Commenters stated that Congress has not yet extended the protections of the Fair Housing Act to persons based on economic circumstances; that is, poverty is not a protected class. Commenters stated that HUD, in its AFFH rule,

endeavors to extend Fair Housing Act protections to certain classes of people who are economically disadvantaged without statutory authority by requiring an analysis of racially or ethnically concentrated areas of poverty.

HUD Response: HUD agrees with the comment that the Fair Housing Act does not prohibit discrimination on the basis of income or other characteristics not specified in the Act, and it is not HUD's intent to use the AFFH rule to expand the characteristics protected by the Act. HUD would note that the majority of its programs are meant to assist low-income households to obtain decent, safe, and affordable housing and such actions entail an examination of income. Moreover, the Fair Housing Act does require HUD to administer its housing and urban development programs – that is, programs that target assistance to low-income persons – in a manner to affirmatively further fair housing. Accordingly, it is entirely consistent with the Fair Housing Act's duty to affirmatively further fair housing to counteract past policies and decisions that account for today's racially or ethnically concentrated areas of poverty or housing cost burdens and housing needs that are disproportionately high for certain groups of persons based on characteristics protected by the Fair Housing Act. Preparation of an AFH could be an important step in reducing poverty among groups of persons who share characteristics protected by the Fair Housing Act. The focus and purpose of the AFH is to identify, and to begin the process of planning to overcome, the causes and contributing factors that deny or impede housing choice and access to opportunity based on race, color, religion, sex, national origin, familial status, and disability. In addition, a large body of research has consistently found that the problems associated with segregation are greatly exacerbated when combined with concentrated poverty. That is the legal basis and context for the examination of RCAPs/ECAPs, as required by the rule.

Comment: Affirmatively furthering fair housing should consider groups beyond those based on the protected characteristics listed in the Fair Housing Act. In contrast to the commenters in the preceding comment, other commenters stated that affirmatively furthering fair housing should recognize and consider a wider range of classes targeted for discrimination. The commenters urged HUD, in the final rule, to recognize members of the lesbian, gay, bisexual, and transgender (LGBT) community, Housing Choice Voucher (HCV) holders (often subject to source of income discrimination as a proxy for discrimination based on race, familial status, and disability), victims of domestic violence, homeless individuals, migrant workers, and residents in rural areas, as groups in need of protections. The commenters stated that these vulnerable populations are disproportionately members of Federally-protected classes, and HUD should encourage program participants to address their housing barriers as part of their efforts to affirmatively further fair housing. Commenters stated that the severity of affordable housing need is not necessarily dictated by membership in a protected class.

HUD Response: While HUD recognizes that persons may experience housing discrimination based on their source of income, marital status, migrant worker status, history of domestic violence, or homelessness, etc., as provided in the response to the preceding comment, HUD may not expand, through regulation, protected bases beyond those specified in the Fair Housing Act. The Fair Housing Act does recognize discrimination against LGBT individuals when such discrimination is on the basis of sex, which is a protected characteristic, as stated in § 5.152 of this final rule, which includes nonconformity with gender stereotypes. Such discrimination should, as appropriate, be considered in a program participant's AFH.

Comment: The AFH analysis must address every protected class. Commenters stated that if a State or jurisdiction makes the determination that its AFH plan that there is no need to

affirmatively further fair housing for a particular group or groups, then the jurisdiction should offer an explanation of this determination. The commenters stated that the baseline presumption should be that every AFH analysis will discuss every protected class in each analysis section, with an explanatory note where the AFH authors elect to only discuss a subset of the protected classes. The commenters stated that this will not only encourage jurisdictions to examine the disparate housing needs and level of segregation of each protected class within their region, but will also encourage research and planning strategies to account for intersectionality – i.e., the distinct experiences of members of one or more protected classes, and stated, as an example, women who are members of racial and ethnic minority groups and may have disproportionate housing needs in a jurisdiction based not only on their identity as a member of a racial or ethnic minority group, but also their identity as women. Some commenters suggested that the proposed rule appears to focus only on protected classes of race and ethnicity.

A commenter suggested that, to ensure that each State, jurisdiction, or PHA fully accounts for every protected class within its region, HUD's final rule should revise § 5.154(d)(2)(iii) and (iv) as follows with italics reflecting new language and brackets reflecting deleted language: "(iii) Identify whether *there are* significant disparities in access to community assets [exist across] for all protected classes *as compared to other groups* within the *same* jurisdiction and region; and (iv) Identify whether *there are* disproportionate housing needs *for each protected class as compared to other groups* within the *same* jurisdiction and region."

<u>HUD Response</u>: The proposed rule provided for the analysis of data on the basis of race, color, religion, sex, familial status, national origin, and disability, and the final rule adopts this language (see introductory text to § 5.154(d)). Program participants that do not address fair housing issues on these bases run the risk of having their AFH determined to be incomplete and,

consequently, not accepted. While proposed § 5.154 listed all the protected classes, HUD determined that the language of this section could be better stated. HUD did not adopt the exact language presented by the latter commenter, but made the clarification requested by this commenter.

Rule clarification. In § 5.154(d)(2), which pertains to the program participant's analysis of data, HUD clarifies that such analysis pertains to "each protected class."

Comment: Housing options must allow elderly persons to age in place. Commenters stated that housing options that support successful aging in place are disproportionately unavailable in racially concentrated segregated neighborhoods. The commenters stated that such communities lack the supportive services and transportation options that are necessary to support successful aging, and that unlike one who lives in a community with more robust options and resources, people in protected classes who live in segregated communities may be forced as they age to make the Hobson's choice of foregoing suitable housing and services or breaking social ties to get access to such supports and services. The commenters asked HUD to provide program participants with adequate information and insight into housing and housing-related aspects of communities that will help people age in place, such as transportation, accessibility and walkability improvements. The commenters stated that the AFH process offers HUD the opportunity to assist program participants to plan for the future and for the needs of a growing population, in support of the Fair Housing Act's goal of integration.

HUD Response: While noting that "age" is not a protected class under the Fair Housing Act, Title VI, or Section 504, HUD agrees that adequate information and insight into housing and housing-related aspects of communities such as transportation and physical accessibility, as well as other housing-related aspects of communities such as access to high performing schools,

are important items that must be considered in the context of affirmatively furthering fair housing. HUD's proposed Assessment Tool provides for consideration of these factors under the heading of "Disparities in Access to Opportunity," and an analysis of the availability of these assets on a nondiscriminatory basis is part of the AFH, and undertaken to help avoid displacement of existing residents in areas experiencing renewed economic growth or housing price appreciation, or disinvestment in existing low-income neighborhoods.

Comment: Clarify applicability of affirmatively furthering fair housing to LGBT individuals. Commenters stated that it is unclear whether, apart from the listed protected classes, other groups are protected by HUD's rule. Commenters urged HUD to require program participants to consider the housing needs and barriers faced by LGBT individuals and families. Commenters stated that such inclusion would make the AFFH rule consistent with HUD's February 3, 2012, rule prohibiting discrimination against LGBT individuals and families in HUD-funded or Federal Housing Administration-insured housing, referred to as the Equal Access Rule. (See § 5.105(a)(2).) Commenters further stated that such inclusion would align with the decisions of Federal courts across the country, which have recognized protections for LGBT individuals on the basis of sex as a protected class. Commenters stated that, because HUD's rule addresses steps that HUD program participants should take to ensure fair housing for all, LGBT individuals and families should be included along with the seven protected classes under the federal Fair Housing Act.

Other commenters stated that, while discrimination based on sexual orientation and gender identity is not explicitly prohibited by the Fair Housing Act, HUD explained in the preamble its Equal Access Rule that it interprets the Fair Housing Act's prohibition against discrimination based on "sex" to include gender identity. The commenters stated that while this

has extended crucial protections to transgender and gender nonconforming individuals, truly ensuring fair housing requires more than just investigation of claims of discrimination after the fact. Commenters stated that explicitly enumerating LGBT individuals and families among those groups whose needs and barriers to housing will receive particular consideration by program participants is especially important.

HUD Response: It is HUD's policy to ensure equal access on the basis of sexual orientation, gender identity, and marital status in housing assisted by HUD or subject to a mortgage insured by FHA. HUD published its Equal Access Rule on February 3, 2012, to formally establish this policy. (See 77 FR 5662, codified at § 5.105(a)(2).) HUD's Equal Access Rule did not and could not, however, expand statutory fair housing protection to all persons on these bases. The principal legal authorities for the AFFH rule are the affirmative provisions of the Fair Housing Act, the United States Housing Act of 1937, the Housing and Community Development Act of 1974, and Executive Order 12892 (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing). HUD may not expand, through regulation, the range of protected characteristics specified in the statutes and executive order.

Although sexual orientation and gender identity are not identified as protected classes in the Fair Housing Act, the Fair Housing Act's prohibition of discrimination on the basis of sex prohibits discrimination against LGBT individuals in certain circumstances, such as those involving nonconformity with gender stereotypes. Therefore, for example, a landlord's refusal to renew the lease of a HCV holder because he or she failed to conform to male or female gender stereotypes could be a violation of HUD's Equal Access Rule as well as the Fair Housing Act. Fair housing complaints filed on this basis as well as results of testing or local knowledge of

these types of discriminatory practices should, if appropriate, be considered in a program participant's AFH.

In addition, a program participant may be located in a State or locality that has adopted a fair housing statute or ordinance that extends fair housing protection on bases in addition to those specified in the Fair Housing Act. Therefore, the program participant may find it beneficial for its larger planning efforts to include such additional protected bases in its AFH. Even so, HUD cannot direct a program participant to do so or to consider AFH content that covers protected classes beyond those in the Fair Housing Act.

c. Scope of AFFH Coverage - Resources

Comment: Clarify use of resources to which AFH would apply. Many commenters stated that the final rule should be explicit that all of a program participant's housing and community development resources, as well as its policies, practices, and procedures must be assessed, and that these resources would involve not only HUD funds or other Federal funds but non-federal resources. Commenters stated that influencing the allocation of HUD dollars is insufficient and that other Federal and State programs must also spend resources in ways that affirmatively further fair housing. The commenters stated that the proposed rule could be misunderstood to only consider use of HUD funds or Federal funds, and that however large the Federal investment in housing may be, it is small in comparison to housing activity in the private market.

Commenters stated that the final rule should make explicit what is already implicit and that is that the duty to affirmatively further fair housing applies to a program participant's activities that do not involve the use of HUD funds. Commenters stated that the scope of the duty is particularly important in two contexts. First, when a program participant has violated the nondiscrimination provisions of the Fair Housing Act through activities that do not involve HUD

or other Federal funds, that entity cannot certify that it is in compliance with the duty to affirmatively furthering fair housing, and HUD should not accept the certification of such a program participant unless its AFH includes an effective remedy for the violation. Second, in many cases, meaningful goals designed to address fair housing contributing factors may require actions on the part of program participants that do not involve the use of HUD funds. The commenters offered as an example that a jurisdiction's existing zoning ordinance may be identified as one of the contributing factors influencing existing residential segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on protected class. Commenters stated that even if the ordinance does not violate the nondiscrimination provisions of the Fair Housing Act the jurisdiction may need to adopt an inclusionary zoning ordinance because such a policy would be the most effective means of addressing the identified contributing factors under the circumstances. Commenters offered as another example, a jurisdiction that has cited the lack of access to mass transit as a contributing factor which hinders the development of affordable units in a high opportunity area and that may need to extend bus service to that neighborhood.

Commenters stated that section 3608 of the Fair Housing Act does not permit jurisdictions to violate fair housing standards with non-HUD resources and, at the same time, certify compliance with the obligation to affirmatively furthering fair housing by analyzing only activities using HUD funds. The commenters stated that if a city's zoning division is enforcing a zoning code (using all local funds) that has been found to discriminate and yet is using CDBG funds in unobjectionable ways, HUD should not accept a CDBG AFFH certification that fails to address a plan to remedy the zoning problem. Commenters concluded that this is well established law and should be made explicit in the final rule and mechanisms should be included

to address this issue.

In contrast to these commenters, other commenters stated that the final rule should be clear that the AFFH rule only applies to programs under HUD's jurisdiction. Commenters stated that imposing the AFFH rule on other resources, such as education, health care, and transportation, requires significantly more comprehensive federal authority that incorporates other federal departments. Commenters stated that the final rule should set clear parameters regarding the resources and programs that are governed by the rule.

HUD Response: As HUD stated in the proposed rule, it is a statutory condition of the receipt of HUD funding that program participants certify that they will affirmatively further fair housing. The proposed rule provided that program participants would take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of this rule and would take no action materially inconsistent with their obligation to affirmatively further fair housing. While the duty to affirmatively further fair housing derives from the receipt of HUD funds, commenters are correct in saying that the duty applies to all of a program participant's programs and activities related to housing and urban development.

Comment: The scope of activities related to housing and urban development should be determined by the program participant. Commenters stated that the appropriate scope of activities should be left up to the communities to decide given the wide variety and characteristics of the communities that participate in this program. Commenters stated that a one size fits all mandate runs the real risk of further eroding the consolidated plan process and substantially reducing the consolidated plan's real value and impact in how a community conducts and implements its planning efforts.

Other commenters stated that the duty to affirmatively further fair housing should apply

to activities that make sense. The commenters stated that affirmatively further fair housing should apply to activities in which there is an opportunity for unfair housing to occur such as home purchase or rental.

HUD Response: HUD agrees with the commenters that the analysis of fair housing issues, the identification and prioritization of contributing factors, and the establishment of goals to address such issues are to be determined by the program participant. This rule cannot provide grantees with authority or obligations beyond those they already have legal jurisdiction over. In some cases, program participants may be local government agencies having authority over some areas that other participants, such as public housing authorities, do not. In many cases, the analysis of local fair housing issues that the rule requires will include issues beyond the program participants' legal authority to change. For example, a PHA may be unable to change a zoning law. In such cases, the analysis is still useful in identifying those challenges that, while they may beyond the program participants' control, could be addressed by other state or local government agencies or that otherwise present a barrier or constitute a fair housing contributing factor, as defined in the rule.

While HUD will review a program participant's AFH for consistency with fair housing and civil rights laws and determine if the AFH is substantially complete, the best source of information about housing and related issues in a geographic area will almost always be found with the program participant or participants undertaking Federally funded housing and related activities in the geographic area or areas that they serve. The program participants are in the better position to identify housing choice issues faced by residents in their areas. HUD's AFFH rule is intended to help program participants by providing additional information and data that is expected to aid the program participants' analysis and final decisions on investment of Federal

funds. HUD will then review the analysis of a program participant for consistency with fair housing and civil rights laws, as well as determine if such analysis is substantially complete. HUD may determine that a program participant's analysis, goals, or actions are materially inconsistent with current Federal laws and regulations related to fair housing and civil rights, or that the program participant has failed to fulfill their obligations to conduct a complete analysis. In such cases, HUD will request that the program participant revise the associated AFH to ensure compliance. Such a request does not interfere with local decisionmaking powers of HUD's program participants, but ensures that such decisionmaking comports with a program participant's overall obligation to affirmatively furthering fair housing.

However, as noted in HUD's response to an earlier comment pertaining to community assets, fair housing choices are not limited to transactions relating to rental or ownership of housing. Fair housing issues may arise from such factors as zoning and land use; the proposed location, design, and construction of housing; public services that may be offered in connection with housing (e.g., water, sanitation), and a host of other issues. Accordingly, the AFH approach focuses primarily on how to assist program participants in being better informed about, and better able to set goals and priorities relating to, conditions in their current environments that involve fair housing concerns, such as patterns of integration and segregation; racially or ethnically concentrated areas of poverty; disproportionate housing needs, and housing-related barriers in access to education, employment, transportation, and jobs, among others, to ensure that these conditions are taken into consideration in making funding decisions.

The final rule provides, as did the proposed rule, that program participants have flexibility in setting goals and priorities relating to fair housing concerns so long as those goals are designed, and are consistent with, the analysis of data and local knowledge and the obligation

to affirmatively further fair housing and other fair housing and civil rights requirements.

d. Scope of AFFH Coverage – Activities

Comment: Clarify scope of activities considered to be activities relating to housing and urban development under the Fair Housing Act should be Federally-funded grant programs. Commenters stated that activities considered related to housing and urban development under the Fair Housing Act should include those eligible under the CDBG program, ESG, the HOME program and other Federal grant programs, as well as PHA mandated activities. Commenters stated that this should be the minimum requirement, and going beyond the minimum should be at the discretion of each program participant. The commenters stated that mandating program participants to go beyond the minimum would likely result in an administrative burden that HUD has not contemplated.

PHA commenters stated that, as HUD is aware, PHAs may only conduct activities within their areas of operation, as defined by State or local law, and that these geographic constraints impede PHAs' ability to implement activities envisioned by a multi-jurisdictional, regional or state AFH. The commenters stated that, for example, a PHA that serves a predominantly minority or high poverty area can only undertake activities within that specific geographic area. Commenters requested that the final rule recognize PHAs' geographic constraints and limit PHAs' liability for issues or activities outside their area of operation pursuant to a jointly-undertaken AFH. PHA commenters stated the following activities should be exempt from fair housing planning: redevelopment on public housing sites owned by a PHA before the effective date of the rule; public housing developments operated by a PHA with fewer than 100 public housing units; public housing developments operated by a PHA which house only elderly persons or persons with disabilities, or both; public housing developments operated by a PHA

which consist of only one general occupancy, family public housing development; public housing developments approved for demolition or for conversion to project-based or tenant-based assistance, including conversions under the Rental Assistance Demonstration program or any equivalent program; public housing developments which include public housing units operated in accordance with a HUD-approved mixed-finance plan; and large redevelopment efforts intended to revitalize neighborhoods and reduce poverty.

Other commenters requested that the proposed rule not address coverage of non-housing CDBG activities, such as community projects, public facilities and economic development. The commenters stated that while these are not housing projects, HUD's rule indicated that funding decisions of these projects may be covered by the rule, but the rule was not clear on this issue.

Other commenters stated that "activities relating to housing and urban development" is extremely broad and HUD needs to clarify or elaborate on what this means.

HUD Response: HUD-funded and other Federally-funded housing and urban development activities are explicitly covered by the duty to affirmatively further fair housing. This rule does not change the scope of the duty to affirmatively further fair housing.

HUD recognizes that program participants may be limited by their State and local enabling statutes in taking certain actions. Nonetheless, the inclusion of a larger regional analysis for participants is necessary to put the local fair housing issues into context required by the Fair Housing Act and case law (e.g. *Thompson v. HUD*). While a grantee may be serving a central city, the regional conditions of surrounding suburbs may be highly relevant to identifying fair housing issues, including those that are beyond the grantees' immediate control or legal authority to influence. Barriers to fair housing choice or other "fair housing contributing factors" (as defined in the rule) may still be relevant in helping to explain the fair housing issues facing

the program participant. In some cases, this may help in encouraging regional solutions to shared problems, and in some cases may simply add needed context to program participants' planning processes.

The AFH is primarily intended as a planning tool designed to identify the full range of fair housing issues affecting a program participants' geographic area, including the jurisdiction, region, and fair housing issues identified may not necessarily be limited to those under the control of the program participant or involving the use of HUD or other Federal assistance. Once fair housing issues and contributing factors have been identified, the scope of actions that program participants may decide to take, and are capable of taking, to address these fair housing issues and contributing factors may often be broader than the scope of the program participants' activities receiving the HUD or Federal assistance that trigger the obligation to affirmatively further fair housing. An objective of the AFH approach is to have program participants consider all available means to address fair housing issues and contributing factors that arise within their geographic area of analysis or impact their geographic area.

4. Benchmarks and Outcomes

Comment: Program participants must be required to establish benchmarks and timeframes for each goal. Many commenters recommended that the final rule require program participants to establish specific action steps/strategies and/or benchmarks in the AFH in order to be able to measure a program participant's progress toward achieving fair housing goals. Commenters stated that GAO, in studying compliance with the obligation to affirmatively furthering fair housing, stressed the need for benchmarks and timeframes. Commenters suggested that proposed § 5.154 clearly delineate what kinds of milestones HUD reviewers would use to determine that a PHA or jurisdiction has made progress toward its goals identified

in a participant's AFH. Commenters stated that § 5.154 must be amended to require that participants submit benchmarks, a timetable in which to complete those benchmarks, and information about the entity responsible for completing them, in their AFH.

Commenters recommended including benchmarks/timeframes for each goal under four general categories: modifying local regulations and codes, constructing new developments, creating new amenities, and facilitating the movement of people. Other commenters suggested that not only should the AFH have benchmarks but the benchmarks should have deadlines. Commenters stated that HUD should provide numerical benchmarks for determining "measureable difference in access." Commenters stated that if a participant fails to meet a benchmark the participant should file a justification noting a plan to achieve the benchmark or modify the benchmark within 30 days of submission of the justification. The commenters stated that HUD should post this justification on its website for public comment within 30 days, and within 30 days of receiving those comments, HUD should complete its review and approve/reject the plan or modification. Other commenters suggested that the benchmarks and timeframes should be outlined in the Consolidated Plan and Annual Action Plans.

Other commenters similarly asked that HUD mandate specific outcomes of the AFH process. Commenters stated that without outcomes, the new AFH process is rendered worthless. Commenters stated that HUD's rule focuses on process, not outcomes and it is the latter which is important.

In contrast to the above commenters, other commenters stated that while they are sympathetic to those who believe that enforcement of the duty to affirmatively furthering fair housing must be far more rigorous and that specific benchmarks should be laid out in the AFH, they believe such a shift would be unwise. Commenters stated that the new AFH process already

brings significantly more accountability to communities and promises to vastly improve the fair housing process; and therefore more stringent applications beyond what has been set out in the proposed rule would be counter-productive and could stymie what would otherwise be productive development.

On the subject of outcomes, commenters, in contrast to the commenters above, stated that they supported HUD's approach of not mandating certain outcomes, but welcomed HUD, through guidance, to provide examples of outcomes that may reasonably be achieved through the new AFH process.

HUD Response: HUD agrees with the commenters that the AFH process, to be effective, should have benchmarks and outcomes, but HUD agrees with the latter commenters that the final rule should not specify the benchmarks or mandate certain outcomes. The final rule provides for the establishment of benchmarks, but established by the program participant and not by HUD. However, as part of the AFH review process, HUD will include review of benchmarks and outcomes, as reflected in a program participant's goals. With respect to the request for guidance, HUD intends to provide the guidance on benchmarks and outcomes requested by the commenters.

Rule change. HUD adds § 5.154(d)(4)(iii) to provide that it is program participants that "identify the metrics and milestones" for determining what fair housing results will be achieved.

Comment: Require annual publically available performance reports. Commenters recommended that HUD require annual publically available performance reports that include actions carried out and results achieved. Commenters stated that the rule should include a performance report requirement to describe efforts to carry out the duty to affirmatively further fair housing. Commenters recommended amending § 91.520 (Performance reports) by adding

the following language: "The Performance report must include…actions taken to affirmatively further fair housing, including the jurisdiction's progress in executing its AFH plan in a timely manner,…." Other commenters stated that the final rule should amend § 903.7(r)(1) (Annual Performance Reports) to require annual performance reports that identify actions carried out to mitigate or address each of the goals in the AFH, describe the results of those actions and specify which fair housing issues were impacted and how they were impacted.

Commenters stated in requiring performance reports, HUD should spell out what information participants must report in terms of progress they have made toward their fair housing goals, and the reports should include uses for the range of HUD grants received and any actions taken with respect to policies, practices, and non-financial resources.

Other commenters recommended that performance results could be provided through a comprehensive 5-year review for each required element of the AFH.

HUD Response: Neither the proposed rule nor this final rule requires new performance reporting. Instead HUD relies upon existing performance reporting requirements or performance assessment requirements already set out in regulations governing consolidated plan program participants and PHAs. For some existing performance review or reporting requirements, HUD builds upon these requirements by specifically referencing review of AFH performance. For example, see § 91.105(e)(1)(i) of the consolidated plan regulations. Similarly the CDBG regulations at § 570.441(b)(3) provide for review of performance in carrying out the duty to affirmatively further fair housing. With respect to PHAs, HUD's Public Housing Assessment System (PHAS) regulations provide in § 902.1(b) that a PHA's compliance with the duty to affirmatively further fair housing and other civil rights requirements such as section 504 of the Rehabilitation Act of 1973 is monitored in accordance with applicable program

regulations and the PHA's Annual Contributions Contract. With respect to specific program regulations, § 905.308 of HUD's Capital Fund regulations in 24 CFR part 905 encompasses a PHA's duty to affirmatively further fair housing in the use of its capital funds, and § 905.802 of those same regulations provide for HUD review of PHA performance under the Capital Fund regulations. In addition, HUD's Office of Fair Housing and Equal Opportunity has existing procedures in place to investigate complaints and conduct compliance reviews relating to a program participant that is not affirmatively furthering fair housing. Given these performance review and monitoring processes already in place, HUD did not see any need to add new review requirements.

HUD notes that the community participation requirements of the AFH, which incorporate the community participation requirements of the consolidated plan regulations in 24 CFR part 91, and those for PHA Plans in 24 CFR part 903, provide an opportunity for a review by the public of the performance by the program participant.

5. Determinants (Contributing Factors in the Final Rule) and Goals

As noted in Section III of this preamble, HUD is replacing "determinant" with "contributing factor." However, since the proposed rule used the word "determinant" and this was the term used in submitting public comments on this issue, HUD retains the word "determinant" for this discussion of public comments.

Comment: More than one goal needs to be established. Many commenters stated that the final rule should prohibit program participants from setting only one goal. Commenters stated that each community should be required to set more than one goal to mitigate the impact of determinants that cause fair housing issues, and that those communities should be required to report on the impact of their activities to address these issues in a specified format. Commenters

stated that the compliance with the duty to affirmatively further fair housing must recognize that while barriers for people of diverse racial and ethnic groups, disabilities, and familial status often overlap, they are not interchangeable and all need to be addressed comprehensively to truly further fair housing.

Some commenters stated that even two goals are not sufficient to ensure progress toward ending segregation and increasing access to community assets. Commenters stated that no program participant should have the option to only select one goal to address or mitigate its identified fair housing issues. Commenters urged HUD to set a higher standard of performance, and to require program participants to set goals and identify specific milestones, and timetables. Commenters stated that the language in the proposed rule must be changed at the final rule stage to reflect all of the components of the duty to affirmatively further fair housing, as described in the definition for this term. Commenters stated that the final rule must require program participants to set fair housing goals based on all of the most significant fair housing determinants.

Other commenters stated that while one substantive goal may be sufficient for some program participants, the option to address only one goal may set a low bar for others. Commenters stated that reference to “one goal” signals to program participants that additional existing fair housing issues can be ignored or somehow de-prioritized, undermining much of what HUD sets out to accomplish with this rule.” Commenters stated that setting just one goal will not even require communities to address both the need to strategically enhance neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) and the need to promote greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation for members of protected classes.

Commenters recommended that the final rule clarify that program participants must identify at least one goal to address and/or mitigate each fair housing issue identified in the analysis as a discriminatory barrier. Commenters stated that although resource constraints in jurisdictions may limit the scope of fair housing goals, it is critical for long-term planning and regional integration for the jurisdiction to identify and execute even modest goals for each fair housing issue or barrier identified.

HUD Response: The regulation does not prescribe a minimum or maximum number of fair housing contributing factors ("determinants" in the proposed rule) or goals to be set for those factors. Although, HUD believes it would be a rare situation in which a program participant has only one goal, HUD does not disregard the possibility that a program participant may identify a single contributing factor and have only one goal for addressing that contributing factor, or that a program participant that has more than one contributing factor may have the same goal for addressing each of those contributing factors. HUD is interested in the substance of the goals and how a program participant's goal or goals would address contributing factors. HUD will evaluate whether the goals appropriately focus on contributing factors, and appear achievable by the program participant. This final rule includes additional clarifying language on prioritizing the most significant contributing factors. In addition, HUD intends to provide greater detail on identifying contributing factors and setting goals in the Assessment Tool and other sub-regulatory guidance.

Also, HUD recognizes that not all identified contributing factors may be obstacles to fair housing requiring an action or goal to eliminate them. For example, a contributing factor may be outside of a program participant's control, such as a neighboring jurisdiction's zoning policies as opposed to the zoning policies of the jurisdiction of the program participant.

In this rule, despite many commenters' concerns to the contrary as discussed in this preamble, it is not HUD's intention to dictate to program participants the decisions that they make based on local conditions. As stated in the proposed rule, through this new AFH process, HUD is not mandating specific outcomes for the planning process. Instead, recognizing the importance of local decisionmaking, the new AFH process establishes basic parameters and helps guide public sector housing and community development planning and investment decisions to fulfill the obligation to affirmatively further fair housing. In addition, it is important to remember that the AFHs will be made available to communities and residents of these communities will have the opportunity to weigh in on whether program participants have accurately identified contributing factors and have established goals appropriate for identified contributing factors and related fair housing issues.

Rule change. This final rule adds § 5.154(d)(4)(iii) that provides that the AFH must set goals for overcoming the effect of contributing factors as prioritized in accordance with paragraph (d)(4)(ii) of the section. This new section further provides that for each goal, a program participant must identify one or more contributing factors that the goal is designed to address, describe how the goal relates to overcoming the identified contributing factor(s) and related fair housing issue(s), and identify metrics and milestones for determining what fair housing results will be achieved. For instance, where segregation in a development or geographic area is determined to be a fair housing issue, with at least one significant contributing factor, HUD would expect the AFH to include one or more goals to reduce the segregation. HUD believes that this added language gives program participants the flexibility to decide, given local factors and conditions, the number of contributing factors that exist and the number of goals to be established.

Comment: Specify that goals must be to overcome fair housing contributing factors rather than mitigate and address the contributing factors. Several commenters stated that regulatory language related to the contributing factor analysis must be revised to require program participants not just to "mitigate or address" problems, but to overcome them. A commenter stated that while the definition of "affirmatively furthering fair housing" in the rule is strong, the proposed requirements for what a program participant must do under the AFH weakens the current standard. The commenter stated that under the current AI process, guidance and enforcement practice all require a participant to "conduct an analysis to identify impediments to fair housing choice within the jurisdiction, and take appropriate actions to overcome the effects of any impediments identified through that analysis….(§ 91.225(a)(1))." The commenter stated that by requiring only that participants "mitigate or address" the determinants of fair housing issues rather than "take appropriate actions to overcome the effects of impediments," HUD appears, perhaps inadvertently, to be taking a step back from the current standards to which participants are to be held.

HUD Response: HUD agrees with the commenter and has replaced, where appropriate, "mitigate and address" with "overcome." HUD stated in the proposed rule that the new AFH process is needed to "facilitate efforts to overcome barriers to fair housing choice." Mitigating and addressing the contributing factors are part of those efforts to overcome such barriers, but the commenters are correct in stating that the ultimate goal is to overcome.

Rule Change. This final rule revises the first sentence of the proposed definition of the term "affirmatively furthering fair housing" in § 5.152 to say that affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict

access to opportunity based on protected characteristics.

Comment: Consider using a term other than "determinant." Commenters stated that HUD should consider using a different term, such as "drivers" in place of the term "determinants," which they stated better describes "the informal nature of the process of hypothesizing about causes and effects [of discrimination and segregation] through community dialogue." Commenters stated that, as provided in the proposed rule, the point of data analysis is to take stock of current conditions and provide information about disparities to initiate a community conversation about how the drivers may have led to those conditions. Commenters stated using the term "determinants" suggests a more scholarly investigation between outcomes and other variables, and not the desired community conversation.

HUD Response: HUD agrees with the commenters and, as noted in Section III, of the preamble, HUD is replacing "determinant" with "fair housing contributing factor."

Comment: Determinants may be difficult to identify. Commenters stated that while it may be easy to determine the presence of segregation or integration, it is not easy, or may even be impossible to identify "primary determinants"' and to further refine that analysis to identify the "most significant determinants." Commenters stated that the requirement to assess determinants is very complex and is often related to factors outside of a program participant's control. Another commenter stated that while it is relatively easy to identify fair housing issues based on some of the thresholds in the rule, determining their exact causes can be exceedingly complex, with many factors of history and geography – most of which are well outside of the control of the program participant. Commenters stated that because HUD already has data on determinants, HUD should be in charge of conducting the review to find the answers it seeks.

Other commenters stated that the "determination of the 'primary determinants' for causal conditions is often inherently arguable, vulnerable to differing interpretations and prioritization" and that the final rule should recognize that the identified conditions should be addressed by the authority and resources available to the jurisdictions. The commenters stated that without bright lines for widely varying circumstances, "any proposed criterion for acceptance or rejection of an AFH alone should be on a predominantly procedural basis." Commenters stated that the final rule should place less emphasis on an analysis that may or may not be of any relevance, which would free up resources to be targeted towards developing solutions. Commenters stated that it is a generous assumption that all program participants have the capacity to perform the required determinants analysis. Other commenters stated that such a requirement creates legal and political exposure to the agencies and entities that they might designate as having ownership of historical determinants of segregation and concentrations of poverty and that this process of "finger pointing and blame" heightens the potential for adversarial relationships to develop among the very partners that must effectively work together to improve the communities served through programmatic resources.

Other commenters stated that for program participants to properly identify determinants, additional guidance is needed from HUD. Commenters stated that while the assessment of determinants is central to the AFH process, the lack of guidance in the rule about determinants is a major shortcoming, as the proposed rule had a limited explanation of what a fair housing determinant is, how determinants should be identified, and how to set goals to mitigate or address determinants. The commenter stated that even though the proposed rule recognizes the need for such guidance in the summary of the rule and the assessment tool is identified as the means of providing such guidance, the "assessment tool" is defined as something that HUD will

issue in the future. The commenter stated that without seeing the tool, jurisdictions may not have the necessary information to prepare these central elements of an AFH. To mitigate concern about the absence of guidance on determinants in the rule, the commenter suggested that the final rule incorporate the guidance that is being developed as an assessment tool by including illustrative examples of determinants and fair housing priorities and goals for mitigating and addressing the determinants that should be considered in drafting the AFH. Alternatively, the commenter stated that the assessment tool should "at a minimum be published for comment before it is finalized."

HUD Response: HUD agrees that identifying factors contributing to fair housing issues may not always be easy. It is for this reason that HUD seeks to assist with such identification by providing to program participants local and regional data on patterns of integration, racially or ethnically concentrated areas of poverty, barriers to access to key community assets, and disproportionate housing needs based on characteristics protected by the Fair Housing Act. While HUD cannot guarantee that the provision of such data will always make evident the factors contributing to such fair housing issues, HUD believes that the data will help in this regard. In addition, the questions presented in the AFH Assessment Tool (which was published for comment after the proposed rule) are designed to help program participants determine the factors that give rise to fair housing issues in their respective geographic areas of analysis. The community participation process will also assist program participants in identifying contributing factors and receiving feedback on whether the correct contributing factors have been identified. HUD will also provide instructions, guidance, training, and technical assistance in various formats to help program participants make this identification.

With respect to commenters' concerns about finger pointing and blame, the purpose of the AFH is to analyze data and local knowledge to identify barriers with a view toward overcoming them, not assigning blame. Although the rule recognizes that many obstacles to housing choice that exist today reflect historic patterns of segregation, the analysis required by the AFH is to identify contributing factors to fair housing issues as a means of better planning how to address the fair housing issues. By providing data, HUD seeks to help program participants in determining the cause of fair housing issues, the extent of impact, and how such fair housing issues may be addressed.

With respect to commenters' concerns about the resources necessary to achieve the desired goals, HUD recognizes that there are likely insufficient funds to achieve every goal for every identified contributing factor, which is why the final rule directs program participants to identify significant fair housing contributing factors and to prioritize such factors. HUD further recognizes that there may be disagreement about which contributing factors are the significant factors leading to a fair housing issue. The public participation process should be of assistance to program participants in helping to identify and prioritize the contributing factors that should be the focus of the AFH.

Comment: Zoning and land use should be explicitly identified as a determinant. Commenters stated that the determinants analysis should include a detailed assessment of a community's zoning and land use regulations. Commenters stated that although the proposed rule requires program participants to use an assessment tool to identify the primary fair housing determinants, they stated that there is no clear indication in the rule that this assessment tool will include a template for analysis of zoning and land use regulations. The commenter stated that because zoning and land use policies are not implicitly listed, the rule may be signaling that a

robust assessment of zoning and land use policies with respect to impeding or limiting fair housing choice is not required. Commenters requested that language be added to § 5.154(d)(3) that would provide that based upon data identified under § 5.154 (d)(2) and community input, the analysis will assess whether a participant's laws, policies, or practices limit fair housing choice, and that examples of such laws, policies or practices include, but are not limited to, zoning, land use, housing plans or policies, or development plans or policies.

HUD Response: The proposed rule did not identify all the questions that would be included in the Assessment Tool, as the Assessment Tool was still under development at the time of publication of the proposed rule. However, as seen in the proposed Assessment Tool published on September 26, 2014, the Assessment Tool does provide for an analysis of land use and zoning laws. HUD also plans to provide program participants with guidance on conducting such an analysis.

Comment: Goals should not be equated with outcomes. Commenters stated that goals should be measured by the extent to which they are achieved. Commenters stated that goals may simply be a process goal that, if implemented, would affirmatively further fair housing; that is, if the process is implemented, the goal is achieved. The commenters stated that goals should not be required to be outcome goals, since the ability to influence and reduce segregation is limited by a number of factors, both known and unknown, including individual preferences, inadequate funding to "move the needle" in a significant way, and the lack of state control over local decision making.

HUD Response: HUD agrees with the commenters that goals should not be equated with outcome. A goal is what one hopes to achieve by taking certain action and the outcome reflects the results of taking such action. As stated earlier in this preamble, HUD is not mandating

specific outcomes, and HUD gives program participants the discretion and flexibility to set goals, taking into consideration the nature and scope of fair housing issues and contributing factors in the relevant geographic areas of analysis and the capacity of the program participant to address fair housing issues. HUD agrees that some goals may be process goals, such as amending a local land use or zoning law to remove barriers to the development of affordable housing in areas of opportunity. Achievement of the process goal by the enactment of the amendment that removes the barriers is a short-term outcome. However, an action of this kind could also yield long-term outcomes, such as reducing segregation or increasing access to opportunity.

6. Integrated Settings for Persons with Disabilities

Comment: The rule, if implemented properly, will significantly improve housing opportunities for persons with disabilities. Many commenters expressed support for the rule's recognition that affirmatively furthering fair housing includes affording persons with disabilities the opportunity to live in the most integrated setting appropriate to the needs of persons with disabilities. Commenters stated that discrimination against persons with disabilities has too often been ignored, and expressed support for the rule's definitions of "fair housing choice" and "segregation" and the rule's statement that for individuals with disabilities, integration also means that such individuals are housed in the most integrated setting appropriate. Commenters stated that the most integrated setting is one that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973. Commenters requested that the final rule also include the following language from HUD's *Olmstead* Statement: "Examples of integrated settings include scattered-site apartments providing

permanent supportive housing, tenant-based rental assistance that enables individuals with disabilities to lease housing in integrated developments, and apartments for individuals with various disabilities scattered throughout public and multifamily housing developments." The commenters stated that including these examples will help regulated entities better understand their obligations.

HUD Response: HUD appreciates the suggestion to include in the rule examples of integrated settings as provided in HUD's *Olmstead* Statement. However, HUD believes that guidance, not the regulatory text, is the better location for these examples and HUD will include these examples in its guidance on affirmatively furthering fair housing.

Comment: Include a reference to providing integrated settings for persons with disabilities with respect to the steps to be taken by PHAs to affirmatively further fair housing. Commenters recommended that in § 903.2, which addressed PHAs taking steps to deconcentrate poverty and comply with fair housing requirements, HUD include a reference to promoting opportunities for persons with disabilities to live in the most integrated setting appropriate.

HUD Response: Section 903.15 of this final rule already captures this concept. Section 903.15(d)(2)(ii) provides that affirmative steps include PHAs engaging in ongoing coordination with state and local disability agencies to provide additional community-based housing opportunities for individuals with disabilities and connect such individuals with supportive services to enable an individual with a disability to transfer from an institutional setting into the community.

Comment: Specify disability organizations that are to be consulted in the development of an AFH. Commenters requested that the rule specify that disability organizations, such as protection and advocacy agencies, independent living centers, and State and local affiliates of

The Arc, Mental Health America, The National Alliance on Mental Illness, and United Cerebral Palsy, be consulted in the preparation of the AFH and the consolidated plan, as well as the citizen participation plan. Commenters stated that these organizations typically have the best knowledge concerning persons with disabilities who are needlessly segregated.

HUD Response: The final rule, at § 5.158(a), requires program participants to undertake consultation in accordance with consolidated plan requirements and requirements governing PHA planning. While HUD mandates meaningful consultation with certain types or categories of organizations, HUD declines to mandate consultation with specifically named organizations.

Comment: Define "institution". Commenters stated that the rule refers to "deinstitutionalizing" persons with disabilities, but does not define "institution," perhaps leaving it to the courts to determine whether housing provided to the disabled as part of a supportive services program or a PHA's designated housing plan is sufficiently community-based to comply with the rule. Commenters stated that consistent with the *Olmstead* decision, the rule also should recognize that the goal of "deinstitutionalizing" persons with disabilities into community-based settings should only apply when: (1) such placement is appropriate; (2) the affected person does not oppose such treatment; and (3) the placement can be reasonably accommodated, taking into account the available resources and the needs of other individuals with disabilities.

HUD Response: The focus of this rule is about fair housing planning and how the process of fair housing planning should be undertaken. For each of the protected classes covered by the Fair Housing Act, and consequently covered by the this final rule, program participants should rely on rules already in place to ensure nondiscrimination for these protected classes, and be guided by these existing requirements in planning the actions they intend to undertake to promote fair housing choice and access to opportunity. HUD therefore declines to adopt

commenters' suggestion to have the rule address in more detail the goal of deinstitutionalizing persons with disabilities. Those requirements are adequately addressed in the Department of Justice's rules and guidance implementing the Americans with Disabilities Act, in the Department of Health and Human Services' s Medicaid rules on Home and Community Based Services, and in HUD's *Olmstead* Statement.

Comment: Do not hold PHAs accountable for inability to move persons with disabilities to integrated settings. Commenters stated that it is troublesome to consider that PHAs may be held accountable for the lack of "disability-related services" that may be available in a person's living environment. Commenters stated that PHAs are not funded for these special needs services and do not have the trained staff to handle these needs. Commenters stated that to relocate disabled persons from institutions into "the most integrated setting appropriate" is a noble pursuit but brings up other issues, such as what resources are available to up-fit units to meet the mobility requirements of the relocates or where they will be able to secure supportive services for those who need mental health services? Commenters stated that often even wheelchair accessible units compliant with fair housing design standards do not come with all the supports a person may need, such as lifts in the bedroom to help them into bed, power door locks, and cameras at the front door to enable a bed-ridden occupant to determine who is outside their door before opening it, etc. are expensive items to install and maintain.

HUD Response: HUD recognizes that PHAs and all program participants may be limited in fulfilling their AFH goals based on available resources. What is expected of program participants, however, is to ensure that they are taking meaningful actions within their control and that their actions do not contribute to or perpetuate discrimination, segregation, and limitation of housing choice, including against persons with disabilities. This rule does not

create new obligations on PHAs to provide housing in integrated settings for persons with disabilities. HUD notes that PHAs have existing obligations to provide housing in the most integrated setting appropriate under section 504 of the Rehabilitation Act and under the Americans with Disabilities Act. Moreover, since State Medicaid agencies have the obligation to provide health care services to individuals with disabilities in the most integrated settings appropriate to their needs, such services should be provided by such agencies. However, one of the biggest needs faced by States in *Olmstead* implementation is locating affordable housing where individuals with disabilities may live and receive State-provided services, and PHA's play an important role, through their public housing and HCV programs in making such housing available. Recent experience, including the Non-Elderly Disabled (NED) 2 Housing Vouchers and the Section 811 Project Rental Assistance program, have shown that closer collaboration between PHAs and State Housing Agencies with State Medicaid Agencies enhances the ability to fulfill their respective responsibilities in this area. HUD intends for its guidance to supplement the AFFH regulations and will provide more information about these collaborations.

Comment: The rule should address PHA admission preferences. Commenters made several different suggestions on how the rule could address PHA admission preferences. Some commenters stated that the rule should mandate that PHAs establish preferences for persons with disabilities. Commenters stated that historically, persons with disabilities have been dramatically underrepresented on PHA waitlists due to the absence of outreach and the sheer isolation of nursing home and institutionalized residents. Commenters stated that there is an urgent need for the creation of a preference for persons with disabilities, and the AFH should mandate that PHAs establish preferences for persons with disabilities. Other commenters stated that in § 903.2(d)(2)(ii), the rule lists residency preferences such as those designed to assist in

deinstitutionalizing individuals with disabilities as an example of a PHA activity that will affirmatively further fair housing. Commenters suggested that HUD change "residency preferences" to "admissions preferences" because admissions preferences will more effectively further the goal of integrating persons with disabilities into housing with the non-disabled population. Commenters further stated that residency preferences, particularly in communities with high non-minority populations, have the potential to be used as a barrier to affirmatively furthering fair housing by affording a preference to persons who are very likely to be non-minority. Commenters stated that this may result in minority applicants spending a disproportionate amount of time on housing waitlists, frustrating the purpose of the affirmatively furthering fair housing mandate.

HUD Response: The Quality Housing and Work Responsibility Act of 1998 (QHWRA) (title V of Public Law 105-276, approved October 21, 1998) eliminated Federal admissions preferences and allows PHAs to adopt their own preferences pursuant to the local PHA planning, including an assessment of local housing needs and review by the Resident Advisory Board, and consistent with Federal fair housing and civil rights requirements. Given that QHWRA eliminated imposed preferences on PHAs and determined that PHAs were in the best position to determine preferences, if any, based on local conditions, this final rule does not mandate preferences on PHAs.

7. Community/Citizen Participation and Engagement

Comment: Require maximum citizen participation at every stage in the fair housing planning process. Commenters state that HUD should require that program participants maximize citizen participation in every stage of the assessment process. Commenters stated that the AFH should be developed by way of an iterative community process so that community

members have the opportunity to respond at each stage of the development of the data and action plan, rather than only to a fully-developed plan.

Commenters stated that enhanced participation would be achieved by: (1) creating an affirmative marketing plan for every event open to the public; (2) publishing all materials and reports in plain language, and in multiple languages; and (3) making all comments on the process available to the public. Commenters stated that, during the consultation phase, program participants should engage in and develop an affirmative marketing plan for activities related to the public participation process that includes an assessment and identification of possible stakeholders. Commenters stated that this plan should be submitted to HUD as evidence of the planning and action steps the program participant undertook to ensure that maximum community participation among stakeholders occurred.

Commenters stated that all of the marketing materials and other materials associated with affirmatively furthering fair housing compliance should be published in plain language so that they can be understood even by those with no expertise in fair housing. In addition to using plain language, commenters stated that these same materials should be translated and published in languages that are most relevant to the program participant's community. Commenters stated that understanding fair housing needs must go beyond data analysis and involve input from those individuals who have first-hand knowledge of the existing hurdles and barriers in their communities. Commenters stated that an aggressive outreach campaign is necessary to ensure that those individuals with concerns are heard, and that no one should be prevented from participating in the process and from providing valuable insight into the fair housing barriers in a community because of a comprehension or language barrier.

Other commenters also focused on marketing campaigns as being critical to meaningful participation. Commenters stated that participants should create major marketing campaigns to educate the public about the negative impact of housing discrimination and how to be proactive on the matter. The commenters stated that this should all be done with particular sensitivity to historically underserved audiences, keeping cultural and linguistic attributes in mind because these are the very individuals most impacted by the new rule and affirmatively furthering fair housing issues.

HUD Response: HUD appreciates the commenter suggestions, but HUD regulations for almost all HUD programs already require HUD program participants to engage in affirmative fair housing marketing. HUD therefore declines to expand upon existing affirmative fair housing marketing requirements at this time, but the final rule does strengthen the proposed rule's community participation requirements.

This final rule strengthens the provisions of proposed § 5.158 pertaining to community participation in the AFH by directing program participants to employ communications means designed to reach the broadest audience. The final rule provides that such communications may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the program participant's official government website, as well as at libraries, government offices, and public places. Also, program participants are required to ensure that all aspects of community participation are conducted in accordance with applicable fair housing and civil rights laws that, among other things, assure access to communications for persons with limited English proficiency (LEP) and access to meetings and materials for persons with disabilities.

With respect to the comment regarding relevant languages, HUD funding recipients are already required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons by existing law, including title VI of the Civil Rights Act. HUD's guidance on LEP can be found at 72 FR 2732 (January 22, 2007). Sections 91.105, 91.115, and 570.441 of this final rule direct that the citizen participation plan required by the consolidated plan regulations shall require that the jurisdiction take reasonable steps to provide language assistance to ensure meaningful access to citizen participation by persons with limited English proficiency.

Rule change. This final rule revises § 5.158(a) to include language that strives to ensure that the AFH, the consolidated plan, and the PHA Plan and any plan incorporated therein are informed by meaningful community participation, and to achieve this objective, program participants should employ communications means designed to reach the broadest audience. The revised section provides that such communications may be met, as appropriate, by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the program participant's official government website, as well as at libraries, government offices, and public places."

Comment: Utilize public participation tools that will reach residents in isolated areas. Commenters stated that HUD must ensure that the approved plans demonstrate effective methods for maximum engagement, particularly for isolated rural jurisdictions and their residents to participate in this process. Commenters stated that those who fall under any of the protected classes and live in isolated communities may encounter obstacles to participate in an AFH process, such as limited public meetings that are located far from their local community. Commenters stated that methods for maximizing public participation need not be sophisticated,

merely effective and efficient, and that remote real-time access to video links, or 'electronic clickers' that allow for anonymous and active participation are used in certain circumstances and should be identified in the planning process so that this engagement process is presented to and approved by HUD.

In a similar vein, commenters stated persons with disabilities in nursing homes and institutions are isolated from the general public. Commenters stated that often, access to persons with disabilities in these settings is monitored or controlled by gatekeepers such as facility staff, medical personnel, or guardians. Commenters recommended that a program participant's citizen participation plan include special notification to nursing homes and other institutions for persons with disabilities, as well as follow up visits and phone calls. Commenters stated that although HUD's proposal includes a requirement that the AFH and related documents be accessible to persons with disabilities, there is no similar requirement relating to the materials and documents relied upon by program participants in deliberating upon and drafting the AFH must be accessible. Commenters recommended that HUD require that such materials be accessible and that website information be Section 508 compliant.

HUD Response: HUD agrees that the community participation processes must consider the populations served, and where they are located, and they must choose public participation approaches that will reach the populations served. These approaches must be reflected in the program participant's citizen participation plan, and HUD emphasizes this point in language added to § 5.158(a). In addition, HUD encourages its program participants to consult the section 508 website and that of the U.S. Access Board, both of which provide guidance on making websites accessible to persons with disabilities. See www.section508.gov and www.access-board.gov.

Rule change. This final rule revises § 5.158(a) to include language that provides that program participants shall ensure that all aspects of community participation are conducted in accordance with fair housing and civil rights laws, including title VI of the Civil Rights Act of 1964 and the regulations at 24 CFR part 1; section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable.

Comment: Modify or replace citizen participation requirements for States. Commenters stated that generating citizen participation at the state level is costly and, in most cases, fruitless. Commenters stated that meaningful and widespread citizen participation for States is expensive and likely require the employment of a consultant. Commenters stated that States are huge geographic areas in which to undertake meaningful citizen participation. Commenters stated that consultation with interest groups is generally more productive because interest groups have a more immediate interest in providing input to the planning process. The commenters stated that interest groups respond to public participation because of their potential for gain, while citizens whose communities may or may not receive a CDBG grant or other CPD assistance, have less interest in providing their input and less of an expectation that they will benefit from a program.

Commenters asked that to minimize costs and in acknowledgement that typical citizens have little or no interest in a statewide consolidated plan or AFH, encourage, but do not require, State citizen participation plans to provide for citizen and resident participation, and permit States to rely almost exclusively on participation of the organizations described in § 91.115(a)(2)(ii).

In a similar vein, other commenters stated that the public participation requirements in § 91.115 should reflect differences between State and local governments. The commenters stated

that the best methods for effective and meaningful interaction vary tremendously based on the size of a jurisdiction's service area.

HUD Response: The community participation requirements for States have long been required under the Consolidated Plan regulations, and HUD believes they have worked well. This final rule applies the same community participation process that States now use under the consolidated plan.

Comment: Clarify that States only need to consult with agencies and organizations that fall under State Consolidated Plan. Commenters stated that the language in the rule pertaining to State consultation for the AFH should make it clear that a State only needs to consult with agencies and organizations that fall under the State consolidated plan.

HUD Response: Similar to HUD's response to the preceding comment, the AFH regulations in § 91.110(a) (introductory paragraph) do not delineate that only State public or private agencies must be consulted. Such delineation is not currently there in the Consolidated Plan regulations and therefore is not delineated in this final rule. However in adding a new paragraph (a)(1) to § 91.110, which pertains to HUD's public housing program or HCV, HUD has clarified that consultation is only required of PHAs administering public housing or HCV programs on a statewide basis or that certify consistency with a State's consolidated plan.

Rule change. In § 91.110, paragraph (a)(1) is revised from the proposed rule to clarify that, with respect to public housing or HCV programs, the State shall consult with any PHA administering public housing or section 8 programs on a state-wide basis as well as with PHAs that certify consistency with a State's consolidated plan.

Comment: Clarify that States do not need to analyze a PHA's geographic area if the PHA adopts the State's AFH. Commenters expressed concern that if local PHAs adopt the State's

AFH, there will be a requirement for the State to analyze units that are much smaller than would otherwise be expected for a statewide analysis because a local PHA is tied to a small jurisdiction (city or county), and the AFH would need to use block group or census tract data and information about the local housing market, trends and stakeholders to be helpful in planning a course of action to address fair housing issues. The commenters stated that this level of analysis is not a reasonable expectation to place on the State for its AFH. Commenters stated that a State needs assurance that its AFH would not need to change course based on the make-up of local PHAs opting to use the State AFH in lieu of their own.

HUD Response: All jurisdictions and insular entities will be required to consult with PHAs on PHA programs. To clarify, States must conduct outreach to PHAs that administer public housing or Section 8 programs on a statewide basis or that certify consistency with the State's consolidated plan. PHAs, however, cannot adopt a State's AFH, but they may work in collaboration with a State pursuant to § 5.156 and § 903.15(a)(1). In addition, as provided in § 5.156(a)(3), all collaborating program participants are accountable for the analysis and any joint goals and priorities to be included in the collaborative AFH, and collaborating program participants are also accountable for their individual analysis, goals, and priorities to be included in the collaborative AFH.

Comment: Public hearings are not the best vehicles to ensure public participation of the targeted populations. Commenters stated that public hearings, which they described as the primary vehicles for soliciting community feedback on the AFH, are hardly a sufficient mechanism to ensure the participation of the target population. Commenters stated that, recognizing that such public hearings may not be sufficiently proactive, § 91.115 (a)(2)(iii) provides that a State should also explore alternative public involvement techniques including the

use of focus groups. Commenters asked that the rule be altered so that all program participants must consider and ultimately employ such techniques, and public hearings would be optional. Commenters stated that program participants and PHAs must be required to pursue outreach strategies that actively engage the community in a dialogue to ensure that their vision of change for their community is also brought to bear.

HUD Response: Public hearings should not be the only vehicle to solicit public participation but HUD believes they can be an effective vehicle based on experience under current regulations. As HUD stated in response to earlier comments, the program participant's public participation processes must consider the populations served, and where they are located, and they must choose public participation approaches that will reach the populations served and these approaches must be reflected in the program participant's community participation plan. Please note earlier discussion of changes to § 5.158 to strengthen community participation.

Comment: A public hearing should not be required until the AFH is completed. Commenter stated that the proposed amendment to § 91.105 would require at least one public hearing on the AFH before it is published for comment. The commenters stated that this requirement confuses the planning principle of citizen participation for plans with research studies like the AFH (which is not a plan). The commenters stated that under sound planning principles, the appropriate time for a public hearing on a research study like an AFH, would be when the AFH is completed and made available for public comment. Commenters stated that there is no need for a public hearing before the AFH is completed, and the comment period should be conterminous with the notice period for a public hearing on the AFH. Commenters stated that HUD has not shown any factual basis for a need for a public hearing prior to the AFH being issued for comment and public hearing. This additional public hearing requirement will

only delay completion of the AFH an extra month — and given the realities of how recipients have handled AIs, this is time that cannot be lost.

Commenters urged HUD to eliminate the requirement of a public hearing before the AFH is published for comment and urged that the comment period start when the public notice of the public hearing on the draft AFH is published. Commenters stated that the time period should be no less than 30 days.

HUD Response: As stated in response to the preceding comment, HUD believes that a public hearing can be a useful vehicle for involvement of the public on a program participant's AFH. HUD also believes that the final rule's scheduling of the public hearing is at the appropriate time – that is, while the AFH is in development so that a program participant may take into consideration the views and recommendations of the affected community. This is the approach taken for the consolidated plan. A public hearing is held during the development of the consolidated plan, not after the consolidated plan is completed. HUD is taking this same approach for the AFH because, in HUD's experience, it will yield valuable information from the community to inform the program participant regarding the identification of fair housing issues, contributing factors, goals, and priorities.

Comment: Separate public hearings must be required for AFH performance reports. Commenters stated that there must be a separate public hearing for the performance reports pertaining to the AFH and consolidated plan. The commenters stated that the CDBG statute, the basis for the Consolidated Plan regulations, calls for "public hearings to obtain citizen views and to respond to proposals and questions at all stages of the community development program, including at least the development of needs, the review of proposed activities, and review of

program performance" [42 U.S.C. 5304 (a)(3)(D)]. Commenters stated that the same must be required of AFH performance reports.

HUD Response: HUD encourages transparency, but will not require a separate public hearing for the performance reports related to the consolidated plan. HUD's regulations already provide for public input on performance reports for participating jurisdictions; e.g., § 91.105(e)(1).

Comment: Meaningful public participation of targeted populations will require technical assistance. Commenters stated that public participation by members of protected classes should be more strongly emphasized. Commenters stated that, in those places that have a disproportionately low share of protected class members as compared to surrounding cities or counties, the final rule should incorporate a requirement to conduct outreach to protected class members who live in those other places (e.g., those who commute to jobs from those other places).

Other commenters stated that while the citizen participation plan of the consolidated plan is "designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used," the consultation requirements in § 91.105(a)(2) limit participation to organizations "that have the capacity to engage with data informing the AFH." (See also § 91.100(e).) Commenters stated that the rule provides no guidance about what is meant by these qualifications. Commenters expressed concern that these qualifiers may be used by some participants to exclude from the AFH process organizations that have meaningful experience to share but lack sophisticated data analysis expertise. The commenters stated that rule should not imply that groups that lack the ability to conduct data analysis themselves cannot participate

meaningfully in a discussion about the implications of such analysis or the steps that should be taken to overcome problems identified through such analysis.

Other commenters stated that with respect to the consultation requirements in § 91.105(a)(2), two factors must be considered: (i) that the low- and moderate-income persons contemplated in the citizen participation plan are more than likely to participate in the development of the AFH and other policies through the structure and mobilization of community-based organizations, and (ii) that such community-based organizations generally lack the capacity to engage with technical data. The commenters stated that jurisdictions will achieve meaningful community participation through pro-active implementation of capacity-building strategies, including allocation of funds, as part of their duty to "take appropriate actions to encourage the participation by low- and-moderate-income persons." The commenters stated that the CDBG program calls on insular area jurisdictions to include in their citizen participation plans a policy regarding provision of technical assistance to groups that are representative of persons of low- and moderate-income. (See § 570.441(b)(2).) The commenters stated that AFFH rule should include similar requirements.

Other commenters also emphasized the importance of involving community-based organizations. The commenters stated that community-based organizations communicate quickly to families — much faster than any national entity, and that their materials for the public are highly culturally competent and in the community's preferred language. Commenters stated that these local groups have made the difference between a family losing or preserving their home. Commenters stated that these organizations stay in touch with families and maintain relationships that have been unmanageable by vast national programs.

Additional commenters similarly stated there are very positive provisions for community involvement in the planning process but no support for capacity building is identified in the rule itself. Commenters stated that the effectiveness of community engagement will depend on existing community capacity, unless additional support is included in 2015 budget.

HUD Response: The commenters raise very important issues that need to be taken into consideration when program participants are planning outreach efforts. The issues raised by commenters also underscore the importance of allowing program participants to tailor outreach efforts to ensure effectiveness given the populations in their areas, and that HUD should not prescribe a list of outreach actions that a program participant must undertake. The program participants are in a good position to tailor outreach methods that will provide for meaningful actions.

However, as stated in responses to prior similar public comments, HUD has revised § 5.158 in this final rule to strengthen the community participation requirements by directing program participants to employ communications methods that are designed to reach the broadest audience, and that are conducted in accordance with fair housing and civil rights laws, including title VI of the Civil Rights Act of 1964 and the regulations at 24 CFR part 1; section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable. In addition, HUD will be providing technical assistance on techniques to encourage participation by the groups that otherwise may not participate. HUD will also review the results of the program participants' community participation process as part of its review of the AFH.

Comment: Program participants should be required to document activities targeted to obtain input from protected classes, and identify the organizations with whom they consulted.

Commenters stated that program participants should be required to document how their community engagement activities will target protected classes. Other commenters suggested that the rule require program participants to identify the organizations with whom they consulted.

HUD Response: The AFFH final rule at § 5.158 requires program participants to consult with the agencies they identify in their PHA Plan or consolidated plan. Program participants are also required to retain records of their community participation efforts, which would be available if HUD investigates a complaint or conducts a compliance review relating to a program participant's duty to affirmatively further fair housing. (See § 5.168.)

Comment: Include real estate and housing professionals in the AFH planning process. Commenters stated that the real estate profession is a diverse profession today and has first-hand experience in addressing housing issues in a community, and that the inter-related issues of housing, education, transportation and economic development are front and center issues for real estate. Commenters stated that each individual REALTOR® and other real estate professionals are intimately familiar with their community and the issues impacting housing choices, and they provide an invaluable resource, particularly the real estate professional serving, and part of, today's multi-ethnic and diverse communities, needs to be invited to participate in the planning process. Commenters stated that similarly, property owners, landlords and business owners all have a personal stake in the decisions flowing from the AFH process. Commenters further stated that while not directly impacted by the rule, the interactions of these individuals with covered program participants, be they local PHAs or municipal governments, can be seriously affected by decisions flowing from the AFH process, and that these important providers of jobs, housing opportunities and local economic activity — strongly committed to fair housing principles — must be assured a maximum voice in the community participation process. The commenters

stated that consultation with state housing finance agencies and the National Council of State Housing Agencies would be helpful in ensuring that State level concerns are appropriately addressed in the final rule.

HUD Response: The commenters identify important groups and organizations that would lend valuable perspectives during the AFH planning process. Identification of these groups underscores the importance of designing a meaningful participation process to ensure that all interested parties have the opportunity to have a voice in the development of the AFH.

Comment: Require each program participant to identify a coordinating entity to oversee the public participation process. Commenters stated that community participation is a critical component of the process, and how participants engage members of their community, as well as how those views are eventually represented or reported in the AFH, will substantially impact the success of the AFH process. Commenters stated that in order to realize the goals embedded in the rule, the community participation component must be significantly strengthened in a number of ways, one of which would be to have each AFH identify a coordinating entity that will oversee the process. Commenters stated that this coordinating entity (CE) would be comprised of all elements of stakeholders, including public, private, academic, and community-based representatives, and the coordinating entity would develop a comprehensive community-organizing plan that encompasses all parts of the community in the process. The commenters stated that both public and private funds should support the establishment and implementation of this CE, which will act as an organizing and monitoring entity.

HUD Response: The commenters have provided an innovative approach to the AFH community participation process, and program participants are free to adopt such approach but it

is not one that HUD will mandate by regulation. (See § 5.156(d).) The entity that is ultimately accountable for the community participation process is the program participant.

Comment: The AFH consultation process requires program participants to seek input from fair housing stakeholders, but this requirement is not in the citizen participation provisions. Commenters stated that while the description of the AFH consultation process requires participants to seek input from fair housing stakeholders, this requirement does not carry through to the citizen participation provisions. Commenters stated that the citizen participation requirements are much more general, and only require that citizen participation plans "provide for and encourage citizens, residents and other interested parties to participate in the development of the AFH, any significant revisions to the AFH, the consolidated plan, any substantial amendments to the consolidated plan, and the performance report. Commenters stated that to ensure a strong linkage between the AFH and the consolidated plan and public housing plan, the consultation provisions of the AFH should also be applied to the citizen participation plans for the applicable programs.

HUD Response: Through the consultation process, HUD directs program participants to consult with organizations that administer housing, organizations experienced in housing issues, and organizations experienced in fair housing issues. The AFH's community participation process is designed to reach out to the residents of the community or geographic area in which the program participant operates, and there is no requirement that the citizens be experienced in housing issues or fair housing issues. However, the rule's provision on community participation is flexible enough so as to permit fair housing groups to be among the "interested parties" that may participate in hearings alongside other members of the public.

Comment: The mandate to ensure meaningful access to citizen participation by persons

with Limited English Proficiency is too broad. Commenters stated that the citizen participation requirement, which states that, "at a minimum, the citizen participation plan shall require that the local government take reasonable steps to provide language assistance to ensure meaningful access to citizen participation by persons with limited English proficiency" is too broad and, given the multitude of the various languages spoken in a given area could constitute a substantial level of expense to provide language assistance.

HUD Response: The "mandate" is one of taking "reasonable steps." HUD recognizes that it may not be reasonable for local governments to assist all LEP persons because of the wide variations of languages that may be spoken in a given area. However, HUD further notes that it is a violation of title VI of the Civil Rights Act to deny meaningful access to programs and activities based on a person's national origin. Program participants should be aware of the languages spoken by LEP persons in their jurisdiction and take the steps set out in HUD guidance to assure access under title VI.

Comment: HUD should require LEP translation, not simply require reasonable steps to assist LEP individuals. Commenters stated that the final rule should require jurisdictions to provide and implement a citizen participation plan that accounts for people with limited English proficiency and persons with disabilities, and not simply require that reasonable steps be taken to assist LEP individuals. Commenters stated that, in the alternative, HUD should adopt, in the regulatory text, certain preamble language. Commenters stated that the preamble to the proposed rule stated that the requirement in proposed § 91.105(a)(4) to provide meaningful access within the public participation process to LEP persons "strives to have local governments involve these individuals to the maximum extent possible." The commenters recommended that the preamble language be included in the regulatory text but revised to read, "…the maximum extent possible,

and in compliance with title VI and other laws requiring meaningful access to LEP persons." The commenters stated that this strengthened language highlights the importance of language access, and serves as a reminder that in certain cases, jurisdictions may have obligations beyond voluntary compliance with respect to ensuring meaningful access to LEP persons.

Commenters stated that while HUD's rule proposed to amend the Consolidated Plan regulations to require that the citizen participation plan include an assessment of language needs, no such provisions are included in the proposed amendments to regulations concerning the PHA Plan process at 24 CFR part 903. Commenters ask that § 903.17(c) be amended to require that PHAs: (1) include outreach to LEP populations in its outreach activities within the jurisdiction, and (2) identify the need for translation of notices and vital documents with respect to the PHA Plan process. The commenters also asked that HUD require PHAs conducting public hearings pursuant to § 903.17(a) to describe how they will identify and address the needs of LEP attendees.

HUD Response: Requirements related to LEP derive from title VI of the Civil Rights Act of 1964 and Executive Order 13166, and HUD's LEP guidance at 72 FR 2732 (January 22, 2007). Under HUD's guidance, funding recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. The HUD LEP guidance discusses title VI's requirements for document translation and the provision of language assistance. For this reason, HUD declines to mandate the specific measure that the commenters suggest; rather, the requirement to take "reasonable steps" applies to all program participants and all program participants' programs and activities. As noted earlier in this preamble, this final rule, in § 5.158, states that program participants should employ communications methods designed to reach the "broadest audience." This language includes involving LEP persons to the

maximum extent possible. On the issue of public hearings, HUD believes that the inclusion of measures to include LEP persons in the community participation process that is part of the PHA planning process is sufficient.

Comment: HUD's communication mandates to program participants must go beyond assisting LEP individuals; it must include persons with disabilities. Commenters stated that reasonable accommodations for persons with disabilities are essential to ensuring that all residents of a jurisdiction may access the proposed AFH plan, and provide meaningful input into its development. The commenters stated that in order to ensure that residents with disabilities can participate in each step of the AFH plan, it will be necessary for the jurisdiction's proposed plan and materials to be available in formats accessible to people with communications disabilities, for any public hearings or meetings to make available sign language interpreters or other appropriate auxiliary aids and services, and for the physical buildings hosting the public hearings or meetings to be accessible to persons with disabilities.

HUD Response: HUD has modified the final rule to make clear to program participants that community participation (like all other programs, services, and activities) must be accessible to persons with disabilities. The access issues discussed by the commenter all fall within existing requirements of section 504 of the Rehabilitation Act and the Americans with Disabilities Act that are applicable to program participants.

Comment: HUD must define "vital document." Commenters stated that it is imperative that the final rule define what is meant by "vital documents" as used in Consolidated Plan regulations at § 91.105(a)(4) (Local governments) and § 91.115(a)(4) (States). The commenters stated that while the term appears throughout HUD's "Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination

Affecting Limited English Proficient Persons" (HUD LEP Guidance), the term should be defined specifically in the context of the citizen participation process with respect to an AFH. The commenters stated that "vital documents" in the HUD LEP Guidance describe those documents that are "critical for ensuring meaningful access." The commenters stated that, borrowing language from that definition, they propose that the final rule include a definition of "vital document" as describing "those documents and other materials that are critical for ensuring meaningful access to the community participation process."

HUD Response: HUD appreciates the recommendations, but declines to define this term for the AFH process. This term has been defined for quite some time in HUD's LEP Guidance. HUD therefore does not see the need to define this term in regulation but will continue to provide support through guidance. HUD notes that, in general, documents related to public participation would be considered vital based on HUD's LEP Guidance.

Comment: Require program participants conducting public meetings to track the languages spoken at the meeting. Commenters stated that program participants conducting public meetings/hearings regarding the AFH should be required to track the languages spoken by meeting attendees. The commenters stated that this information will inform program participants' subsequent assessments of language needs, and that if a program participant finds that LEP persons are continually underrepresented at public meetings/hearings, it must take steps, outlined in its assessment of language needs, to improve attendance by LEP residents.

The commenters stated that the final rule should note that jurisdictions needing guidance in determining which language groups require translated vital documents and notices should consult with the four factor analysis detailed in the HUD LEP Guidance, which is a balancing test that considers the following: (1) the number of LEP persons served or likely to be served or

encountered; (2) frequency of contact with LEP persons; (3) importance of the activity or program at issue; and (4) available resources. The commenters stated that this test can provide jurisdictions with an initial snapshot of the language access needs for the purposes of ensuring effective citizen participation, including what languages should be covered.

HUD Response: HUD appreciates the suggestion and commends any program participant that undertakes the effort to track languages spoken at meetings, since this information would be evidence of effective outreach to persons with LEP, as required by title VI of the Civil Rights Act, in the event HUD receives a complaint or conducts a compliance review on this issue. However, HUD declines to mandate such tracking.

8. Collaboration, Consultation, and Other Planning Efforts

Comment: The consultation requirement does not appear to apply to PHAs. Commenters stated that while it is clear that the consultation requirement applies to States and local jurisdictions that are required to produce consolidated plans (see §§ 91.110(a)(2) and 91.100(e), respectively), this consultation requirement does not appear to apply to PHAs and it should.

HUD Response: HUD disagrees with the commenters. Consultation requirements for PHAs are fundamentally different as direct consultation is focused upon the residents served. This takes place through specific consultation of the Resident Advisory Board (see § 903.13), as well as residents in the HCV program. Public participation requirements for PHAs also require that PHAs "conduct reasonable outreach activities to encourage broad public participation" and take a number of actions to ensure such participation occurs (see § 903.17). HUD Guidance also directly specifies interaction with difficult to reach groups such as those with LEP (PIH Notice 2011-31[13]).

[13] See http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2011-31.PDF.

Comment: Require jurisdictions to consult with financial institutions. Commenters stated that HUD should require jurisdictions to consult with local financial institutions about issues related to access to credit and mortgage lending as part of the development of the AFH. Commenters also stated that HUD should require jurisdictions to consult with community development financial institutions (CDFIs) and to review local financial institutions' Community Reinvestment Act (CRA) public performance reports as part of preparing the AFH.

HUD Response: HUD encourages jurisdictions to consult with financial institutions as suggested by the commenters, and encourages financial institutions to participate in community participation processes, but HUD declines to require jurisdictions to undertake consultation with financial institutions.

Comment: Provide guidance on what is meant by "sufficiently independent and representative." Commenters stated that HUD should provide clarification regarding the rule's consultation requirements at § 91.100, specifically, the requirement that organizations be "sufficiently independent and representative." Commenters stated that many community organizations with valuable input are also CDBG subgrantees. Commenters requested that HUD should ensure the rule's more clear linkage of the AFH to the consolidated plan process does not exclude those subgrantees representing protected classes from the AFH consultation process.

HUD Response: The broad citizen participation requirements under § 91.100 are intended to include consultation with a wide variety of public and private agencies, local governments, and PHAs. The proposed rule provided additional language that emphasizes that "sufficiently independent and representative" organizations must be consulted on the obligation to affirmatively further fair housing, but such language is not intended to exclude subgrantees or other interested organizations from the consultation process.

Comment: Other planning efforts must include Qualified Allocation Plan and Metropolitan Transportation Plan. Commenters stated that there are two other sets of plans and programs that should be coordinated with the AFH fair housing planning effort – the Low Income Housing Tax Credit (LIHTC),[14] Qualified Allocation Plan, and the Department of Transportation's (DOT's) Metropolitan Transportation Plan (MTP) and/or Transportation Improvement Plan (TIP). Commenters stated that given the volume of the LIHTCs and studies indicating LIHTC-financed projects are often located in areas of concentrated racial or ethnic poverty, the availability of LIHTCs and the Qualified Allocation Plan (QAP) process should be included in the AFH analysis and AFFH certification consideration. The statute requires QAP selection criteria to include, among other factors, the location of proposed projects and the needs of two protected classes, special needs populations and families with children. The MTP is a planning document that considers goals, strategies, and projects with a 20-year time horizon; and this plan is updated every 5 years. The commenters stated that the TIP is a statement of proposed transportation investments that is updated every 4 years. The commenters stated that Metropolitan Planning Organizations (MPOs), which have a comprehensive public participation process, are responsible for these planning endeavors. The commenters also stated that there is also a parallel statewide process, and that is Transit-Oriented Development, which is the siting of transit lines and transit stops, bus routes and frequency. The commenters stated that these planning efforts work to prevent segregation and are important informing fair housing planning. Commenters requested that QAP, MTP, TIP be included in required planning efforts.

Other commenters stated that as the largest producer of affordable housing in this country, the LIHTCs must be a part of the AFH planning process. Commenters stated that

[14] Although the popular terminology is low-income housing tax credit or LIHTC, the correct legal name is Low-Income Housing Credit. The word "tax" is not in the legal name.

inclusion of LIHTC is especially important since, according to the commenters, LIHTC funding is limited to Qualified Census Tracts, which bear a strong resemblance to concentrated areas of poverty.[15] Commenters stated that LIHTC is also one of the funding vehicles for rehabilitating or producing HUD-supported housing, such as mixed-finance public housing developments, rehabilitated project-based Section 8 developments, Sections 202 and 811 properties, and supportive housing under the McKinney-Vento program. Commenters stated that HUD should be coordinating its enforcement of the duty to affirmatively further fair housing with the Department of Treasury and making all efforts to have Treasury incorporate the principles of affirmatively furthering fair housing into its administration of the LIHTCs.

In contrast to these commenters, other commenters stated that requiring AFH planning to be coordinated with other plans by other agencies is a legal stretch and is problematic in implementation. These commenters stated that HUD should not mandate coordination with any plan or programs that are beyond the control of the program participant and over which HUD does not have jurisdiction. Commenters stated that coordination with other Federal agencies should not be required because just getting all HUD entitlements to cooperate and line up consolidated planning processes would be a monumental task. They stated that asking jurisdictions also to line up with additional Federal agencies is not feasible.

Commenters stated that it is unclear how the AFH and the QAP for LIHTC would successfully meld together given these conflicting goals. The commenters stated that the goals of LIHTC do not match the goals of the AFFH rule. Commenters stated that LIHTC, New

---

[15] Contrary to the commenters' statement, tax law does not limit LIHTCs to buildings located in Qualified Census Tracts. Rather one of the three types of proposed projects to which allocating agencies must give preference is "projects which are located in qualified census tracts … and the development of which contributes to a concerted community revitalization plan" (emphasis added; citation omitted). Many LIHTC projects are appropriately located in locales that are not Qualified Census Tracts.

Market Tax Credit (NMTC), and Enterprise Zones actually encourage or prioritize development of projects in areas of low-income households. The commenters stated that for the LIHTCs there is, in fact, a basis boost for locating projects in Qualified Census Tracts (areas of low-income concentration) specifically to encourage the construction of multifamily projects in these areas/communities.

HUD Response: Commenters have identified some planning processes being undertaken by other Federal agencies. If HUD program participants are involved in any of these planning efforts, these should be addressed in their AFH, and the Assessment Tool provides for such inclusion. HUD agrees that coordination with these other planning efforts will enhance a program participant's assessment of fair housing. HUD declines, however, to mandate in the regulation coordination with these other planning processes.

In response to the specific comments on the use of Federal programs that encourage redevelopment of or investment in low-income neighborhoods, the use of various strategies including redevelopment or preservation of existing affordable housing is not necessarily at odds with the planning requirements in this regulation.

Comment: Clarify the composition of a Fair Housing Advisory Council. Commenters stated that the term Fair Housing Advisory Council could be interpreted to allow a jurisdiction to meet the consultation requirement by only engaging a hand-picked advisory council while avoiding consultation with any of the fair housing organizations listed at the beginning of the entire section (such as Fair Housing Initiative programs (FHIPs)) and other public and private fair housing service agencies). Commenters requested that HUD clarify the composition of such councils.

HUD Response: HUD agrees with commenters' concerns and did not intend to allow for

a Fair Housing Advisory Council to be considered a replacement for the broader consultation requirements in part 91.

Rule change. HUD has removed the language regarding Fair Housing Advisory Councils in proposed §§ 91.100(e) and 91.110(a)(2). In lieu of rule language, HUD intends to provide guidance on models for meeting the consultation requirements, which may include Fair Housing Advisory Councils.

Comment: Convene a Partnership on Sustainable Communities or Reconvene the President's Council on Fair Housing. Commenters stated that there is more that HUD could do, through its own planning efforts, and these include convening a Partnership on Sustainable Communities along with other Federal agencies and offices that are responsible for housing, fair housing, civil rights, or equal opportunity outcomes, to develop a strategic plan to address cross-agency action towards regional fair housing and civil rights goals that support both mobility and investment goals. The commenters also stated that the President's Council on Fair Housing, originally established under President Clinton's Executive Order 12892 to foster access to opportunity and integration strategies across Federal agencies should be reconvened.

HUD Response: HUD appreciates these suggestions from the commenters and will take these under consideration as ways in which HUD and other Federal agencies may be helpful to jurisdictions and other program participants in carrying out their obligation to affirmatively further fair housing.

Comment: HUD must work closely with the U.S. Department of Transportation (DOT) in assisting program participants to affirmatively further fair housing. Commenters stated that HUD must work with DOT staff to share AFH data on segregation, concentrated poverty, and access to opportunity trends – and identify ways that MPOs and transit agencies can align AFH

with the DOT's equity and environmental justice analyses per their title VI obligations. Commenters stated that the two agencies should provide guidance for regions and jurisdictions that assist in aligning AFH-Consolidated Plans-Public Housing Plans-and Regional Transportation Plan timelines and goals so that they can achieve integrated, coherent use of their HUD and DOT resources.

HUD Response: HUD appreciates these suggestions and is working with DOT to share data that enhances the planning processes of both agencies.

Comment: Consultation requirements for States exceed those required by statute. Commenters stated that the "consultation" requirements for States appear to greatly expand the requirements under QHWRA, in a way that does not appear to have a legal basis under either QHWRA or Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act). Commenters stated that the "consultation" requirements go far beyond consultation and actually require the State to help the PHA remedy its fair housing violations. Commenters stated that the only requirement under QHWRA is that States discuss how they will help "troubled" PHAs with financial or technical assistance, as set forth in their comprehensive housing affordability strategy (CHAS) or consolidated plan (Consolidated Plan). Commenters further stated that QHWRA specifically defines a troubled PHA as one whose physical units do not meet "acceptable housing conditions," and the statute states that if public housing is distressed, the solution is for the PHA to "voucher out" the PHAs residents.

Commenters stated that § 91.110 of the proposed rule states that "If a PHA is required to implement remedies under a Voluntary Compliance Agreement, the State should consult with the PHA and identify the actions it may take, if any, to assist the PHA in implementing the required remedies." The commenters stated that this provision goes far beyond QHWRA, which only

speaks to assisting troubled PHAs with financial or technical assistance, and that by stating that the State has an obligation to help a PHA, the rule shifts the burden from the PHA to the state to address problems created by the PHA or other non-state entity.

Commenters stated that this same regulatory section states that: "The State shall consult with any state housing agency administering public housing concerning consideration of public housing needs, planned programs and activities for the AFH, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing, and proposed actions to affirmatively further fair housing." Commenters stated that while "all state agencies administering public housing" could refer to State agencies only, it could also be interpreted to mean any PHA operating in the State, including those in entitlement jurisdictions.

Commenters concluded by stating that HUD needs to clearly say that the State consultation only applies to PHAs located in non-entitlement jurisdictions, and that the language in the proposed rule that says the State should identify what actions the State should take to assist the PHA when the PHA is implementing the required remedies should be removed as it has no legal basis under the QWHRA or other legislation that of which the commenters are aware.

Other commenters similarly stated that under the State Consultation Requirements in § 91.110(a)(2), which provides that the "State shall consult with state and regionally-based organizations that represent protected class members…and other public and private fair housing service agencies, to the extent such agencies operate in the State," HUD needs to be clear that this applies to such entities and regional organizations that operate in the State's non-entitlement jurisdictions, and that the focus should be on the non-entitlement areas in these consultations.

<u>HUD Response</u>: HUD disagrees that the consultation requirements imposed on States exceed statutory authority. With respect to a PHA under a voluntary compliance agreement

(VCA), the language in § 91.110(a)(1) encourages States to consult with such PHA. There is no mandate to provide funding for those PHAs under a VCA.

In response to comments that the States have a very different role from entitlement jurisdictions, HUD is developing an Assessment Tool especially for States that will take into consideration the different role of States.

9. Consolidated Plan

Comment: Standards by which HUD will measure strategies and actions in Consolidated Plan are unclear. Commenters stated that the standards by which HUD will measure the strategies and actions in the consolidated plan and Annual Action Plan are unclear. Commenters stated that the proposed rule and guidance reiterate that jurisdictions will be able to choose the strategies in the consolidated plan and the actions in the Annual Action Plan that will be used to support the goals in the AFH, but that detailed guidance is needed for jurisdictions to understand the standards by which HUD will review the strategies and actions supporting AFH goals in the consolidated plan and Annual Action Plan. Commenters stated that these changes to the Annual Action Plan regulations do not include information about consequences, like withholding of grant funds, if HUD does not approve the strategies or actions listed in the consolidated plan or Action Plan. Commenters stated that although there is a clear relationship between the AFH and consolidated plan and Annual Action Plan, the final rule should clearly state the expectations of how each document should relate. Commenters stated that, for instance, it is unclear whether all priorities and goals identified in the AFH must be addressed in strategies in the consolidated plan and whether each Annual Action Plan must include actions to address all priorities and goals in the AFH. Commenters stated that no changes were made to the Consolidated Annual Performance and Evaluation Report (CAPER) regulations, and that it is unclear whether HUD's

review of actions carried out in support of AFH goals will be altered when reviewing the CAPER after the final rule is in effect. Commenters stated that clarity on HUD's expectations regarding reporting requirements is needed.

HUD Response: The standard of review of the consolidated plan at § 91.500(b) is unchanged by this rule. A plan will only be disapproved if it is inconsistent with the consolidated plan statute (Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12703 et seq.)) or the plan is substantially incomplete. With respect to the latter, based on this rule's requirements at §§ 91.215, 91.315, and 91.415, a strategic plan must include how its priorities and objectives will affirmatively further fair housing consistent with the goals and other elements in the assessment, and will identify additional objectives for any goals that are not addressed. Therefore, for a strategic plan to be complete and meet HUD review standards, a jurisdiction must at a minimum identify strategies and actions to overcome the contributing factors and show how it plans to address each of the goals identified in the AFH (although it is not necessary to be a one-for-one match up as a single strategy may address multiple goals or a combination of strategies may address a single goal). In turn, the annual action plan will require the jurisdiction to describe the actions it plans to take in a particular year that address goals identified in the AFH (see §§ 91.220, 91.320, 91.420). If the substantive elements of the consolidated plan or annual action plan are not included in a consolidated plan, the plan may be disapproved as substantially incomplete. See § 91.500(b) of the Consolidated Plan regulations, which provide examples of actions that may result in a determination by HUD that the plan cannot be accepted or is substantially incomplete.

In this regard, a consolidated plan or annual action plan may also be disapproved as substantially incomplete if the AFFH certification is rejected by HUD, after HUD has

determined the certification to be inaccurate based on inspection of evidence and provided the program participant an opportunity for notice and comment. New AFFH certification language at §§ 91.225, 91.325, 91.425, and 903.15(d)(3) provides the standard under which HUD will review the validity of AFFH certifications.

HUD further notes that, under the Fair Housing Act and program statutes, program participants are ultimately responsible for affirmatively furthering fair housing, not just developing an AFH with goals and priorities and planning documents with strategies and actions. It is the program participants' responsibility to affirmatively further fair housing and to set, evaluate, and readjust goals, priorities, strategies, and actions to fulfill that legal duty.

Comment: Additional attention needs to be paid to impact on HOME consortium. Commenters stated there is insufficient guidance on the changes that will be necessary to the HOME consortium grant agreement for HOME Consortia, and reference to their re-certification process under the State's Consolidated Plan, regardless of renewal clauses contained in their current Consortia Agreements.

HUD Response: HUD will provide additional guidance as needed, as well as technical assistance on a case-by-case basis.

Comment: Require States to include language in their Consolidated Plans on how they will use their resources to assist with achievement of fair housing goals. Commenters stated that regional collaboration should be encouraged, and the new AFH regulations should require that States include language in their consolidated plans on how they will use resources to assist the regions with their fair housing goals. Commenters stated that an AFH is not intended for States and should not be forced on States merely for ease of administration. States are diverse and

should be given the flexibility to assist regional collaborations without having to fit into their mold.

HUD Response: The AFH includes States, but HUD recognizes that fair housing planning assessments by States will be different in scope and emphasis than entitlement jurisdiction. Therefore, as noted earlier in this preamble, and in the publication of the AFH Assessment Tool, HUD is developing a separate Assessment Tool for States.

Comment: The Consolidated Annual Performance and Evaluation Report (CAPER) can measure AFFH performance; program participants should continue to be allowed self-evaluation. Commenters stated that performance review by HUD of the Consolidated Plan regulations should be the same one used to assess how program participants have acted with respect to the goals they set out for affirmatively furthering fair housing. Commenters stated that feedback on progress of affirmatively furthering fair housing is included within CAPER, and this should continue to be a self-evaluation that is then reviewed by HUD. Commenters stated that HUD does not review CAPERs with any consistency, and that, for some years, a review letter comes within six months of the CAPER submission; other years there has been no letter at all. Commenters stated that jurisdictions across the country report similarly mixed responses from the various HUD field offices, and they asked why HUD would not hold all jurisdictions to the same level of review.

HUD Response: The annual performance reporting requirements at § 91.520, including the requirement to report on actions taken to affirmatively further fair housing, and HUD review requirements at § 91.525 are unchanged in this rule. Levels of review may vary based on priorities and resources. HUD takes note of the commenters' concerns about consistency in review.

Comment: Allow jurisdictions to match up planning cycle to next available cycle. Commenters recommended that jurisdictions be given the ability to match up planning cycles in the next available cycle. Commenters stated that this may require the PHA and or the consolidated plan length (3 to 5 years) to be shorter or lengthen to match up, but should be decided at the local level and approved by HUD. Commenters stated that matching up FYs is less important if the AFH is planned for and produced before the PHA/consolidated plan are due. Commenters stated that if a region wants to align their 5-year consolidated plan cycles to facilitate a regional AFH, according to, the commenters stated their understanding of existing rules, many jurisdictions would need to prepare a shorter consolidated plan – perhaps even just one or two years, further increasing costs and demands on scarce staff time in an upcoming 5-year period.

HUD Response: Jurisdictions already have the flexibility – and HUD intends to accommodate such flexibility – to change the submission date of its consolidated plan under § 91.10. This section explicitly allows changes, with HUD's agreement, to allow for strategic plans to stretch beyond 5 years for the purpose of aligning plans.

Comment: No additional public comment period is required for AFH, public comment period for CAPER and Consolidated Plan is sufficient. Commenters stated that the public comment periods for the CAPER and consolidated plan (15 and 30 days, respectively) are sufficient. Commenters stated that it seems that the AFH requirements of holding one public hearing, as well as consultation with various fair housing and similar groups, will fit into the current planning and reporting citizen participation process.

HUD Response: The AFH is a distinct document with data, analysis, and priority and goal setting that feeds into the consolidated plan. Further, public input is a fundamental and

necessary component in the AFH process. Jurisdictions may be able to appropriately conduct some outreach or hearings on both, but must be aware that submission timelines require that the AFH must be submitted 270 calendar days (for first AFHs) or 195 calendar days (for subsequent AFHs) before the start of the first program year to which the new housing and homeless needs assessment, market analysis, and strategic plan, as required by 24 CFR 91.15(b)(2), and referred to in the regulatory text as the "new consolidated plan" applies. It may be more likely that there be shared outreach efforts on a prior year action plan or performance report, but in any such case the AFH should be a distinct agenda item for any public hearing.

Comment: Recommendations for comment period for AFH. Commenters stated that the AFH review for public comment on consolidated plan participants should be a minimum of 45 days. Other commenters stated that HUD's rule should allow up to 30 days for public comment, allowing the program participant to decide on an appropriate comment period within these parameters. Yet other commenters stated that 15 days is insufficient time for public comment.

HUD Response: This rule sets the minimum public comment period for a jurisdiction at 30 days, the same period required for the consolidated plan. The minimum public comment period for a PHA remains 45 days under existing PHA Plan public comment requirements. Jurisdictions may choose to follow a longer public comment period, if desired.

Comment: Placing AFH community participation and consultation requirements in 24 CFR 91.110 and 91.115 creates certain issues for State grantees. Commenters stated that placing the community participation and consultation requirements applicable to the AFH in §§ 91.110 and 91.115 has the virtue of giving formal recognition to the distinctive character of State-level undertakings in connection with the two processes. Commenters stated that additional clarification may be needed to limit consultation obligations to entities that fall under the

coverage of the two processes—i.e. making consultation with entitlement localities or PHAs, for example, optional rather than mandatory where there is no state program coverage.

HUD Response: HUD has not changed the requirement in this rule, but only extended such requirements to the AFH process. As provided in the rule, the requirement for States is to consult with "any housing agency administering public housing or section 8 on a State-wide basis as well as all public housing agencies that certify consistency with the State's consolidated plan." (See § 91.110(a)(1).) HUD understands this requirement to limit required consultation to State level public housing agencies or those that certify consistency with the State's consolidated plan.

Comment: Consolidated Plan public participation requirements can be improved to achieve more meaningful public comment. Commenters stated that the consolidated plan public participation requirements could be improved to foster more genuine and complete public participation. Commenters stated that given the amount of information in a draft AFH or draft consolidated plan, a 60-day (60 calendar days) public review and comment period is warranted. Commenters stated that not only is there much to read and assess, community-based organizations need time for their members to process comments before presenting them at a hearing or later in writing (see § 91.105(b)(4)). Commenters stated that there must be an adequate amount of time between the availability of a draft AFH or draft consolidated plan and a public hearing to obtain public comments about it, perhaps 30 days. Commenters stated that advocates have experienced public hearings about draft consolidated plans within the current 30-day review and comment period, affording the public only one or two weeks to review the draft and prepare testimony (see § 91.105(b)(3)). Commenters stated that there must be a reasonable amount of time between the hearing about the draft AFH or consolidated plan and submission to

HUD for review, perhaps one to two weeks. Commenters further stated that advocates have experienced consolidated plans or PHA Plans submitted to HUD a day or two after a public hearing, not a sufficient amount of time for the jurisdiction or the PHA to have considered public or resident comment (see § 91.105(b)(5)). Commenters stated that in 1994 advocates called for a period of 60 days to review consolidated plan performance, and that given the importance of AFFH performance, there must be more than a 15-day review period. At a minimum 60 days is suggested in light of the next point – the need for a performance report hearing.

HUD Response: As stated previously in this preamble, the AFH regulations state the minimum public comment period. Program participants may set higher public comment periods. Citizen participation plans are also subject to citizen input. Participants are required to demonstrate in the AFH that they have considered community comments and how they have dealt with those comments. Just setting a minimum time period for consideration does not guarantee that the time will be used for the purpose of review, which is why HUD will instead look to the summary of citizen input and responses as demonstration that public input was considered. Further, it is up to jurisdictions to decide how to appropriately schedule public hearings, so long as the scheduling is done in a manner that makes the hearing accessible to all and promotes public participation. While HUD will not require all participants to hold separate hearings on performance reports, jurisdictions may choose to do so.

Comment: Make all comment periods for all reports the same. Commenters stated that comment periods for all reports should be the same to create a reliable schedule community members can depend on.

HUD Response: It is HUD's position that not all reports warrant the same period of public comment. HUD has set public comment period for the AFH in line with the consolidated

plan and annual action plan requirements (e.g., 30 days). The performance report comment period of 15 days is unchanged by this rule and reflects the nature of the document as reporting out of actions taken rather than a proposal for future action that may be subject to more public debate.

Comment: The new certifications at § 91.225 and in part 903 are too broad. Commenters stated that requiring a program participant, at § 91.225, to certify that "it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing" is too broad of a legal standard, and may result in increased litigation spurred by individual instances, or decisions of the State or a State recipient that one or more parties may feel is inconsistent with an AFH, even though a State's actions, on the whole, affirmatively further fair housing as set forth under the AFH and other related program requirements. The commenters stated that these decisions may be related to non-housing community assets over which State housing program administrators have no knowledge or control, or may relate to actions of individual state recipients over which the state has no legal authority.

PHA commenters stated that the proposed certification sets forth an unreasonable expectation. The commenters stated that under this standard, a PHA would be hard-pressed to justify capital improvements on a property that exists in a neighborhood lacking community assets, and that similarly, a PHA would struggle to explain how lowering their voucher payment standard in order to be able to stretch their budget and continue to serve the same number of families meets the definition of “affirmatively furthering fair housing.”

Other commenters stated that the program participants do not know what “materially inconsistent means in the certification; that HUD offered no explanation of its meaning. The commenters asked who decides what is “material” and what are the criteria for being deemed

"materially inconsistent." The commenters stated if HUD does not define this term and does not identify criteria that it will use to review and approve AFHs, then HUD must exercise flexibility in interpreting this provision. Commenters stated that under the proposed rule's definition of affirmatively furthering fair housing, which can be read to discourage investments in existing low-income neighborhoods, the certification can be challenged on the basis that investments in poverty/minority concentrated neighborhoods are a violation of affirmatively furthering fair housing, because the effect of such investment does not "expand access to high opportunity neighborhoods" and develop "investment possibilities in underserved communities."

Commenters stated that HUD must provide certification that has clear standards for meeting compliance standards; that program participants should not bear the burden of providing that they have complied with ill-defined and changeable standards.

Commenters recommended that HUD should add language to the AFFH certification to more clearly state its meaning of the certification – that HUD should adopt the language from the Westchester consent decree, requiring that in certifying compliance with the obligation to affirmatively further fair housing, the jurisdiction or PHA acknowledges that "the location of affordable housing is central to the fulfilling the commitment to affirmatively further fair housing because it determines whether such housing will reduce or perpetuate residential segregation." Other commenters recommended the final sentence of the certification state preservation of affordable housing and investment in areas of racial or ethnic concentrations of poverty are not actions necessarily materially inconsistent with the obligation to affirmatively further fair housing.

<u>HUD Response</u>: The commenters concerns about the certification provisions largely arise from concerns that HUD's rule did not assure a balanced approach and that participation in

HUD or other Federal housing programs serving specified populations may be viewed as a violation of the duty to affirmatively further fair housing. HUD has already addressed both of these concerns in this preamble by advising of revisions in this final rule to the "purpose" section of the regulation and to the definition of "affirmatively furthering fair housing," and by inclusion of a definition of "housing programs serving specified populations."

HUD does not believe the standard of material inconsistency is overly broad. The obligation to affirmatively further fair housing is a statutory obligation, and the certification provisions simply restate the fact that a participant cannot act in a way that is inconsistent with its legal obligation. Unrelated types of actions would not be materially inconsistent; there would have to be some relationship between the action and the obligation to affirmatively further fair housing. HUD would review the AFH and certification and determine if the actions planned to address the goals in the AFH, or the actions that are taken by the program participant, including those based on the AFH, are materially inconsistent with the obligation to affirmatively further fair housing. If they are, HUD would review the certification under existing procedures in 24 CFR part 91 or the procedures in § 903.15(d)(3) to determine whether the statutory duty is violated.

HUD believes that the certification language is appropriate and consistent with statutory requirements and, therefore, makes no change in this final rule.

<u>Comment: Certification should clarify the duty to affirmatively further fair housing with respect to non-federal funds</u>. Commenters asked that the certification at § 91.225 provide that a program participant will take no action, "whether using federal funds or not," that is materially inconsistent with its obligation to affirmatively further fair housing. The commenters stated that this same phrase should be added to the certification language at § 91.325 and § 91.425.

Commenters further stated that the applicability of the duty to affirmatively further fair housing to all housing and community development resources could be strengthened by including language similar to that used by the Federal Transit Administration in its update of guidance on title VI of the Civil Rights Act. The commenters stated that the guidance includes the following language: "Title VI prohibits recipients of Federal financial assistance (e.g., states, local governments, and transit providers) from discriminating on the basis of race, color, or national origin in their programs or activities, and it obligates Federal funding agencies to enforce compliance."

Other commenters, however, stated that the certification should not pertain to activities that do not involve HUD or other Federal funds.

HUD Response: HUD believes the existing certification appropriately reflects the scope of actions to which the program participant must certify.

Comment: Certification should be both prospective and retrospective. Commenters stated that any jurisdiction other than one that is submitting a certification for the first time should be obliged to make a retrospective representation about AFFH compliance.
The commenters stated that a jurisdiction should be required to make explicit the fact that it is making a certification with the intention that HUD rely on it without conducting an independent investigation. The commenters recommended that the certification requirement in the final rule read as follows: "Each jurisdiction is required to submit a certification that it has and will affirmatively further fair housing, which means that: (a) it has and will take all meaningful steps possible to overcome barriers to fair housing choice that exist in or are contributed to by the jurisdiction; (b) it has not and will not take any action inconsistent with its obligation to affirmatively further fair housing; and (c) it has not and will not fail to act where such failure to

act has been or would be inconsistent with its obligation to affirmatively further fair housing. The certification shall include a statement from the jurisdiction that it is representing that the certification is true, complete, and based on supporting evidence, and that it understands that HUD is entitled to rely upon such certification without conducting an independent investigation."

HUD Response: HUD disagrees with the recommendation to change the language of the certification. Program participants are subject to certifications to AFFH for all periods of time during which funds are received from HUD. Therefore, if a program participant did not affirmatively further fair housing in a prior time period when HUD funds were received, it was in violation of a prior AFFH certification. HUD notes that the commenter is correct that HUD relies on certifications for purposes of extending funding to program participants. However, HUD sees no need to include this language in the regulation, since funding is conditioned on the certification and, if the certification is inaccurate, HUD has existing processes to investigate or challenge it.

10. Definitions

Comment: The definition of "affirmatively furthering fair housing" is improved but can be read as discouraging investments in existing low-income neighborhoods. Many commenters stated that the regulation's proposed definition of affirmatively furthering fair housing is more straight forward than the previous definition and that increased clarity will promote greater compliance by participants in Federal programs. Commenters specifically pointed to phrasing in the definition which states that affirmatively furthering fair housing means taking proactive steps beyond combating discrimination.

However, other commenters stated that HUD's definition can be read as discouraging investments in existing low income neighborhoods. The commenters stated that HUD's definition makes no mention of the kinds of investments in underserved communities that have been shown to improve those neighborhoods, such as quality affordable housing, and can be read as explicitly excluding affordable housing investments in low-income minority communities. Commenters stated that under this definition, virtually any investment in poverty/minority concentrated neighborhoods can be attacked under this provision.

HUD Response: As noted earlier in this preamble, HUD did not intend to indicate that an investment in a neighborhood of racial or ethnic concentration of poverty is not an acceptable means of affirmatively furthering fair housing. Such investments may be an acceptable means of affirmatively furthering fair housing when designed to achieve fair housing outcomes such as reducing disproportionate housing needs, eliminating RCAPs/ECAPs, increasing integration, and increasing access to opportunity, such as high performing schools, transportation, and jobs. HUD believes that the clarifications and changes made to the purpose section and the definition of "affirmatively furthering fair housing" demonstrate that the final rule supports a balanced approach.

Rule change and clarification. In § 5.150, HUD revises the purpose and in § 5.154(d)(5) HUD adds strategies and actions, to clarify HUD's support for a balanced approach to affirmatively furthering fair housing. Additionally, as noted earlier in this preamble, HUD has replaced the term "proactive steps" with "meaningful actions" in the definition of "affirmatively furthering fair housing" to clarify the types of actions grantees are expected to take to affirmatively further fair housing.

Comment: The term “community assets” is not clearly defined in the rule; the term “neighborhood asset” is not defined. Commenters stated that the term “community assets,” which is defined as part of the definition of “significant disparities in access to community assets” is not clearly defined in the rule compared to the data sets HUD is providing. Commenters stated that different measures for community assets are included in different parts of the rule. Other commenters stated that any definition of “community assets” should include affordable housing itself as an example of a community asset. In fact, “community assets” should be broadly defined to include factors such as affordable housing, access to healthy food, quality schools, social services, transportation, and other factors that foster a healthful, secure, and opportunity-centered quality of life.

Other commenters stated that the term “neighborhood asset” was used but not defined and that any use of the term “neighborhood asset” should include a social/family network of support, stating that such networks increase individuals’ access to opportunities and resources.

HUD Response: HUD appreciates the concerns and suggestions made by the commenters. HUD’s Assessment Tool, published on September 26, 2014, addresses more thoroughly certain community assets that are key to access to opportunity, and HUD believes the Assessment Tool is more appropriate for addressing and clarifying what is meant by community assets. HUD further notes, however, that many communities have unique assets and the use of a broad definition is intended to capture not only the most common assets that afford access to opportunity, but also those that are less common, but nonetheless very important in communities across the nation. In this final rule, HUD does not use the term “neighborhood asset.”

Comment: Strengthen the definition of “community participation.” Commenters stated that the proposed definition of "community participation" should provide detailed, result

orientated steps that will aid states, local governments, and public housing agencies in understanding the rigor and importance of the requirement that funding recipients proactively involve the community in furthering fair housing. Commenters stated that the proposed definition of "community participation" should provide specific examples of acceptable community participation plans to clearly illustrate the importance of community participation and provide guidance to funding recipients. Commenters additionally stated that the proposed definition of "community participation" should require recipients of funding not just to "consider the views and recommendations received" and have a "process for incorporating such [community] views in decisions and outcomes," but should also have a requirement that recipients of funding demonstrate that such views have, indeed, been incorporated into decisions and outcomes.

HUD Response: HUD declines to revise the definition of “community participation” in the manner the commenters suggest. The additional detail that commenters are seeking about community participation can be found in § 5.158, entitled “Community participation, consultation, and coordination.”

Comment: HUD’s definition of “concentration” is without appropriate basis. Commenters expressed disagreement with HUD’s definition of a concentration of minorities as provided in the proposed rule, which commenters stated automatically defines an area of concentration as any area that has a non-white population of 50 percent of more. The commenters stated that, as HUD has noted, the U.S. is moving to majority minority status, and therefore to use the automatic 50 percent standard is a false measure that does not accurately reflect local community demographics or take into account the changing demographics of the United States as a whole. The commenters stated that HUD’s definition makes an assumption

that an area that is "majority minority" is, in itself, an inherently bad thing – an assessment that many would disagree with, and that the "solution" called for by this "problem," following the logic that commenters stated HUD is using, would require program participants to adopt a strategy encouraging minorities to move out of the suburbs and into the central city.

Commenters stated that HUD's definition of concentration in the proposed rule is the one that has been used by HUD's Office of Fair Housing and Equal Opportunity (FHEO) for competitive programs such as Choice Neighborhoods and Sustainable Communities, but given that the basis for conducting the AFH (and previously the AI) has been based on CDBG statute, as well as the other formula programs in the Office of Community Planning and Development (CPD), the commenters recommend that HUD use the CPD definition instead. Commenters stated that the CPD definition provides that a concentration exists if the minority population is ten percent higher than the jurisdiction as a whole, and provided the following example – if a jurisdiction was 10 percent minority, then any census tract over 20 percent would constitute a concentration, and if a jurisdiction was 60 percent minority, a concentration would exist if the census tract was more than 70 percent minority. Commenters stated that this is a fairer and more reasonable method of measuring concentrations (particularly at a State level where vast areas of geography is involved) as well as reasonably addressing minority majority jurisdictions, both urban and suburban.

<u>HUD Response</u>: First, HUD would clarify that neither the proposed rule nor the final rule includes a numeric threshold in the definition of the term, "racially or ethnically concentrated area of poverty." The commenters referring to a 50 percent threshold for minority population are instead commenting on the AFFH Data Documentation paper that HUD released concurrently with the proposed rule, and which HUD also requested comment on. The

comments on those thresholds will be addressed through the development of the Assessment Tool, including consideration of the correct threshold that may be applicable to different geographic areas, for instance rural versus central city areas.

In addition, the comments on the use of a 10 percent threshold used in HUD's consolidated planning regulations appear to refer to those regulations' provisions on disproportionate housing needs analysis and not to a threshold for defining an area as having a high minority population. HUD notes that the term "concentration" appears in other HUD regulations, including in the requirements on site and neighborhood standards, without the specific threshold provided in the regulatory text itself. See, for example, §§ 91.220, 92.353, 570.208, 891.125(c), 891.680, 905.602, 972.218, 982.54, and 983.57.

Comment: Revise the definition of "fair housing choice" with respect to persons with disabilities. Commenters asked that the final rule clarify that fair housing choice means that housing is not conditioned on acceptance of disability-related services (unless that is one of the rare instances in which it is specifically required by a Federal statute).

Other commenters stated that the definition of fair housing choice must clearly indicate that "choice" includes residents' ability to choose to remain in homes and communities where they have long lived and where they have deep and important social, community, and economic ties, even if those communities are racially or ethnically concentrated areas of poverty. Commenters recommended the following revised definition of "fair housing choice" with respect to persons with disabilities: "For persons with disabilities, fair housing choice is the ability to live where they choose. This includes access to accessible housing, and, for disabled persons in institutional or other residential environment, housing in the most integrated setting appropriate as required under law, if they so desire, including disability-related services that an individual

needs to live in such housing. Fair Housing Choice also means recognizing that not all persons with disabilities desire to live in an integrated setting and that those people have the right to choose to reside with others with the same disability in housing built to meet their needs that includes services focusing on that specific disability."

Other commenters stated that HUD's definition of fair housing choice includes housing choices not constrained by barriers "related to" protections contained in the Fair Housing Act and the commenters stated that they object to HUD's apparent inclusion of matters correlated with protected classes but not related causally to those characteristics.

HUD Response: HUD appreciates the commenters' suggestions and, as noted earlier in this preamble has revised the definition of "fair housing choice." Although HUD's definition of fair housing choice does not address the involuntary receipt of services, HUD interprets its regulations under section 504 of the Rehabilitation Act to require disability-related services to be voluntary.

Rule change. HUD has revised the definition of "fair housing choice" in § 5.152 to mean that individuals and families have the opportunity, as well as the information and options to live where they choose free of discrimination or other barriers, and that persons with disabilities have the option to reside in accessible housing and in the most integrated setting appropriate to an individual's needs, as required under Federal civil rights law. This choice also includes disability-related services an individual may require in order to live in such housing.

Comment: The definition of "fair housing issue" is meaningless. Commenters stated that the definition of "fair housing issue" includes, "any other condition that impedes or fails to advance fair housing choice." The commenters stated that by including anything and everything, the definition means nothing. The commenters stated that HUD must provide a definition of

"fair housing choice" that program participants can understand. The commenters stated that the definition of "fair housing issue" in the proposed rule can lead to the conclusion that, since men and women with disabilities have lower incomes than unprotected classes, and since lower incomes impede housing choice, the lower incomes of persons with disabilities is a matter subject to requirements and mitigation under the Fair Housing Act. Commenters recommended that HUD adopt the following definition: "Fair housing issue means unequal housing opportunities for persons in a protected class under federal law and evidence of illegal discrimination or violation of existing civil rights law, regulations, or guidance, as well as any other condition that impedes or fails to advance fair housing choice."

Other commenters stated that the definition of "fair housing issue" must omit reference to ongoing local or regional segregation. Commenters stated that because fair housing issues do not stop at the borders between jurisdictions, it is important that the definition of fair housing issue use "and" instead of "or."

HUD Response: HUD disagrees with the commenters, but does agree that a clarification would be helpful. The definition of "fair housing issue" is intentionally broad because the factors and conditions that may impede fair housing choice or access to opportunity are wide and varied.

Rule change. As noted earlier in this preamble, HUD has made certain clarifying changes to the definition of "fair housing issue." (See § 5.152.) Specifically, a fair housing issue is a condition in a program participant's geographic area of analysis that restricts fair housing choice or access to opportunity.

Comment: The definition of "integration" does not clearly define the geographic area under review. Commenters stated that the definition of "integration" does not clearly define the geographic area under review, but includes, "jurisdiction or Metropolitan Statistical Area

(MSA)." The commenters stated that those geographic designations may represent vastly different areas with vastly different demographic characteristics. The commenters stated that a community may be integrated in a jurisdiction but segregated in an MSA or vice versa. Commenters stated that reference to "Metropolitan Statistical Area as a whole" should be removed in the definition of "integration." Commenters stated that MSAs cover broad areas that a single jurisdiction cannot influence, as multiple jurisdictions are often captured in a single MSA. Commenters stated that another concern with the definition is the standard presented for persons with disabilities, which is that they live, "in the most integrated setting appropriate." Commenters asked whom does HUD believe is competent to determine what is appropriate. Commenters stated that the better terminology is to state the most integrated setting chosen by the household.

Other commenters asked that in the definition of "integration," HUD replace the word "handicap" with "persons with disabilities."

HUD Response: The geographic area under review will differ depending upon who is the program participant. In this regard, HUD has included a definition of "geographic area" that is intended to acknowledge that different program participants have different geographic areas in which they will undertake their assessment of fair housing. With respect to integration, as noted earlier in this preamble, HUD has revised the definition of "integration," which HUD believes addresses the commenters concerns.

Rule change. The definition of "integration" in § 5.152 is revised. HUD has replaced the word "handicap" with "disability" and has better identified the particular geographic areas at issue, by providing a definition of geographic area in § 5.152, which program participants will analyze using the Assessment Tool.

Comment: HUD needs to define "region." Commenters stated that if HUD is requiring a regional analysis for every entity submitting an AFH, then HUD must define what is meant by a "region." Commenters asked whether a region for State AFH planning purposes is the State and surrounding States, or all the regions within a State, however those are defined.

HUD Response: The duty to affirmatively further fair housing requires a regional analysis. The court in HUD v. Thompson placed a strong emphasis on the need for regional solutions to decrease segregation and racial isolation. For these reasons, a PHA would need to consider fair housing effects outside its jurisdictional border, as would an entitlement jurisdiction, in order to meet the requirements under the Fair Housing Act and fair housing case law. A PHA may conduct its own AFH with geographic scope and proposed actions scaled to the PHA's operations and region. PHAs choosing to conduct and submit an independent AFH, must include an analysis for the PHA service area and region, in a form prescribed by HUD, in accordance with § 5.154(d)(2). Program participants' regions will ultimately be defined by the AFH Assessment Tool provided by HUD.

Comment: The definition of "segregation" needs further clarification. Commenters stated that the definition of "segregation" is unclear as to whether HUD is defining segregation in terms of a jurisdiction, some other "geographic area," or a particular development – the same concern expressed about geographic area that commenters expressed about the definition of "integration." Commenters stated that the definition is confusing when it references "particular housing developments" – that the definition seems to say that segregation occurs when there is a high concentration of persons with disabilities "in a particular housing development," though, the commenters stated that it is unclear whether concentrations in a development apply only to persons with disabilities or other protected groups as well.

Other commenters stated that HUD should strike the phrase "a particular housing development" or else this would lead to individual projects having to deny eligible applicants housing if they do not meet particular characteristics. Commenters also stated that HUD should strike the clause "or other clauses" because this phrase is simply too vague.

Commenters stated that HUD must define "segregation" to be the result of government or private sector actions and not the actions of individuals making their own location decisions. Commenters stated that the term "segregation" is a politically and emotionally loaded term and its use may create obstacles to rational discussion of the reasons why certain racial/ethnic groups are clustered in particular locations. Commenters stated that the use of more neutral terms such as "dissimilarity index" and "isolation index" would enable communities to explore these questions without the value-laden judgment implicit in the use of the term "segregation."

HUD Response: HUD understands that the term "segregation" may be an emotionally charged term, but the Fair Housing Act was enacted to overcome historic patterns of segregation, including the exclusion of people because of their characteristics protected by the Fair Housing Act. HUD declines the commenters' suggestion to define "segregation" as a result of government or private sector actions. Instead, the final rule generally defines "segregation" as a high concentration of persons according to protected class status regardless of the cause. The rule also provides more specificity regarding segregation of persons with disabilities. Thus, identifying a pattern of "segregation" is only the first step in the analysis. Program participants will then assess the related contributing factors to determine whether addressing them should be a high priority (e.g., where the contributing factor represents a limitation or denial of fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance). HUD agrees with commenters that segregation at the development or building level can include

not only persons with disabilities but also persons with other protected characteristics. HUD has addressed the issue of the size of geographic area at issue in segregation by providing a definition of geographic area.

Rule change. Similar to the change made to the definition of "integration" HUD has revised the definition of "segregation" and has added a new defined term of "housing programs serving specified populations" to clarify that developments that may contain a high proportion of persons with disabilities do not constitute a "fair housing issue of segregation" provided the program or program activity serving those residents is not otherwise violating applicable Federal civil rights requirements, including the duty to affirmatively further fair housing. (See § 5.152.)

Comment: The definitions of racially or ethnically concentrated areas of poverty are defined by census tract, which can be problematic. Commenters stated that the definition of racially or ethnically concentrated areas of poverty is defined by census tract boundaries, and the commenters expressed concern that this will not allow for any analysis of areas that may be smaller than census tracts but still are racially or ethnically concentrated areas of poverty. The commenters recommended that HUD clarify that program participants should consider smaller such concentrated areas of poverty as part of their analysis.

HUD Response: Neither the proposed rule nor the final rule include a limitation that the definition of an RCAP/ECAP is based only on a census tract. The final rule states that an RCAP/ECAP "means a geographic area with significant concentrations of poverty and minority populations." The term "geographic area" is further defined as, "a jurisdiction, region, State, Core-Based Statistical Area (CBSA), or another applicable area (e.g., census tract, neighborhood, Zip code, block group, housing development, or a portion thereof) relevant to the analysis required to complete the assessment of fair housing, as specified in the Assessment

Tool." As such, the Assessment Tool will propose the appropriate level of geography for determining various elements of the AFH, including RCAPs/ECAPs. In general, RCAPs/ECAPs will likely be based on census tracts, at least for many program participants, including entitlement jurisdictions as well as PHAs in urban areas. However, other levels of geography may be relevant for different elements, for example HUD's Small Area Fair Market Rents use zip codes, which may be useful for some types of analyses in a participant's AFH.

Rule Change. This final rule adds a definition of the term "geographic area."

Comment: The definition of significant disparities in access to community assets is too broad. Commenters stated that HUD's definition of this term is too open-ended to be useful and open to many different interpretations and uses. Commenters stated that, for example, based on the literal meaning of the words, it is hard to understand how a disparity in access to educational assets could exist with regard to any household within a local school's attendance area since all school-aged children are eligible to attend and the schools typically provide transportation. Commenters also asked about the meaning of "differences in access to transportation." Commenters asked if low-income areas with a high percentage of a particular race have more access to public transportation, or if more affluent communities have little access to public transportation, is that a disparity in access that should be addressed. Other commenters stated that the definition of "significant disparities in access to community assets" should be more precise. Commenters stated that the definition should include a "measurable difference in access." The commenters stated that because even minute differences may be measurable, this language should include a qualifier such as a "significant or material" measurable difference. Commenters also stated that the Fair Housing Act does not cover significant disparities in community assets and such inclusion is beyond the scope of the statute.

HUD Response: As stated in HUD's proposed rule, research indicates that disparities in access to community assets negatively impact educational and economic outcomes. Sustained exposure to highly distressed neighborhoods is associated with a reduction in children's odds of high school graduation by at least 60 percent, while low-income students who have access to asset-rich neighborhoods with good schools may realize math and reading gains that help close the achievement gap. (See 78 FR 43714.) Given this research, one of HUD's objectives through the new AFH process is to reduce disparities in access to community assets (that is access to opportunity) based on race, color, religion, sex, familial status, national origin, or disability.

HUD declines to set out a measureable standard for determining significant disparities in community assets, as program participants and communities should have flexibility in making such a determination since these disparities will vary across communities. HUD believes the Assessment Tool will help program participants to identify such significant disparities through the provision of data.

Comment: Other terms need to be defined. Commenters suggested definitions for such terms as "affirmative move," "complaint," "discrimination," "exclusionary practices," "fair" "fair housing," "family," "homelessness," "inclusive communities," "jurisdiction," "local data," "material inconsistency with data," and "neighborhood."

HUD Response: As noted in Section III of this preamble, HUD has included a definition on "local data" but declines to define these additional terms. For some of the terms, such as "fair" and "complaint," the rule uses these terms based on the common dictionary definition of such terms. The term "fair housing" reflects the meaning as used in the Fair Housing Act. For terms such as "family" and "homeless," these terms are already defined in HUD regulations, and the final rule does not need to further define these terms. The term "jurisdiction" is defined in

HUD's regulations in 24 CFR part 91, as noted by HUD in the introductory language to the definition section, § 5.152. Commenters asked that HUD define "inclusive communities" to emphasize that the rule is speaking of such term in the context of protected classes. HUD believes such qualification is unnecessary since this rule is about providing an approach for program participants to more effectively affirmatively further fair housing for persons with characteristics protected by the Fair Housing Act. The term "material inconsistency with data" is addressed in the data document.

New terms defined. As noted in Section III of this preamble, HUD has added, in this final rule, definitions for "data," which includes a definition for "HUD-provided data" and "local data." HUD defines "local data" as metrics, statistics, and other quantified information, that are subject to a determination of statistical validity by HUD, relevant to the program participant's geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH using the Assessment Tool. The phrase "subject to a determination of statistical validity by HUD" is included to clarify that HUD may decline to accept local data that HUD has determined is not valid but not that HUD will apply a rigorous statistical validity test for all local data. HUD also provides a definition for "local knowledge." As also noted in Section III and discussed in response to several comments, HUD has included in this final rule definitions for "geographic area," "housing programs serving specified populations" and "qualified PHA." In this final rule, HUD has also added a definition of "joint participation" to refer to the collaboration of two or more program participants conducting an AFH, but which is distinguished from regional collaborating program participants, which must include in such collaboration at least two consolidated plan program participants. (See § 5.152.)

11. Disproportionate Housing Needs

Comment: HUD's definition of disproportionate housing needs is overly complicated. Commenters stated that the approach HUD took in defining disproportionate housing needs seems overly complicated and that HUD has failed to demonstrate that the "measures and indices are valid, robust, and stable." Other commenters stated that HUD's apparent treatment of disproportionate need appears to conflate potential disparate impact on protected classes with the effects of real estate markets. Commenters stated that HUD should consider whether members of protected classes have disproportionate housing needs compared to similarly situated members of unprotected classes (e.g., households in protected classes living near transportation hubs or near high performing schools compared to households living near these community assets who are not in protected classes).

Other commenters stated that the proposed definition of disproportionate housing needs seems to indicate that affordable housing projects should only house families in protected classes with disproportionate housing needs and exclude other low-income individuals who qualify for such housing. Commenters asked whether this means that Federal funds should be devoted only to helping those in a protected class and not others with the same economic challenges. Commenters stated that moving households from an area of poverty as currently defined and putting them in one that is not an area of poverty may cause the second area to become an area of poverty or otherwise "flip the communities." Other commenters stated that the categories of housing need included in the definition of "disproportionate housing need" (cost burden, severe cost burden, overcrowding, and substandard housing) and their accompanying analyses are too expansive and recommended conducting an analysis solely on income, as income directly correlates to other identified factors.

Commenters stated that it is crucial that the disproportionate housing need analysis be regional in scope, to encompass the entire housing market, so that the solutions developed are not primarily focused on providing housing where the majority of low-income families already live. Other commenters stated that a final rule should ensure that the definition of "disproportionate housing needs" is more clearly focused on regional housing needs rather than conditions "within the jurisdiction."

Lastly, commenters questioned the basis for the threshold of 10 percent. Commenters recommended changing the percentage from 10 percent to at least 20 percent. Commenters stated that the American Community Survey (ACS), which HUD proposes to use, has high margins of error, often over 20 percent in a given census tract and occasionally approaching 30 percent. Commenters stated that because the margins of error are so high, the percentage should be changed from 10 percent to 20 percent or higher, especially for more rural states and rural areas within all states.

HUD Response: HUD agrees with the commenters that the definition of "disproportionate housing needs" in the proposed rule was not as clear as intended. As noted in the overview of changes made at the final rule stage (Section III of this preamble), HUD has revised the definition of "disproportionate housing needs" and removed the 10 percent threshold.

HUD agrees with the commenters that a single numeric threshold for determining disproportionate housing needs would be unsuccessful in accurately identifying disproportionality across different population sizes, demographic characteristics, and relative to other protected classes or subsets of the same protected class within a category of housing need, as well as relative to the total population. As commenters pointed out, the same threshold also may not accurately depict disproportionate housing need in both low- and high-density areas, or

among both homogenous and heterogeneous populations. HUD's intention is to identify disproportionate housing need in an inclusive and relative way, and to do so fairly in every set of circumstances. Therefore, HUD revises the definition of disproportionate housing need to remove the numeric threshold and provide more clarity to the meaning of disproportionate housing needs.

An example of disproportionate housing needs would be found when, according to U.S. Census Bureau data, a significantly higher proportion of the jurisdiction's black residents experience a severe cost burden when compared to the proportion of the jurisdiction's white residents experiencing a severe cost burden. Another example of disproportionate housing need can be found when a higher proportion of Hispanic individuals with limited English proficiency experience substandard housing conditions than the proportion of the state's population that experiences substandard housing conditions.

Rule change. HUD has revised the definition of "disproportionate housing needs" in § 5.152. HUD's revised definition uses the term "significant disparities," but this term does not mean "statistically significant," but rather is included to note the possibility of existence of substantial disparities, which should be interpreted as "significant" in terms of their impact on affected persons rather than merely "statistically significant."

12. Housing Choice Vouchers

Comment: Fund the Housing Choice Voucher program in order to affirmatively further fair housing. Commenter stated that the best way to deconcentrate poverty is to double funding to increase the payment standard for the HCV program so that more households can live in higher-income resource-rich communities. Commenters stated that the HCV program has traditionally been a tool to help minorities and lower income families move into housing areas

not as concentrated with poverty, but with the funding cuts, barely perceptible increases in fair market rents (FMRs), and increased utility costs, rental units in deconcentrated areas are not even available or eligible because the rents are too high. The commenters stated that therefore the only areas in which a voucher holder can find housing are in the traditional areas in which they have always lived in. Commenters stated that, unless funding is restored and payment standards and FMRs are adjusted upwards, the HCV program cannot realistically be a vehicle for affirmatively furthering fair housing.

HUD Response: HUD is cognizant of the constraints within which program participants must operate, in particular given the current budgetary environment.

Comment: HCV "hard units" should not be the sole consideration in an assessment of fair housing. Commenters stated that given the growing predominance of HCV, "hard units" should not be the sole consideration for the AFH; rather consideration must include the full portfolio of a PHA's Federally-assisted units, vouchers, project-based vouchers (PBV), and RAD converted units (PBV or project-based rental assistance (PBRA)). Commenters stated that it is unclear if "hard units" means only public housing units, or if the term also covers PHA-owned units that have PBVs or PBRA (important after RAD conversions), or other PBV units in properties that the PHA does not own. Commenters stated that HUD should define "hard units" to include all PHA-owned units that have HUD-funded rental assistance, and all units, regardless of ownership, that have PHA-administered PBVs.

HUD Response: HUD agrees that "hard" units, such as public housing units, PBVs, and PHA-administered PBRA are not the sole consideration of an AFH, and notes that Section 8 HCVs will also be addressed in a program participant's AFH. Greater specificity on different program types will be addressed in the Assessment Tool, rather than in the regulatory text.

Comment: HCV program conflicts with duty to affirmatively further fair housing as presented in HUD's rule. Commenters asked, given that the HCV program presents a choice of housing location to voucher holders, whether HUD expects PHAs to impose restrictions that limit locational choice in order to affirmatively further fair housing. Commenters stated that, while PHAs can and do make efforts to recruit participating landlords in diverse areas and inform voucher holders about housing opportunities in low-minority areas, ultimately, voucher holders may make their own housing choices based on a number of different considerations, including proximity to existing family and social networks, employment opportunities, and religious institutions; access to public services, including public transit; and landlord willingness to participate in the program. Commenters stated that families may choose to live in areas of concentrated poverty even when other choices exist.

Commenters stated that one of the goals of AFH is not to steer applicants to low-income areas, but that, given that funding resources are at a historical low and trends are still set for that to continue, a PHA would be in direct conflict with that intent. Commenters stated that increasingly public housing programs are developing new housing units in low-income areas due to lower costs associated with construction there, and PHAs that have difficulty meeting housing assistance payment obligations for the HCV program are being instructed by HUD to discontinue allowing their participants to move to higher cost areas to mitigate their shortfall. Commenters stated that given the continued downward trend of funding for PHAs, this instruction places PHAs in direct conflict with the duty to affirmatively further fair housing as provided in HUD's rule.

Other commenters stated that not all cities have high poverty, high minority, and poor performing schools located in the same areas, and that, in many communities, some of the best

schools are in low-income areas, and this occurs as a result of magnet and charter schools choosing to locate in these areas. The commenters stated that PHAs can encourage voucher holders to consider non-minority areas of the city but cannot force or steer them to these areas. Commenters further stated that it is problematic to pay higher rents only in non-minority neighborhoods as a means of encouraging minorities to live in non-minority areas, and, to do so, brings up the concern that minority landlords that own units in minority areas would believe they were being discriminated against by lower rent payments.

HUD Response: HUD disagrees with the commenters' statement that the HCV program conflicts with the duty to affirmatively further fair housing. HCV participants can choose any housing that meets the requirements of decent, safe, and affordable housing in the private market. Most HCV programs are administered locally by PHAs, which must comply with fair housing and civil rights laws. This rule does not impose restrictions that limit participant choice in the HCV program. The question is whether there are impediments in the locality that limit housing choice; for example, the lack of affordable housing in diverse neighborhoods, the lack of information about housing opportunities in more affluent or diverse neighborhoods, racial steering, and misconceptions about the type of housing appropriate to persons with disabilities. The HCV program already operates under requirements that reinforce housing choice. For example, during a voucher recipient's briefing, if the client is living in a high-poverty census tract in the PHA's jurisdiction, the briefing already must explain the advantages of moving to an area that does not have a high concentration of poor families. In addition, under the SEMAP, the PHA is scored on the following factors if it is in a metropolitan fair market rent area: whether the PHA has adopted and implemented a written policy to encourage participation by owners of units located outside areas of poverty or minority concentration; whether it informs voucher

holders of the full range of areas where they may lease units both inside and outside the PHA's jurisdiction; and whether it supplies a list of landlords or other parties who are willing to lease units including units outside areas of poverty or minority concentration.

Comment: Require PHAs to demonstrate efforts to enable families to move to new jurisdictions who seek to move. Commenters stated that it is especially critical that PHAs and other entities that administer HCVs be required to demonstrate that they are making efforts to assist those voucher holders who seek to move to communities of higher opportunity and to remove barriers, such as onerous portability requirements, that impede use of vouchers to obtain housing opportunities outside of the jurisdictional boundaries of the PHA. Commenters stated that unless such demonstration is required of PHAs, the HCV program will not live up to its objective of promoting integration and mobility and, instead, will reinforce prevailing patterns of racial segregation.

Other commenters recommended that HUD designate regional housing choice voucher initiatives as a recognized activity for fair housing opportunity. Commenters recommended HUD could improve the HCV program to better facilitate movement of people by supporting mobility programs and by changing FMRs and payment standards to improve access to areas that are not RCAPs and are already high in community assets such as quality schools.

HUD Response: As stated in response to the preceding comment, PHAs administering HCVs will continue to be subject to fair housing and civil rights laws. In addition, PHAs may consider implementing success rate payment standards if less than 75 percent of voucher recipients can find housing within the term of their voucher. PHAs can also consider exception payment standards for a portion of the fair market rent area to increase housing opportunities. More generally, this final rule aligns the PHA Plan and consolidated plan development process

for the furtherance of goals specified in the AFH. This final rule creates a structure for PHAs to cooperate fully with their local jurisdiction toward this purpose.

In addition, this rule provides PHAs the option to cooperate with each other in the creation of an AFH, allowing PHAs to develop a coordinated approach to address fair housing issues. Such an approach could help to expand mobility through the creation of cooperation, agreements, memorandums of understanding (MOUs), consortia, or other tools to take regional approaches to HCV mobility policies.

Comment: It is not clear how the rule applies to voucher-only PHAs and small PHAs. Commenters stated that the rule is too vague regarding what requirements will be made for voucher-only PHAs, and also of small PHAs. Commenters stated that § 903.2 (now § 903.15) of the proposed rule describes a PHA's burden to affirmatively further fair housing through its "development related activities," but it is unclear whether or how the rule applies to voucher-only PHAs. Commenters stated that, considering the constrained fiscal environment in which PHAs are operating and the lack of fee income generated by voucher only PHAs, HUD should consider limiting the rule's applicability to PHAs with development programs. Commenters asked how HUD expects voucher only PHAs to have their tenants de-concentrate when tenants choose where to live.

Other commenters stated that in § 91.110 HUD omits references to the HCV program in several places without any apparent reason. Commenters stated that they assume this was a mistake. Commenters stated that HUD should: insert "or the Housing Choice Voucher program" at the end of the first parenthetical in paragraph (a); insert "or the Housing Choice Voucher program" after the first reference to "public housing" in paragraph (a)(1); and change "PHA's program" to "PHA's programs" in paragraph (a)(1) near the bottom of 78 FR 43736.

Other commenters stated that it is important for HUD to clarify in the final rule that the affirmatively furthering fair housing obligations and certifications apply to the HCV Administrative Plan and all PHA planning documents, including the Moving to Work Plans for those PHAs that have been selected for the Moving to Work program. Commenters stated that these documents specify key PHA policies that affect efforts to expand housing choice within their jurisdiction and throughout the regional housing market in which they are located.

Commenters stated that past actions, such as setting higher payment standards in higher cost suburban locations are no longer feasible. Commenters stated that, in the event that HUD deems the rule is applicable to voucher-only PHAs, the commenters requested guidance regarding what steps such PHAs can take to affirmatively expand housing opportunities. Other commenters requested that HUD add an explicit statement in the final rule that defines a PHA's undertaking of recruitment activities to encourage participation by landlords in low-poverty, low-minority areas within the PHA's jurisdiction as meeting its duty to affirmatively further fair housing.

HUD Response: HUD appreciates the recommendations made by the commenters but specifying which HUD programs in which PHAs are covered by the duty to affirmatively further fair housing is unnecessary. The duty to affirmatively further fair housing and the requirement to conduct an AFH applies to all PHAs, regardless of the HUD program or initiative in which they are participating. Therefore HCV-only PHAs must submit an accepted AFH and include goals to affirmatively further fair housing in their planning processes. With respect to the commenter's reference to development activities in § 903.2 of the proposed rule and HCV-only PHAs, HUD notes that the section under the proposed rule and § 903.15 of this final rule makes reference to both operational and development activities. However, HUD has also clarified strategies and

actions that a PHA may take in § 5.154 of this rule, and those include both mobility-based options that may be more applicable to HCV-only agencies, as well as place-based solutions that may have more applicability to public housing only agencies.

13. Local Control and Zoning

Comment: HUD's rule is an effort to impede local control on zoning. Commenters stated that HUD's rule opens the door for the Federal government to determine zoning, rents, placement of infrastructure and other services over the local government, and that the Federal government is ill-suited to determine best practices for the thousands of diverse localities across the nation. Commenters stated that HUD's rule will subvert private property laws and limit if not eliminate any or all future suburban development. Commenters stated that land use control belongs with local governments, not the Federal government, and that housing and development actions cannot be accommodated through Federal mandates.

Commenters stated that through this rule HUD is furthering the idea that there is housing discrimination and unfairness toward those who are not financially able to afford living in a more affluent neighborhood and that a Federal agency can now impose a rule on local municipalities and counties that they must not only zone for and build affordable housing, but that HUD actually has the authority to make land use decisions on behalf of the municipality. Commenters stated that great care must be used to avoid unintended negative consequences, and that the worthy objective of HUD's rule could be upset by the costs of compliance especially by medium-sized and smaller municipalities and by the potential fear of having HUD personnel in Washington supplant their knowledge in thousands of jurisdictions around the country.

Commenters stated that while HUD advises that it is not prescribing specific actions or solutions, the rule has the potential to greatly influence local decisions by issuing guidance that

becomes akin to regulations. Commenters stated that clearly, one-size-fits-all solutions should not be suggested or imposed by HUD, and any guidance must clearly present pros and cons for different types of situations. Commenters stated that land use planning should be primarily the province of local units of government, and that housing activity is uniquely local and reflects the desire and aspirations of specific communities and the complex interaction of market forces at the local level. The commenters stated that a Federal regulation that potentially dictates the use of particular local planning tools and the location, place and form of development does not reflect local community or market circumstances and is not appropriate. The commenters stated that policies that work in one region may have serious unintended negative consequences in another, and that the United States is far too diverse demographically, historically, geographically and economically to successfully implement a "one-size-fits-all" program.

HUD Response: HUD agrees that determinations about the goals, priorities, strategies, and actions that a community will take to affirmatively further fair housing should be made at the local level. This rule does not impose any land use decisions or zoning laws on any local government. Rather, the rule requires HUD program participants to perform an assessment of land use decisions and zoning to evaluate their possible impact on fair housing choice. This assessment must be consistent with fair housing and civil rights requirements, which do apply nondiscrimination requirements to the land use and zoning process. However, this rule does not change those existing requirements under fair housing and civil rights law. Instead, the purpose of this assessment is to enable HUD program participants to better fulfill their existing legal obligation to affirmatively further fair housing, in accordance with the Fair Housing Act and other civil rights laws.

It is important to note, however, that, while zoning and land use are generally local

matters as stated by the commenters, when local zoning or land use practices violate the Fair Housing Act or other Federal civil rights laws such as title VI of the Civil Rights Act, section 504 of the Rehabilitation Act, or the Americans with Disabilities Act, they become a Federal concern, as with any violation of Federal law that occurs at a local level. See, e.g., U.S. v. City of Black Jack, Missouri, 508 F.2d 1179, 1187-1188 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); U.S. v. Yonkers Board of Education, et al., 837 F.2d 1181 (2d. Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

Inclusion of zoning and land use is not intended to assume these issues will have such implications for most or many program participants. However, including zoning and land use for consideration is needed to gain an accurate overall picture of local housing and neighborhood issues, such as the availability of affordable rental housing in a diverse set of communities.

HUD also agrees that "one size fits all" solutions should not be mandated by Federal regulation. HUD is not prescribing any "one size fits all" or specific solutions to fair housing issues that may exist in a given locality; rather, HUD requires that planning documents such as the consolidated plan – which, again, affects Federal funding – consider the findings of the AFH. The manner in which this consideration is implemented, however, will, absent violations of Federal law and regulation, be up to the jurisdiction. Thus, the goals, priorities, strategies and actions that a community will take to fulfill its obligation to affirmatively further fair housing will be decided at the local level based on data and analysis from the AFH.

It is true that the United States is demographically, historically, geographically, and economically diverse. This final rule takes this variation into account and provides flexibility for the broad diversity of types of HUD program participants. Further guidance will help program participants apply the rule to meet their specific needs and characteristics. There is also

flexibility provided in how best to craft strategies and actions to meet local needs and challenges. Program participants still are required to follow applicable Federal laws, and in the case of Federal programs that provide funding for affordable housing and economic development, these include the legal obligation to affirmatively further fair housing under the Fair Housing Act.

Rule change. HUD has added a "strategies and actions" provision in § 5.154(d)(5).

Comment: HUD's rule is based on the mistaken belief that zoning and discrimination are the same. Commenters stated that equating zoning with discrimination is wrong. Commenters stated that zoning laws restrict what can be built, not who lives there, and that just because a community uses zoning to limit high density housing does not make the community racist. Commenters stated that it has been proven over and over again in cities that high density housing stretches municipalities and school systems beyond their limited resources. Commenters stated that zoning laws are geared to provide for the safety, security, peace, tranquility, enjoyment, and preservation of the property values of both existing and future individual and commercial property owners, the latter of which also includes an investor's ability to generate an acceptable rate of return or cost of capital.

Commenters stated that developers choose where they will purchase, develop, and build based upon the existing zoning laws that have been put in place, in most cases years in advance of any development, as part of that community's long term planning and development process, and that amendments and modifications to such zoning laws are reviewed and approved by a city planning commission or zoning review board including public comment, and they are ultimately ratified by the local city council.

Commenters stated that data can be manipulated and interpreted improperly to further social engineering motives, and that HUD's data does not show and cannot prove that zoning

laws are solely responsible for any perceived racism.

In contrast to these commenters, other commenters stated that HUD's rule should assure that State, regional, and local government entities are focused on strengthening their local land use and zoning policies so that they encourage affordable housing development in areas of opportunity and that they increase the availability of land for the development of low and moderate income housing. Commenters stated that, in addition to zoning, there are many local policies that often create significant impediments, including stringent design, parking and setback requirements and excessive fees for utilities, parks, storm water, etc. Commenters stated that to counteract these types of local barriers, broader regional policies should be implemented and enforced, and that communities should also reduce or waive these fees for affordable units as a means of addressing impediments.

Other commenters stated that there can be affordable housing and good zoning, and urged HUD to not adopt regulations that can be used against communities that are equally concerned about the environment, loss of green space, flooding, clean water, wetlands and natural beauty, which are things that all people, including those in lower income brackets, need.

HUD Response: The issue of including zoning and land use as factors for consideration in the AFH was addressed in response to the preceding comment. As to the comment that data can be manipulated to further social engineering, it is the program participants themselves, which include State and local governments, that will analyze the data and produce the AFH, and program participants may include any statistically valid local data that they can obtain and believe relevant to the AFH. The AFH will help inform future planning related to the use of Federal funding and other funding for housing and economic development. This final rule, and Assessment Tools and guidance to be issued, will assist recipients of Federal funding to use that

funding and, if necessary, adjust their land use and zoning laws in accordance with their existing legal obligation to affirmatively further fair housing. The approaches that can be taken to accomplish this are varied and not specifically prescribed by this rule. This rule, in accordance with existing law, simply requires an assessment, based on data, of effects on the availability of affordable housing, and does not overturn any local decisionmaking process.

Comment: Provide examples of zoning laws that are barriers to fair housing. Commenters stated that it would be helpful if HUD would give specific examples of codes or regulations and specific standards that HUD considers to further fair housing or that HUD considers to present barriers to fair housing. Commenters stated that some may see a zoning law as a barrier to affordable housing and others as an affirmative act to prevent displacement of low-income and minority households.

HUD Response: Zoning and land use laws that are barriers to fair housing choice and access to opportunity can be quite varied and often depend on the factual circumstances in specific cases, including zoning and land use laws that were intended to limit affordable housing in certain areas in order to restrict access by low-income minorities or persons with disabilities. Examples of egregious zoning actions that were found to violate the Fair Housing Act can be found going back to the zoning ordinance at issue in U.S. v. City of Black Jack, 508 F.2d 1179 (1974). An example of a positive zoning action that would further fair housing would be the removal of such an ordinance. HUD will include additional examples in its guidance for its affirmatively furthering fair housing regulations.

14. Standards for Review

Comment: Final rule should designate HUD offices with responsibility of review of AFHs. Many commenters requested that the final rule designate HUD's Office of Fair Housing

and Equal Opportunity (FHEO) as the lead authority regarding AFH review and acceptance, and certification that a participant is affirmatively furthering fair housing and that FHEO be provided sufficient resources to carry out this new responsibility. The commenters stated that designation of FHEO as the lead reviewing office would maintain consistency and preserve institutional knowledge among reviewers even as administrations change.

Other commenters recommended that the rule designate HUD's Office of Community Planning and Development (CPD) as HUD to review and approve the AFH for participants in HUD's CDBG, HOME, ESG, and HOPWA programs because these programs fall under CPD's jurisdiction.

Other commenters recommended that the final rule explicitly state that HUD's Office of Public and Indian Housing (PIH), CPD, and FHEO all be designated with equal authority to review AFHs.

Other commenters recommended that HUD regional and field offices be required to review the AFHs of program participants in their jurisdictions to alleviate any problem of inadequate HUD staffing at HUD Headquarters.

Other commenters recommended that HUD establish "Fair Housing Review Councils" to review AFHs, review complaints, and recommend remedies to HUD, with a cross-section of HUD agency officials providing consistent guidance, based on the model that HUD's Office of Sustainable Housing and Communities (now HUD's Office of Economic Resilience) undertook in reviewing applications for grants under HUD's Sustainable Communities Initiative (SCI). Commenters stated that, under this model, the following HUD offices, OSHC, CPD, FHEO, and PIH, along with Federal colleagues from the Federal Highway Administration of the U.S. Department of Transportation, and the Environmental Justice Division of the Environmental

Protection Agency all jointly reviewed applications, alongside of experts from the field. Commenters stated that, alternatively the council could be comprised of candidates who apply for membership on the council and who have qualifying credentials that include demonstrated experience in housing law, policy, and/or finance; affordable housing development; asset-building, transportation equity, housing, community and economic development; civil rights, fair housing, educational equity, youth development; urban planning, public health/health equity, environmental justice, criminal justice reform with a representative mix from philanthropy, public sector, and the private sector.

Another commenter stated that no matter who reviews AFHs that HUD should ensure that AFHs are reviewed in a consistent and objective manner so that the outcome of the review is not dependent on the perspective of the individual reviewer or HUD office. Similar to this comment, another commenter recommended that the same set of HUD employees review all AFHs using clear and detailed standards of review.

HUD Response: HUD appreciates the recommendations regarding who, within HUD or outside of HUD, should review AFHs. There is no need for HUD to specify in the final rule which offices will review AFHs and HUD emphasizes that HUD's review of an AFH under § 5.162 is a "HUD" review. However, since this rule provides that an AFH is a necessary and important component of the consolidated plan and PHA planning processes, HUD can assure program participants that the review of AFHs will be a collaborative process among FHEO, CPD, PIH, the Office of General Counsel, and their respective staff in their regional and field offices, and other HUD staff that HUD may determine should be involved in review of AFHs.

HUD also understands concerns about variations in outcomes of review of AFHs as a result of different reviewers, but HUD also assures that all reviewers of AFHs will perform their

reviews under clear and consistent evaluation standards. HUD also believes that program participants' use of an Assessment Tool to create their AFH will help to ensure that AFHs are developed consistently and will facilitate objective, consistent reviews.

Comment: Review of an AFH should not precede review of the consolidated plan or PHA Plan, but should occur simultaneously. Commenters stated that review of AFH should not precede review of the consolidated Plan but should occur at the same time. Commenters expressed that this approach would only delay funding to program participants.

HUD Response: The responsibility to affirmatively further fair housing is such an important responsibility placed on HUD and its program participants by the Fair Housing Act that HUD concluded, particularly in light of the criticism of the former AI process, that to fulfill this statutory obligation as intended, the AFH should commence prior to submission of a program participant's consolidated plan or PHA Plan, as applicable. As HUD stated in its proposed rule, it is also important that the AFH be informed by meaningful community participation. The community participation and consultation requirements that HUD has established in § 5.158 provide for reasonable opportunities for the public to be involved in the development of the AFH prior to its incorporation into the consolidated plan or PHA Plan. This prior involvement should facilitate HUD's review of the AFH. The involvement should also facilitate review of the consolidated plan and/or PHA Plan, or any plan incorporated therein, since the affected communities would have already had the opportunity to review and comment on the AFH, HUD will have the opportunity to identify any deficiencies in the AFH, and the program participant will have the opportunity to correct any deficiencies, prior to incorporation of the AFH into the consolidated plan or PHA Plan, such that funding to program participants will not be delayed.

Comment: HUD's review and acceptance of AFH is vague and does not specify how HUD will evaluate the AFH. Commenters stated that the rule lacked necessary details on how an AFH is to be reviewed and accepted or not accepted by HUD. Commenters stated that the rule suffers from overwhelming vagueness in terms of expected actions and outcomes that leaves program participants exposed to extreme risks and litigation challenges. Commenters stated that the proposed rule does not provide specific details on how HUD will evaluate the effects of the AFH, which was one of GAO's primary criticisms of the AI process. Commenters stated that the rule is particularly not clear with respect to HUD's non-acceptance of an AFH that is "materially inconsistent with the data and other evidence available to the jurisdiction" or "substantially incomplete," and without clarity as to the meaning of these terms, the AFHs of program participants are subject to rejection and program participants are vulnerable to litigation. Commenters stated that "materially inconsistent" in particular would subject program participants to arbitrary decisions by HUD or to litigation by third parties. Commenters stated that HUD should define these terms or eliminate them from the regulatory text. Other commenters stated that the rule should provide more examples of what these terms mean. Other commenters stated that only substantial incompleteness should be a basis for rejection of an AFH and not inconsistency with fair housing and civil rights laws.

Other commenters asked for the rule to be clear on the impact if a portion of an AFH is not acceptable.

HUD Response: HUD understands commenters' concerns about the standards of review provision in the rule. It was not HUD's intention to be vague, but it was also not HUD's intention to be overly prescriptive as to the standards by which HUD will evaluate and determine whether to accept an AFH. HUD recognizes that the content of a program participant's AFH

depends on local conditions and local laws, and very prescriptive standards may interfere with the local assessment and planning that a program participant must undertake.

As HUD stated in the proposed rule, this final rule will be supported by HUD with technical assistance and examples that will help guide program participants as to what it means to have an AFH that is substantially incomplete or one that is inconsistent with fair housing or civil rights laws. However, in the regulatory text, HUD has included two examples for each of these categories.

The reference to acceptance or nonacceptance of a portion of an AFH in the proposed rule was directed to program participants submitting collaborative AFHs; that is, a joint AFH or Regional AFH. HUD has revised the language in § 5.162 to clarify how nonacceptance of a joint or regional AFH may occur. An AFH as a whole will either be accepted, or not accepted with respect to an individual program participant. This means that if a portion of a program participant's AFH, such as the analysis of a key issue, not accepted then the entire AFH for that program participant is not accepted. In addition, HUD's determination not to accept an AFH with respect to one program participant does not necessarily affect the acceptance of the AFH with respect to another program participant in the case of a joint or regional AFH.

Rule change. In this final rule, HUD revises § 5.162 to state that HUD will provide written notification to the program participant or participants (where a regional AFH is submitted) of HUD's nonacceptance of the AFH (either to one or more program participants or all when a regional AFH is submitted) and the written notification will specify the reasons why the AFH was not accepted and will provide guidance on how the AFH should be revised in order to be accepted.

<u>Comment: HUD should review an AFH holistically and not reject an AFH for a single</u>

concern or withhold funds. Commenters stated that HUD should review an AFH holistically and that a single deficiency should not be the basis for a negative determination. Commenters recommended that the final rule should provide that: (1) an unsatisfactory "AFH plan" will not be the sole cause for suspension of funds, but there must also be a problem in AFH implementation such as a sustained pattern of fair housing violations; (2) only funds directly involved in the fair housing violation may be suspended (e.g., distinguish effect on HOME, ESG, CDBG funds); and (3) HUD will offer an appeal process if HUD finds the AFH or its implementation unacceptable. Other comments asked that the rule provide information about the consequences and remedies if HUD finds an AFH substantially incomplete and that HUD clarify the consequences of submitting an unacceptable AFH after the initial resubmission.

Commenters recommended that a program participant's funds be partially or wholly suspended when a resubmitted AFH is rejected and until an acceptable AFH is submitted. Other commenters recommended that HUD consider sanctions other than withholding a program participant's HUD funds if the participant is unwilling or unable to submit an acceptable AFH. The commenters stated that HUD funds properly spent create housing opportunities and that it is hard to see how withholding the resource necessary to create affordable housing improves the situation for a program participant that is not willing to create affordable housing choices for its residents. Commenters stated that, if local opposition to fair housing makes it difficult for local officials to submit an AFH that would be accepted by HUD, HUD should carefully consider remedies other than withholding HUD funds and thus rewarding those in the community opposed to affordable housing

HUD Response: HUD appreciates the recommendations made by the commenters but believes that the rule contains the right approach. With respect to concerns about violations of

Fair Housing Act requirements, it is important to point out that the rule addresses the fair housing planning process, and the assessment of fair housing planning. This rule does not focus on actions taken by a program participant that may result in a violation of the Fair Housing Act, including a failure to affirmatively further fair housing, or other civil rights laws.

With respect to funding, the current process for distribution of funding under the programs covered by this rule is that a program participant does not receive funding until its consolidated plan or PHA Plan, as applicable, is accepted by HUD. This final rule does not alter that process. The rule, however, does make an accepted AFH a required element of a consolidated plan or PHA Plan.

As provided in the proposed rule and adopted in this final rule, if HUD identifies a deficiency in a program participant's AFH, HUD will notify the program participant and advise of the deficiency and how the program participant may address the deficiency so that HUD can accept the AFH. Because HUD will work with a program participant to produce an AFH that HUD will accept, HUD believes it is unlikely that a program participant will not produce an AFH that will be accepted by HUD. One of the significant changes that HUD committed to make under this AFH process is greater engagement by HUD and better guidance to program participants on how to fulfill their duty to affirmatively further fair housing.

Comment: HUD should contact a program participant for discussion about any AFH deficiencies rather than reject the AFH. Commenters recommend that HUD should contact a program participant for discussion about deficiencies with an AFH rather than reject the AFH if it finds priorities or goals are materially inconsistent with evidence available to the program participant. Another commenter stated that HUD set forth potential reasons for rejecting an AFH and not pre-determine expected results of participants' assessments.

HUD Response: The rule already provides for the practices that the commenters are requesting. HUD's initial nonacceptance of an AFH is not the end of the AFH review process. HUD will not only advise a program participant of deficiencies identified in the AFH but how these deficiencies may be overcome. HUD's review is not based on any predetermined expected results. Moreover, the rule does not restrict HUD from contacting a program participant to obtain information about an AFH if HUD believes it does not have adequate information to decide whether or not to accept an AFH.

15. Enforcement and Oversight

Comment: HUD only needed to enforce the existing AI requirement. Commenters stated that HUD cites to the GAO report as one justification for its proposed rule, but stated that GAO recommended modest, incremental changes to HUD's oversight processes to address the substantial, systemic weaknesses identified by GAO. Commenters stated that HUD, rather than elect to address its own deficiencies and implement an effective means to oversee compliance of program participants with the duty to affirmatively further fair housing, proposed a radical revision to the definitions underpinning the duty to affirmatively further fair housing, and the processes used by some HUD program participants to determine methods for overcoming identified fair housing issues and their contributing factors. The commenters urged HUD to reconsider its approach to and attend to its own performance with regard to the duty to affirmatively furthering fair housing before expanding the policy reach of the Fair Housing Act. The commenters stated that an alternative approach would be to strengthen HUD's support for and oversight of effective implementation of the duty to affirmatively further fair housing, consistent with HUD's existing Fair Housing Planning Guide. Commenters stated that rather than going forward with a new approach, HUD could make sure program participants prepare

current AIs that meet standards laid out in guidance such as HUD's Fair Housing Planning Guide.

HUD Response: HUD considered various options for how to improve the affirmatively furthering fair housing process and determined that a comprehensive improvement of the AI process and clarification of requirements for both program participants as well as HUD is likely to lead to a more effective fair housing planning process. HUD believes that its provision of data to its program participants is an important component of improving fair housing planning, as is the community participation requirement, the Assessment Tool, and greater integration to the extent possible with the PHA planning and consolidated planning processes.

Comment: HUD needs to specify the range of sanctions to be imposed on program participants for failure to affirmatively further fair housing. Commenters stated that the proposed rule was deficient regarding how HUD would enforce the rule's requirements. Commenters stated that the most significant areas needed for improvement of HUD's proposed rule relate to oversight and accountability. The commenters stated specifically that the proposed rule (1) fails to provide an effective mechanism for HUD to assess initial and ongoing compliance with the obligation, and (2) lacks a mechanism for individuals and communities aggrieved by violations of the rule to challenge those practices administratively. Commenters stated that while HUD has the power to withhold funds for lack of compliance, HUD needs to establish a process of "progressive discipline" to bring about compliance before going to the extreme of withholding funds.

Commenters stated that HUD needs to specify that it has a range of sanctions available to use for failure to affirmatively further fair housing, including something HUD has still not done (or at least not persuaded the Department of Justice to do), which is to bring a False Claims Act

claim against jurisdictions that make false or fraudulent representations. The commenters stated that taking such action would hardly be unprecedented in the context of protecting the Federal government from fraud, stating that the Department of Health and Human Services, for example, has no problem bringing False Claims Act claims against those who defraud the Federal Government in connection with Medicaid. The commenters stated that it is equally important for HUD to build in a real auditing function, not unlike the Internal Revenue Service (IRS). The commenters stated that the effectiveness of the IRS has obviously varied greatly over time, but the underlying problem faced by the IRS is one well worth thinking about. Commenters stated that some taxpayers will meet their obligations because it would never occur to them not to, while others are committed to evading their obligations unless and until caught.

Other commenters expressed concern that HUD did not propose to amend its existing regulations at § 570.912 (nondiscrimination noncompliance) and § 570.913 (other remedies noncompliance). These commenters stated that these regulations provide for a wide range of sanctions, including referral to the Attorney General for the commencement of an appropriate civil action, and while HUD's proposed rule references § 570.601 (affirmatively furthering fair housing) §§ 570.912 and 570.913 need to be amended to reference § 570.601 to reflect the applicability of these sanctions to the duty to affirmatively further fair housing.

HUD Response: HUD understands the commenters' concerns regarding the absence of an enforcement provision in this final rule with respect to the duty to affirmatively further fair housing. This final rule, however, is a planning rule, not a rule directed to the enforcement of the duty to affirmatively further fair housing. As a planning mechanism, this rule provides for a review by HUD of the AFH to determine compliance with the standards set forth in § 5.154, and for acceptance, or nonacceptance and resubmission (in the case of nonacceptance) of an AFH if

the AFH fails to meet these standards. While HUD declines to include a provision in this planning rule that would specifically set out the process for enforcing the duty to affirmatively further fair housing, HUD notes that it already has the authority to enforce this statutory obligation and that HUD uses its existing Fair Housing Act, title VI of the Civil Rights Act, section 504 of the Rehabilitation Act, and the Americans with Disabilities Act regulations and processes to accept complaints and conduct compliance reviews regarding the duty to affirmatively further fair housing. As provided in this final rule, HUD also may follow procedures set out in 24 CFR parts 91 and 903 when it has information that a program participant's certification to affirmatively further fair housing may be invalid. HUD believes that it is unnecessary for the rule to reflect additional complaint receipt, investigation, compliance review, and enforcement procedures when such processes and authorities are already in existence under other regulations.

Comment: HUD's rule needs to clearly address oversight and accountability following acceptance of an AFH. Commenters stated that once an AFH is accepted, there remains the need for oversight and meaningful enforcement. The commenters recommended that HUD require annual performance reports to document actions taken to address or mitigate each of the goals identified in the AFH, describe the results of those actions, and specify which fair housing issues were impacted and how they were impacted. Commenters stated that, in addition to the standard review process, and to ensure in-depth evaluation of AFHs, the final rule should provide for periodic audits by HUD of selected AFHs, and that, in the event that program participants have not met their substantive benchmarks, HUD require that these participants provide specific reasons for why these goals have not met and disclose how the participant is working to overcome any barriers to completion. Commenters stated that a formal complaint process for

community stakeholders to object to the program participant's actions or certification that they are affirmatively furthering fair housing is critically important, and must be added.

Other commenters stated that critical to effective enforcement of the AFH process is for HUD to: (1) permit residents and the public to file complaints with HUD objecting to the AFH or to the failure to meet the duty to affirmatively further fair housing; and (2) establish an enforcement mechanism setting forth how complaints will be processed and what potential sanctions may result from violations. Commenters stated that, while the rule places great emphasis on, and significantly strengthens, public and community participation in the AFH process, the rule inexplicably includes no provisions that set forth the right of community members to complain about compliance with the duty to affirmatively further fair housing or the enforcement mechanism to be used in processing such a complaint. The commenters stated that this was especially disappointing because in recent years HUD has developed an internal process for accepting third party complaints alleging violations of the duty to affirmatively further fair housing that details how to handle and investigate such complaints. The commenters stated that, through the process developed for these matters, HUD accepted and investigated complaints of non-compliance with the affirmatively furthering fair housing requirement and established a uniform enforcement mechanism for ensuring compliance with the duty to affirmatively further fair housing.

Commenters stated that, based on the proposed rule, program participants are their own monitors, and that is the case under the current AI system – program participants essentially operate in a system of voluntary compliance with their duty to affirmatively further fair housing and that HUD’s rule does nothing to change this system by not including concrete enforcement mechanisms in the rule. The commenters stated that transparent enforcement and true

accountability is paramount to successful rules and regulations.

HUD Response: In response to earlier comments, HUD has already advised that it declines to add to performance review and monitoring that are already in place under consolidation plan and applicable public housing and Section 8 regulations. In addition, as noted in the response to the preceding comment, this rule is a planning rule and not a rule directed to the enforcement of the duty to affirmatively further fair housing. Procedures to receive and investigate complaints, conduct compliance reviews, challenge AFFH certifications, and obtain compliance are already available to HUD under regulations implementing the Fair Housing Act and other civil rights statutes.

Comment: Do not establish a public complaint or contestation of an AFH. In contrast to the above commenters, other commenters stated that they are aware of some stakeholders and advocates who are asking that HUD include a process for public complaints or contestation of an AFH and the fair housing goals derived from that assessment, and that HUD provide interested members of the public with standing for individual actions concerning AFHs and fair housing goals. The commenters stated that they are strongly opposed to both of these possibilities. The commenters stated that recent decisions surrounding fair housing litigation have demonstrated the imagination and persistence of fair housing litigants, and that there are ample tools available for fair housing litigation without any additional grounds being created.

HUD Response: The AFH process contains opportunities for public involvement in the AFH process, which are provided in §§ 5.158, 91.105, 91.115, 91.401, 903.17, and 903.19. HUD anticipates that participation in the process will reduce complaints regarding the results. Furthermore, any aggrieved person can file a complaint with HUD regarding any fair housing-related matters, including an AFH. Since such complaint process already exists, HUD declines

to include additional complaint provisions in the rule.

Comment: The new AFH process will not reduce litigation. Commenters stated that HUD repeatedly advised in the proposed rule that one of the goals of the new AFH process is to "reduce the risk of litigation for program participants." The commenters expressed concern that the rule will increase litigation due to a lack of specificity as to what is expected of program participants, and as program participants pursue competing goals set by HUD. The commenters asked HUD to provide program participants with protection from litigation based on their compliance with the policies and procedures of the AFH rule.

HUD Response: One way in which this final rule is intended to help reduce the risk of litigation is by providing more specificity compared to the AI process that the AFH approach replaces. By creating an Assessment Tool that will allow program participants to identify housing segregation, disproportionate housing needs, and the contributing factors that affect fair housing choice and access to opportunity, program participants will better be able to direct their Federal and other resources and make other decisions relating to housing and community development in ways that fulfill their civil rights obligations, thus reducing the potential for liability. Public participation in the AFH process may also reduce the need to seek recourse in courts. Regarding protection from litigation, HUD cannot by regulation either grant or foreclose legal jurisdiction over particular claims in courts.

16. Procedural Issues

a. Period of Review of an AFH

Comment: The 60-day review period is too brief given the volume of AFHs to be reviewed and HUD's limited staff, and will result in an incomplete review. Many commenters expressed the concern that the 60-day review period is too brief for HUD to undertake a

thorough review of AFHs. Commenters stated that HUD has limited staff and there will be times when HUD will receive many AFHs at once making it difficult for HUD to give all the AFHs the thorough and critical review that is needed, and consequently some AFHs may be deemed accepted based on an incomplete review.

Several commenters recommended that HUD phase-in initial AFH submission dates so that limited staff resources can provide the highest level of review for all AFHs and ensure that most AFHs will be reviewed within two years after the effective date of the regulation.

Several commenters recommended that, to avoid such a consequence, the rule should provide for a longer review period by HUD, such as 90 days or 120 days. The commenters submitted that 60 days is too brief a period to provide any meaningful review of the AFH and the likely result will be as ineffective a review process as the current AIs and consolidated planning review process.

Other commenters suggested that for any AFH that did not undergo a thorough review but HUD deems accepted the acceptance should be valid for only a one-year period.

Other commenters stated that the final rule must provide a backstop to prevent acceptance of inadequate AFHs.

HUD Response: In developing the proposed rule, HUD gave careful consideration to the period of time that HUD staff would need to properly review and evaluate AFHs and HUD determined that a 60-day period presented a reasonable period for HUD staff to review and determine whether to accept or not accept an AFH. In settling on a 60-day period, HUD considered that the AFH Assessment Tool would not only provide a streamlined format making it easier for program participants to submit an AFH, but also make it easier for HUD staff to review an AFH.

HUD points out that its review of an AFH does not end with the 60-day review period and HUD's possible acceptance of an AFH. HUD's review of strategies and actions to affirmatively further fair housing continues with HUD's review of a consolidated plan or PHA Plan. As stated in the proposed rule, "an accepted AFH and completion of corresponding requirements related to affirmatively furthering fair housing in the consolidated plan and PHA Plan will be required for HUD to approve those respective plans." (See 78 FR 43715.)

However, HUD believes that a staggered submission deadline, as recommended by many commenters, would be helpful not only to HUD but to program participants, and the final rule adopts a staggered submission approach.

Rule change. In this final rule, HUD revises § 5.160 (Submission Requirements) to provide for a staggered submission deadline for AFHs. Entitlement jurisdictions that receive an FY 2015 CDBG grant of more than $500,000, and PHAs joining in submission with such entitlement jurisdictions will be the first program participants to submit their first AFH. States, Insular Areas, PHAs, and entitlement jurisdictions receiving an FY 2015 CDBG grant that is $500,000 or less will have a later first AFH submission deadline.

b. Approval versus Acceptance of an AFH

<u>Comment: HUD should approve an AFH, not simply accept</u>. Commenters requested that there should be an active approval by HUD, not solely an acceptance of an AFH, and that HUD should allow sufficient time for review to be able to approve an AFH. Another commenter stated that, in spite of HUD disclaimers to the contrary, HUD's deemed acceptance of an AFH creates the impression of a "safe harbor" for jurisdictions that may be violating the Fair Housing Act on an ongoing basis. The commenter recommended that the deemed accepted provision be removed, and replaced with an audit-type review.

Commenters recommended that if HUD cannot perform a thorough review of any one AFH within the time period for AFH review, HUD should designate the AFH as un-reviewed, and not deem it accepted. In a similar vein, other commenters stated that HUD should eliminate the characterization of "deemed accepted" for AFHs that were not reviewed. The commenters stated that HUD must make an affirmative determination of AFH compliance, rather than allowing for acceptance by default

Another commenter suggested that HUD not automatically deem accepted any AFH that HUD has not had the time to thoroughly review unless the program participant submits evidence that demonstrates its AFH is affirmatively supported by a broad cross section of stakeholders representing each of the protected classes, and is not subject to any significant challenges. Other commenters recommended that HUD not review each and every AFH but undertake a sample of AFHs and the sample reviewed would be based on fair housing complaints directed to a particular program participant.

HUD Response: HUD believes that the final rule achieves the appropriate balance of interests by requiring program participants to submit AFHs to HUD for review and acceptance rather than requiring AFHs to be approved by HUD. Program participants have asked for flexibility in determining their goals, priorities, strategies, and actions to affirmatively further fair housing at the local level, and the rule provides this flexibility. However, HUD believes it would be inappropriate to create the perception of a safe harbor or limit a private right of action under the Fair Housing Act based on an "approval" of an AFH. For this reason, HUD has decided to limit its review to acceptance or nonacceptance. HUD understands the concerns of commenters about the "deemed accepted" provision, but HUD believes the time allotted for

review of AFHs, coupled with the adoption of a staggered AFH submission approach, is sufficient.

c. Appeal of HUD's Acceptance of an AFH

Comment: The final rule should provide a right to appeal HUD's acceptance of an AFH. Many commenters asked that HUD establish a mechanism that enables advocates to appeal a HUD decision to "accept" an AFH. Commenters stated that such appeal would then trigger an immediate in-depth review by HUD of an AFH. Some commenters recommended that HUD provide for public comment on the AFH during HUD's review of the AFH. Commenters recommended that members of a community be allowed to file a complaint at any time, and that the final rule outline the specific process involved for filing a complaint, and provide that HUD respond to all complaints, in writing, within 90 days.

Other commenters stated that allowing a complaint to be filed will add additional layers of burden to the AFH process and might be easily abused. Commenters stated that the requirements for public participation in the AFH process and those involved in the consolidated and PHA Plans provide ample opportunities for the public to register their concerns. Commenters stated that any further appeal or complaint process for members of the public will unreasonably delay implementation of plans and recommends that HUD reject proposals to create a private right of action or any further appeal or complaint processes in the proposed rule.

Commenters recommended that if HUD adds an appeal process that the grounds for an appeal be narrowly defined and the burden of proof placed on the party challenging the AFH. Other commenters suggested that the final rule provide a process by which interested members of the public can file a challenge with HUD in cases where they believe that a participant has failed to meet the requirements of the regulation or failed to meet its obligation to affirmatively

further fair housing. Commenters stated that such a challenge should trigger HUD's reconsideration of the AFH that was submitted, in light of the information provided by the party bringing the challenge.

Other commenters stated that HUD should reject recommendations by commenters to create a private right of action for a deficient AFH.

HUD Response: HUD believes that establishing a new appeal process specifically regarding HUD's decision to accept an AFH is unnecessary given that HUD maintains a complaint process for any fair housing matter. Further, HUD's requirement of robust community participation in the development of an AFH will create a forum for the public to seek changes. This complements and in no way diminishes the current complaint review process. The final rule provides at § 5.158, as did the proposed rule, that to ensure that the AFH is informed by meaningful community participation, program participants must give the public reasonable opportunities for involvement in the development of the AFH and in the incorporation of the AFH into the consolidated plan, PHA Plan, and other planning documents, as may be applicable. This section further provides that the consolidated plan program participant must follow the policies and procedures described in its applicable citizen participation plan adopted pursuant to 24 CFR part 91 (see §§ 91.105, 91.115, and 91.401) in the process of developing the AFH, obtaining community feedback, and addressing complaints. The jurisdiction must consult with the agencies and organizations identified in consultation requirements at 24 CFR part 91 (see §§ 91.100, 91.110, and 91.235). For PHA Plans, this section provides that PHAs must follow the policies and procedures described in §§ 903.13, 903.15, 903.17, and 903.19 in the process of developing the AFH, obtaining community feedback and addressing complaints.

The processes, both for the consolidated plan and the PHA Plan, require the program participant to provide a summary of the public comments and a summary of the comments or views not accepted and the reasons that they were not accepted. By applying the longstanding citizen participation requirements of the consolidated plan and the PHA Plan to the AFH, which were not applied to the AI, HUD submits that any serious deficiencies that may be in a proposed AFH or other concerns that members of the public may have about an AFH will be addressed in the citizen participation processes. For these reasons, HUD's final rule does not need to provide another public comment period during the HUD review of AFHs.

With respect to filing a complaint that a program participant has failed to meet the requirements of the regulations or failed to meet its obligation to affirmatively further fair housing, nothing in the proposed rule or in this final rule prohibits a member of the public from notifying or filing a complaint with HUD that a program participant has violated a statutory or regulatory requirement, whether such requirement is the duty to affirmatively further fair housing or another program requirement. As noted earlier in this preamble, HUD has existing procedures under the Fair Housing Act and other civil rights statutes to handle such complaints, including complaints that question a program participant's AFH.

d. Distinguishing AFH Planning from Affirmatively Furthering Fair Housing

Comment: Clarify the relationship of an acceptance of an AFH to the duty to affirmatively further fair housing. Commenters stated that acceptance of an AFH should mean that HUD has determined that a program participant has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act, and has complied with other civil rights laws, regulations or guidance. According to a commenter, if HUD is not willing to indemnify a program participant based on

HUD's acceptance of the participant's AFH, HUD should include in the final rule a list of safe harbor criteria and guidance for compliance and noncompliance. Commenters further stated that the purpose of preparing the AFH and submitting it to HUD for review and approval, and the program participant's good faith efforts in addressing its fair housing goals, should mean that the jurisdiction has complied with its legal obligation to affirmatively further fair housing. Commenters stated that program participants that comply with the standards of HUD's regulation must be provided with a safe harbor from litigation.

In contrast to these commenters, other commenters stated that the final rule should clarify that an accepted AFH does not provide a determination of compliance with the obligation to affirmatively further fair housing, including, but not limited to, any "safe harbor" provision. The commenters stated that, in this regard, HUD should clarify that the final rule does not foreclose litigation, and that HUD specifically disclaim any notion of a "safe harbor" for jurisdictions with a current AFH plan that has been accepted by HUD.

HUD Response: The preparation and submission of an AFH that is accepted by HUD does not fulfill a program participant's obligation to affirmatively further fair housing, rather it is a first step towards that duty. As stated in HUD's proposed rule, and earlier in this preamble to the final rule, the purpose of the AFH is to provide and aid program participants with a more effective means of meeting the statutory obligation to affirmatively further fair housing. Whether a program participant, in fact, affirmatively furthers fair housing depends upon the actions the program participant takes, not the actions a program participant states that it plans to take in its AFH.

For purposes of receiving funding from HUD, each program participant must certify that it will affirmatively further fair housing. In general, this means that a program participant will

take meaningful actions to further the goals in its AFH, conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing. Specific certification language can be found in 24 CFR 91.225 (entitlements), 91.325 (States), 91.425 (consortia), 570.487(b)(1) (State CDBG grantees), 570.601 (all CDBG grantees) and 903.7(o)(3) (public housing agencies). The rule also defines affirmatively furthering fair housing for purposes of fair housing planning, at 24 CFR 5.152, as by stating that it means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. As this section provides, specifically, affirmatively furthering fair housing means taking actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

HUD explicitly stated in the proposed rule that HUD's acceptance of an AFH only means that the program participant has met the planning requirement described in the rule, but does not mean that HUD has determined that a program participant has complied with its obligation to affirmatively further fair housing under the Fair Housing Act, or with other civil rights statutes and regulations. HUD reiterates that statement in this final rule.

Comment: Notify program participants of acceptance of its AFH. Commenters recommended that HUD send program participants acknowledgement of acceptance of their AFH.

HUD Response: As described in § 5.162 of this final rule, program participants will

know that their AFH has been accepted 61 calendar days after the date that HUD receives the AFH, unless HUD has provided written notification that it does not accept the AFH.

e. Submission and Response Deadlines

i. 45 Days to Resubmit Nonaccepted AFH

Comment: Allow more than 45 days to revise a rejected AFH. Commenters asked that HUD allow more than 45 days to resubmit an AFH to permit participants to develop the changes and obtain whatever governing body approvals it may need before resubmitting it. The commenters stated that many governing boards meet only on a monthly basis.

HUD Response: HUD understands that there may be circumstances where program participants will require more than 45 days to resubmit an AFH that HUD will accept. Therefore, this final rule states that HUD will provide program participants with a specific time period to revise and resubmit the AFH, and that this period will be at least 45 days, but may be greater if so warranted.

Rule change. HUD revises § 5.162(c) to state that HUD will provide a program participant with a time period to revise and resubmit the AFH of no less than 45 calendar days after the date on which HUD provides written notification that it does not accept the AFH.

Comment: Clarify the process to revise a rejected AFH. Commenters stated that HUD's proposed rule was unclear whether the public comment period required by 24 CFR part 91 applies to AFHs that are resubmitted because they were originally rejected by HUD. The commenters stated that if the public comment period does apply, that would make it difficult to meet the 45-day resubmission deadline of paragraph. Commenters asked that HUD clarify whether another public comment period and consultations are not required when resubmitting a rejected AFH.

HUD Response: HUD has revised § 5.162(c) to clarify the process for revisions and resubmissions of an AFH. Program participants will be afforded a period of time no less than 45 days after the data on which HUD notifies the program participant that it does not accept the AFH.

ii. Comment Period on Draft AFH

Comment: HUD should require jurisdictions to provide a longer comment period on draft AFHs. Commenters stated that HUD should require jurisdictions to provide a 45-day to 60-day public comment period on their draft AFHs. Commenters stated that a longer period is important to ensure that the process is open and inclusive of all members of the community.

HUD Response: HUD's consolidated plan regulations provide and have long provided for a minimum 30-day public comment period for its citizen participation requirement. As stated earlier in this preamble, HUD emphasizes that this is the minimum and not maximum period of time provided for the citizen participation requirement under the consolidated planning processing. With respect to PHAs, this final rule adopts the provisions in the proposed AFH rule that PHAs must follow the policies and procedures in 24 CFR part 903 pertaining to community input.

iii. 270 Day Submission of AFH

Comment: The 270-day submission places the AFH process outside of the Consolidated Plan process. Commenters stated that the requirement that a participant must submit an initial AFH to HUD at least 270 calendar days before the start of the program participant's program year substantially places the AFH process outside many communities' consolidated plan process and will not integrate fair housing concerns into the consolidated plan process but will force a participant to conduct a separate process with associated expenses and allocations of scarce

administrative resources. Commenters stated that participants should be allowed the option to choose, based on local conditions and characteristics of the participant and its community, to prepare the AFH within its consolidated plan process and timing schedule.

Other commenters stated that the 270 days is too long a submission prior to the consolidated plan. The commenters stated that State participants would have to start the AFH/consolidated plan process in mid-December of 2013 to meet a 2016 due date, or almost 2 and ½ years before the consolidated plan would become effective. The commenters stated that with this length of time since the start of the development of the AFH, the data that is used for the AFH may not be valid by the time the AFH is submitted, and that the data should be fresh when program participants are thinking about fair housing at the same time consolidated plans are being developed.

Other commenters stated that under the proposed rule, an AFH would be due 270 days before a consolidated plan participant could begin its plan, and that the "begin" date would occur after 60 days of HUD review of the AFH, a total of 330 days. Commenters stated that, in effect, this would mean State grantees would have to start their AFH and consolidated planning efforts a minimum of 19 months ahead of the consolidated plan start date. Commenters stated that the time and resources necessary to complete the AFH and consolidated planning processes are simply too long and intensive, and that the effect of this AFH and consolidated planning processes would be that program participants would be in a constant planning and reporting cycle, draining staff time and resources away from effective implementation and monitoring of identified goals and objectives of both the AFH and consolidated plan.

<u>HUD Response</u>: The 270-day period remains in the final rule but that period only pertains to the first AFH to be submitted by program participants. The final rule provides ample

time to prepare the first AFH and better aligns with the consolidated and PHA planning processes. HUD believes the 270-day time period is needed to allow the results of the AFH to inform the consolidated and PHA plans.

Comment: Clarify when the 270 days commences, and clarify what program year means. Commenters asked that the submission of the AFH 270 days in advance needs to be clearly defined in the rule. The commenters asked whether the submission deadline refers to the start of the program participant's fiscal year or the due date of the consolidated plan. Other commenters asked whether "program year" as used in the rule refers to a PHA's fiscal year, the federal fiscal year, or the calendar year. The commenters stated that many PHAs participate in multiple programs, and they operate on a mix of schedules, rendering the term "program year" largely meaningless.

HUD Response: HUD believes that the staggered submission deadline provided in § 5.160, which divides program participants into categories, clarifies what is meant by program year and fiscal year.

Comment: Reconcile contradiction in AFH submission between § 5.160(a) and § 5.160(c). Commenters stated that the proposed regulations provide the requirements for submission of the AFH to HUD in terms of submission deadline and frequency. Commenters stated that proposed § 5.160(a)(1) and (a)(2) state the submission deadline for initial AFH and subsequent AFH Statements, respectively as follows: (1) "…each program participant … shall submit an initial AFH to HUD at least 270 calendar days before the start of the program participant's program year,") and (2) "After acceptance of its initial AFH, each program participant … shall submit subsequent AFHs to HUD at least 195 calendar days before the start of the jurisdiction's program year.") Commenters stated that these two provisions contradict

proposed § 5.160(c) (Frequency of submission): ("Each consolidated plan program participant must submit an AFH at least once every 5 years, or as such time agreed upon by HUD and the program participant in order to coordinate the AFH submission with time frames used for consolidated plans, …") Commenters stated that HUD's Consolidated Plan regulations require entitlement jurisdictions to submit their Consolidated Plan One-Year Action Plans annually 45 days prior to the start of jurisdiction's program year, and therefore, it is unclear whether HUD expects the localities to submit an AFH on an annual or 5 year basis.

Commenters further stated that, in addition, the proposed rule at § 5.160(a)(1), which requires submission of the initial AFH Statement 270 calendar days prior to the start of a jurisdiction's program year would result in localities having to formulate and submit their initial AFH during their CAPER formulation and submission process for the prior program year's consolidated plan. Commenters stated that attempting to formulate and submit both Federally-required reports within the same time frame would create an excessive administrative burden.

Commenters recommended that HUD: (1) modify proposed § 5.160(a)(1) and (a)(2) to provide clarification and be consistent with proposed regulation § 5.160(c) regarding frequency of submission; and (2) modify proposed regulation § 5.160(a)(1) to change the submission deadline to relieve the administrative burden to be closer the consolidated planning cycle (for example, 180-210 calendar days before), and provided the following suggested language: The amended regulation § 5.160(a)(1) may be modified to read as follows: "…each program participant … shall submit an initial AFH to HUD at least (180-210) calendar days before the start of their 3- or 5-year consolidated planning process,…").

Finally, PHA commenters stated that a PHA that elects to submit an independent AFH is required to update its PHA Plan annually, while all other program participants are required to submit only every 5 years? The commenters asked HUD to justify this position.

HUD Response: The staggered submission deadlines provided in the final rule address the concerns raised by the commenters. In addition, as noted earlier in this preamble, under the overview of changes made at the final rule stage, PHAs will be required to submit AFHs every 5 years.

f. Abbreviated AFH for Small Entities

Comment: Allow small program participants to submit an abbreviated AFH. Commenters requested that HUD allow small program participants to submit an abbreviated AFH. Commenters stated that small program participants do not have the resources or staff to develop the AFH envisioned in the proposed rule. Commenters stated that small program participants have smaller staffs which would be burdened with these new data requirements and goals in the rule. The commenters stated that little data is available at the jurisdiction level for small jurisdictions but only available at county or even State regional level resulting in a skewed measurement that can falsely shape the AFH. Commenters suggested that an abbreviated AFH would focus solely on (1) a summary of fair housing issues in the jurisdiction, if any, (2) community input through the Consolidated Plan, and (3) a discussion of the use of CDBG, HOME, and other possible resources to address fair housing issues in the community.

HUD Response: HUD recognizes that a “one size fits all” approach may place the same burdens on all entities but that such small entities have fewer resources to deal reasonably with such burdens. As discussed in Section II.D of this preamble, the final rule provides for a staggered AFH submission deadline. Certain program participants (States, Insular Areas, PHAs)

and small program participants (qualified PHAs and jurisdictions that receive a small CDBG grant in fiscal 2015) have the option of submitting their first AFH at a later date than provided for entitlement jurisdictions that receive an FY 2015 CDBG grant of more than $500,000. The staggered submission recognizes the capacity challenges, especially of small entities, and it is HUD's expectation that by the time their AFHs are due, the AFH approach and submission requirements will be more refined and these small entities and HUD can benefit from the experience of program participants that have already submitted AFHs.

The term "qualified PHA" was established by the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110-289, approved July 30, 2008) and defines such PHA as one that has a combined unit total of 550 or less public housing units and section 8 vouchers; is not designated as troubled under section 6(j)(2) of the 1937 Act, and does not have a failing score under SEMAP during the prior 12 months. HERA exempted qualified PHAs from the requirement to prepare and submit an annual plan. As discussed in Section II.D of this preamble, an FY 2015 CDBG grant of $500,000 or less has been designated a small CDBG grant.

Rule Change. Section 5.160 provides that PHAs, and entitlement jurisdictions that receive an FY 2015 CDBG grant that is $500,000 or less, as well as States, and Insular Areas, may submit their first AFHs at a later date than entitlement jurisdictions that receive an FY 2015 CDBG grant of more than $500,000 and PHAs that jointly submit an AFH with an entitlement jurisdiction that receives an FY 2015 CDBG grant of more than $500,000.

g. Recently Completed AIs

The proposed rule asked the question whether HUD should waive or delay preparation and issuance of an AFH for program participants that recently conducted a "comprehensive" AI. Although a few commenters stated that the AFH should not be waived because the AI is a failed

process, overwhelmingly commenters responded yes, that the AFH should be waived or delayed because significant time and resources already went into preparation of the AI. Specific comments were as follows:

Comment: Allow the use of a recently completed AI to comply with first AFH submission requirement. Commenters stated that developing an AI can be a costly and time-consuming effort and the product of that effort should not be discarded and that it would seem unfair and a waste of resources to require a program participant that, in good faith, recently completed a comprehensive AI to start all over and create a new AFH. Commenters requested that HUD not require program participants to create a new AFH if an AI was completed within 5 years of the date of the final AFH and the program participant's current consolidated plan has already been submitted or their next Consolidated Plan is due to be submitted within 12 months or less of the date the AFFH final rule. In that case, the AFH would be required to be submitted in conjunction with the program participant's next 5-year consolidated plan.

Other commenters ask that HUD allow a completed Fair Housing and Equity Assessment (FHEA) to count as an AFH. Commenters recommended that Regional Analysis of Impediments developed in support of the Sustainable Communities program should also be permitted to continue for some period of time.

HUD Response: HUD believes that the staggered AFH submission deadline provided in this final rule addresses to a considerable extent the commenters' concerns about recently completing an AI and then having to, perhaps within a short period of time, complete an AFH. HUD, however, wanted to ensure that for recipients of an FY2010 or 2011 Sustainable Communities Competition award that completed a regional analysis of impediment (RAI) in connection with such award, and where the RAI was submitted within 30 months prior to the

date when the program participant's AFH is due, such RAI would be accepted in lieu of the AFH. The analysis required under the Sustainable Communities competition award is a more rigorous analysis and more comparable to the AFH approach provided in this rule.

Rule change. HUD has revised § 5.160 to provide that entitlement jurisdictions that participated in and signed on to a HUD-approved RAI in accordance with a grant awarded under HUD's FY 2010 or 2011 Sustainable Communities Competition that was submitted within 30 months prior to the date when the program participant's AFH is due will be accepted in lieu of the AFH.

h. Resolving Disputes on the Content of a Joint or Regional AFH

In the proposed rule, HUD asked commenters what process should guide the resolution of disputes between collaborating program participants if an AFH is not accepted because of disagreements between the collaborating program participants. The comments were as follows:

Comment: Provide for dispute resolution and set an end date for such resolution. Commenters stated that a dispute among program participants is particularly worrisome, because failure to submit a consolidated plan within the federal fiscal year precludes the ability of the program participant to work through the issues and ever receive funding. Commenters requested that HUD allow a program participant, caught in this situation, to proceed to submit its consolidated plan, and then allow the program participant a specific amount of time for the participant to work through differences with HUD. Commenters stated that it is critical that the process for resolving disputes about the content of an AFH should not jeopardize receipt of critical funding. The commenters stated that HUD should assure that resources do not get unreasonably delayed and establish a review/approval/dispute process that is responsive to local

operational needs such that funds continue to flow while these issues are addressed, barring a clearly unresponsive noncompliant program participant.

Commenters stated that there needs to be some HUD Headquarters involvement where a disagreement continues beyond some reasonable period, such as 60 to 90 days. Commenters stated that meeting with HUD to facilitate agreement and/or mediation as a last resort would be a great process to guide the resolution of disputes between program participants. The commenters stated that HUD would be in the best position to provide technical assistance to iron out any differences.

Other commenters stated that HUD should offer technical assistance with the disapproval of the first AFH submitted, and needs to be clear about all issues in the first letter of disapproval, so a program participant can expect, once identified issues are addressed, approval of the AFH would be forthcoming, rather than learning that additional issues have been identified.

Commenters stated that the rule should provide for a dispute process so that everyone knows how to resolve a dispute and funding will not be jeopardized.

In contrast to the foregoing commenters, other commenters stated that HUD should not concern itself with the internal problem-solving mechanisms of the regional collaboration. Commenters stated that the party responsible for submitting the regional AFH to HUD should have authority over disputes, as they are lead agency and responsible for the AFH. Commenters stated that if a participant does not agree with the AFH, they can submit a dissenting opinion. This should include ability by the dissenter to not do the activity they disagree with, or to do activities they deem more appropriate.

HUD Response: HUD appreciates commenters responding to the specific question posed on this issue. On further consideration, HUD declines to include a dispute resolution process in

the rule and has also removed the provisions regarding PHA dissenting opinions. Since joint and regional collaborations are entirely voluntary, HUD anticipates that disputes among collaborative program participants would be the exception as the program participants themselves selected the collaborative relationship. HUD also encourages MOUs to be entered into by collaborative program participants as a means of resolution, so that if disputes do arise, the collaborative program participants can resolve issues among themselves without HUD intervention.

i. Impact of Disaster Situations on an AFH

Comment: Serious consideration must be given to timing of submission of an AFH that must be revised as a result of a declared disaster. Commenters stated that the requirement that an AFH be revised in the event of a Presidentially-declared disaster is appropriate but when the revision must be done and submitted to HUD must be considered in light of the multiplicity of tasks required during disaster recovery. Commenters stated that the program participants will likely be consumed with disaster recovery tasks for some time, and that any requirement by HUD to revise the AFH within a brief period following the disaster may divert human resources from disaster recovery. Commenters stated that HUD must recognize that a program participant's first responsibility will be to deal with the victims of the disaster. Commenters stated that HUD should leave preliminary determinations of the need for and timing of revisions to the local jurisdiction.

Commenters stated that the rule should integrate revising the AFH with the timeline for the Action Plan recovery expenditures required under HUD's Community Development Block Grant- Disaster Recovery (CDBG-DR) program, and recommended that HUD establish a requirement that, as part of the Action Plan process under CDBG-DR, grantees be required to discuss in the Action Plan how the AFFH related data that the CDBG-DR Notice provides

impacts the barriers identified in the AFH and/or creates any new barriers, and how the Action Plan's programs address those barriers. Commenters stated that a uniform requirement of a revision following a disaster calls for specificity not only regarding the timing and submission of the revised AFH but the content. Commenters stated that the elements included in revision of the AFH should be a modified or condensed set of elements that target the most impacted aspects of the disaster rather than require a complete revision and rewrite of the AFH. Additionally, commenters stated that HUD should at least exempt grantees from the public hearings, only when a revision is needed due to a major disaster.

Other commenters also stated that there should be no assumption that a natural disaster automatically requires jurisdictions to deviate from the priorities set out in a compliant AFH. Commenters stated that this is an issue that would need to be addressed on a case-by-case basis. Commenters stated that, in some cases, a disaster could have no effect on compliance with the AFH if it is fairly localized in a rural area or the low-income housing is repairable and the most immediate need would be to get people back into their homes. Commenters stated that revising an AFH following a disaster should only be required where the disaster requires substantial reconstruction of new housing, not those primarily requiring repair of existing housing. Commenters stated that HUD's rule needs to allow some flexibility and discretion in determining whether and when a jurisdiction needs to revise its AFH.

Other commenters state that while HUD must give program participants adequate time to revise an AFH in the event of a major natural disaster, program participants should not be exempt from revision as a result of a major natural disaster. Commenters stated that natural disasters confront communities with a challenge to rebuild and to start over, and that this presents a totally unique opportunity to rebuild without the pre-disaster patterns of segregation.

Commenters stated that the rule must anticipate these pressures and create the circumstances where fair housing practices can be applied and a positive pro-integrative transformation can take place. Other commenters similarly stated that natural disasters, while creating many barriers, also can provide opportunities to increase access and better inclusion in the future, and that these opportunities should be pointed out to the entities and they should be monitored to see how well they serve fair housing goals during the disaster and in their rebuilding efforts. Commenters stated that the AFH and disaster relief goals can and should be coordinated so that disaster relief funds are not misdirected to maintain the status quo, including high levels of racial segregation and low levels of affordable housing in high opportunity areas.

Some commenters suggested that HUD should work with the Federal Emergency Management Agency (FEMA) on developing appropriate recommendations and guidelines instead of establishing a new and separate mandated process. In addition to opposing a mandate to revise an AFH as a result of a disaster situation, commenters stated that HUD should be precluded from denying relief to jurisdictions due to disputes about the AFH and the actions identified therein. Commenters stated that it would be unconscionable that HUD use disaster relief funds as leverage in bona fide disputes with local jurisdictions.

Other commenters recommended that HUD should consider an AFH template specifically for a disaster-declared area, similar to what it does with waivers requests for the use of CDBG-DR funding, with options that a grantee can utilize under various categories. The commenters stated that the template should establish fair share allocations of disaster recovery resources for households based on income, sex, age, national origin, disability etc. to ensure members of classes of persons protected under the Fair Housing Act receive access to disaster recovery funds at a rate equal to the degree they were impacted by the disaster; require housing

units rebuilt in the wake of a disaster to be "visitable" to persons with disabilities; and require a disaster vulnerability assessment of neighborhoods and ensure that in neighborhoods where there are concentrations of persons protected under the Fair Housing Act such residents receive fair access to infrastructure to remediate the vulnerability of these areas to future disaster.

Other commenters suggested that HUD provide a guidebook for jurisdictions to use to modify their AFH post-disaster plans and to lawfully exercise opportunities posed by large rebuilding programs. In the immediate aftermath of a major disaster jurisdictions face many challenges in gearing up to rebuild. The commenters stated that, by pre-developing guidance, HUD would ensure that the process of modifying the AFH would be informed by best practices and proceed smoothly.

HUD Response: HUD appreciates the very good suggestions offered by commenters regarding preparation of an AFH in the face of a disaster situation causing significant damage to an area or areas of the U.S., and, thereby, possibly requiring changes to a program participant's AFH. HUD wholeheartedly agrees with the commenters that their first responsibility is to assist the residents in the areas affected by the disaster. HUD will consider working with FEMA on guidance related to the revision of an AFH after a disaster.

Rule change. HUD has revised § 5.164 (Revising an Accepted AFH) to provide that a program participant must revise its AFH whenever a "material change" in circumstances occurs in the jurisdiction of a program participant, which is a change that affects the information on which the AFH is based to the extent that the analysis, fair housing contributing factors, or the priorities and goals of the AFH no longer reflect actual circumstances.

Revised § 5.164 provides examples of what constitutes a material change such as a Presidentially declared disaster, under title IV of the Robert T. Stafford Disaster Relief and

Emergency Assistance Act (42 U.S.C. 5121 et seq.), in the program participant's area that is of such a nature as to significantly impact the program participant's duty to affirmatively further fair housing; significant demographic changes; new significant contributing factors in the participant's jurisdiction; and civil rights findings, determinations, settlements (including Voluntary Compliance Agreements), or court orders. While a Presidentially declared disaster is the most prominent example, it is only one example, and a material change is not limited to Presidentially declared disasters. Other disasters that cause significant damage to housing or infrastructure, result in significant displacement of populations, or have significant disproportionate effects based on protected class in their direct effects in response or recovery, would be among the types of disasters likely to significantly impact the steps required to affirmatively further fair housing and therefore be consider a "material change." HUD will work with grantees that experience such events and provide additional clarifying guidance as may be needed given the material change at issue.

Revised § 5.164 further provides that where a revision to an AFH is required because of a material change in circumstances, the revision shall be submitted within 12 months of the onset of the material change in circumstances, or at such later date as HUD may provide, and that where a revision is required due to a Presidentially declared disaster, the time for submission shall be automatically extended to the date that is 2 years after the date upon which the disaster declaration is made, and the deadline may be further extended upon the request for good cause shown.

Revised § 5.164 also provides that HUD may require a program participant to revise an AFH upon written notification to the program participant specifying the reasons why HUD determined a revised AFH is necessary. Revised § 5.164 allows, however, for a program

participant to respond to HUD and advise of reasons why the program participant believes a revised AFH is not necessary.

j. Need for Safe Harbor

Comment: Provide a safe harbor for program participants that faithfully follow the requirements in the AFH rule. Commenters stated that the proposed rule lacks a "safe harbor"; that is, that the rule provides no assurances that a program participant has sufficiently met its obligation to affirmatively further fair housing. Commenters stated that a safe harbor is especially important in the initial years of implementation of the new AFH process because it is a major change from the AI process, and, as with any transition to a new system, the new AFH approach may not play out as HUD envisioned. Commenters stated that HUD needs to recognize program participants for their good faith efforts to comply with new requirements, and hold them harmless for factors outside of their control. Commenters stated that they appreciate HUD stating that, through this new AFH process, HUD expects to reduce litigation and the commenters suggest that including a safe harbor would definitely reduce litigation.

Commenters stated that part of the reason for requesting a safe harbor is that HUD must recognize that there are factors beyond a program participant's control, and that such factors include operating under a consent decree pursuant to a court order that requires a program participant to take action in accordance with the decree that may conflict with the AFH rule, or a program participant is faced with concentrations of populations that occur for nondiscriminatory purposes, as for example, populations surrounding HUD-funded Historically Black Colleges and Universities.

Other commenters clarified that they are not seeking a safe harbor that the program participant has fulfilled its duty to affirmatively further fair housing, but rather the commenters

stated that they are seeking a safe harbor that, if a program participant submits an AFH, and if HUD approves the AFH, then the program participant is considered in compliance with the AFH planning requirements.

HUD Response: As stated earlier in this preamble, this rule does not assess whether a program participant has carried out its statutory obligation to affirmatively further fair housing. As also stated earlier in this preamble, an AFH will be deemed accepted after 60 calendar days from the date HUD receives an AFH unless HUD has provided the program participant(s) with notification that HUD does not accept the AFH

17. Entitlement and Nonentitlement Jurisdictions and Role of the States

Comment: State AFHs should cover only nonentitlement jurisdictions. Commenters stated that State AFHs should cover only the non-entitlement jurisdictions, and should not be required to cover entitlement jurisdictions. Commenters stated that entitlement jurisdictions will be required to prepare their own AFH, therefore requiring the State to also complete an assessment of the same area would be redundant and a waste of time and money. Commenters stated that the basis for States preparing the AFH is based on the use of CDBG, HOME, ESG, and HOPWA funding, and that States use these resources primarily in non-entitlement jurisdictions, and that, in fact, States may not legally use most of their HUD resources in entitlement jurisdictions, just as entitlement jurisdictions are required to use their HUD funding within their own geographic boundaries. Commenters stated that since entitlement jurisdictions will be required to prepare their own AFHs, having the State do an assessment of these same areas would be redundant and a waste of resources. Commenters stated that if States choose to participate in regional AFHs that include entitlement jurisdictions, they may do so and the AFH

would include the entitlement jurisdictions. Commenters recommended that the definition of a State AFH (§ 5.152 Definitions) should be limited to non-entitlement areas of the State.

Commenters stated that HUD does not appear to understand how States operate, and how they are different from entitlement jurisdictions. Commenters stated that what a State can accomplish is different from what an entitlement community can accomplish. The commenters stated that the geographic scope of entitlement communities is limited and their structures of control are far greater, both politically and economically. The commenters stated that State entities cover widely varying geographies and tend to have far more limited capacity to control political and economic outcomes. Commenters stated that, throughout the proposed rule, guidelines that may be appropriate to entitlement local governments are being applied inappropriately to State programs.

Commenters stated that the new mapping system to gather data is not workable for State grantees. Commenters stated that it would be helpful if when HUD designs mapping systems for collecting data they work with a sub-committee that includes State grantees. The commenters stated that the whole data gathering system for the e-con planning suite is another example of mapping systems that do not work for State grantees. It is fine if HUD wants to offer this mapping system as a tool that can be used but its use should not be made mandatory.

To resolve the treatment of States in the AFH regulations, commenters recommended that HUD have separate regulatory sections for States and local governments that acknowledge the differences in their needs, capabilities and size of geography. Commenters stated that HUD's proposed rule did not acknowledge that State governments operate at a different level of responsibility and for a different geographic area of coverage; and that States are more like HUD

in their administration of housing and community development programs than local governments.

Commenters further stated that States have limited influence over local government actions that could be most effective addressing a fair housing issue, and that while there may be significant fair housing issues in a locality, a State may have no ability to influence the locality, and, therefore, a State cannot include goals for mitigating the factors contributing to the fair housing issue. Commenters stated that States do not have control over zoning and local land use decisions; that land use decisions are local responsibilities that can be informed by using geographic data systems and maps that analyze current demographic and socio-economic conditions. The commenters stated that State AFHs should not be rejected under § 5.162(b) if they do not address local issues.

Commenters stated that providing separate sections for State and local governments is not unprecedented, pointing to HUD's Consolidated Plan regulations at 24 CFR part 91 that separate certain State and local requirements in recognition of their differences. Commenters further recommended that HUD draft regulatory sections applicable to States in close consultation with a wide variety of States (small and large States; States with many local entitlement jurisdictions and States with few local entitlement jurisdictions; and States with few metropolitan areas and states that are predominantly metropolitan) and their associations, such as the Council of State Community Development Agencies (COSCDA) and the National Council of State Housing Agencies (NCSHA).

Commenters stated that while HUD specifically addresses four distinct types of program participants, States apparently fall under the more generic category of "jurisdiction" per § 91.5. Commenters stated that this becomes problematic when examining the language describing the

required elements of the analysis, which speaks in terms of various signifiers within "the jurisdiction and region." Commenters stated that, in the case of States, what this means is not altogether clear. Commenters asked that HUD clarify whether the State analysis covers the jurisdiction (which the commenters said taken literally would mean the State as a whole) or only those portions of the State nonentitlement areas that are subject to the various CPD programs (noting that the geography of entitlements varies with each program). The commenters stated that the inclusion or exclusion of entitlement jurisdictions with their primarily urban/suburban populations would produce very different assessment outcomes.

Commenters recommended that regional analysis should only be required when a regional AFH is prepared. The commenters stated that since a State's jurisdiction is much larger than a local jurisdiction's, the rule should require only a statewide analysis, but allow those States that prefer to undertake smaller geography analyses to do so. Other commenters stated that HUD should revise § 5.154 (d) and (e) of the proposed rule to establish different requirements that are appropriate to State governments.

Commenters stated that if HUD does not distinguish the responsibilities of the State from nonentitlement jurisdictions in the final rule, HUD must clarify that a State is not responsible for the failure of its subrecipients to comply with the requirements of this rule or to monitor their compliance. Commenters stated that States should not be bound by administrative actions taken by HUD against a local jurisdiction that fails to submit an acceptable AFH. Commenters stated that in the case of a local jurisdiction's failure to submit an accepted AFH, and HUD withholds the jurisdiction's CDBG award, the State jurisdiction should not be prohibited from awarding other CPD funds to the local jurisdiction. Commenters stated that States are better equipped and suited to develop policies and priorities for distributing funds according to procedures that seek

to minimize concentrations and promote choices of places to live. Commenters stated that States should only be responsible for monitoring their subgrantees' efforts to affirmatively further fair housing, not all of the jurisdictions in the non-entitlement areas, and that for non-entitlement areas within the State that have not been funded by the State, the final rule should not expect States to be held responsible for subgrantees' actions to affirmatively further fair housing.

Other commenters stated that States, particularly, should be held accountable for the duty to affirmatively further fair housing based not only on how States expend HUD funds, but also on the level of compliance they require of local jurisdictions, including those that do not receive HUD funds. Commenters stated that State laws and regulations governing zoning and preventing exclusionary practices are one such mechanism for encouraging compliance. The commenters stated that expenditure of State discretionary funds (including non-HUD funds as well as non-federal funds) for housing production and preservation, economic development, water and sewer infrastructure, transportation, and school building facilities can also have a powerful impact and should be included in the creation and implementation of an AFH.

Finally, commenters addressed the consultation requirement and noted that the proposed rule states at § 91.110(a)(2) that the "State shall consult with state and regionally-based organizations that represent protected class members…and other public and private fair housing service agencies, to the extent such agencies operate in the State." Commenters recommended that States be required to consult with entities in non-entitlement areas only and that the focus should be on these non-entitlement areas in these consultations. Commenters stated that regarding consultation by States, only statewide public housing authorities must be consulted in developing an AFH. Commenters stated that the proposed rule at § 91.110 (a)(1) provides: "The State shall consult with any state housing agency administering public housing (PHA)

concerning consideration of public housing needs, planned programs and activities, the AFH…" Commenters stated that the language should indicate clearly that it is only statewide housing authorities that must be consulted. Commenters stated that if HUD's intent was broader, that language should be limited to "representatives of public housing authorities covered by the state's Consolidated Plan" not all public housing authorities.

HUD Response: The commenters raise very valid points about the differences between entitlement jurisdictions and the role of States with respect to receipt, distribution, and expenditure of HUD funds. HUD believes a rule change is not necessary, however, in recognition of the unique role that States play, HUD intends to develop a format of the Assessment Tool that is more tailored to the activities of States.

18. Regional Collaboration and Regional Analysis.

Comment: It is important for PHA and local jurisdictions to collaborate: require a letter affirming cooperation. Commenters stated that currently, in most locations, fair housing planning between jurisdictions and PHAs is not significantly interwoven. Commenters stated that PHAs are oftentimes distinct legal entities outside the control of local governments, even though they may be located within the geographical boundary of a jurisdiction, and that the only linkage may be the appointment of PHA board members by the local elected official or body. Commenters stated that notwithstanding a strong linkage, a jurisdiction's discussion with PHAs is often very helpful in better understanding the real "impediments" a PHA's residents face in trying to locate affordable housing outside of the public housing developments and gaining a better understanding of the nuances of any discriminatory actions they may encounter, and that therefore, it is important for jurisdictions and PHAs to come to the table and fully collaborate in the development of the AFH.

Commenters requested that to ensure such cooperation, HUD should require a letter affirming cooperation between the two entities in the development and implementation of the AFH. Other commenters stated that HUD should require a meeting of the entities seeking to engage in joint participation with HUD's staff in FHEO. Commenters stated that HUD should issue a sample agreement for use between or among program participants seeking to jointly undertake the AFH planning process.

HUD Response: HUD appreciates the value that the commenters see in a joint participation by PHA and local government, and HUD seeks to be helpful to such entities in their efforts to jointly undertake AFH planning, but HUD declines to require such entities to execute a letter or agreement affirming cooperation or meet with FHEO staff. As noted in response to an earlier comment, HUD encourages the creation of MOUs to govern the joint participation process when completing an AFH.

Comment: Clarify whether a regional analysis is required of every AFH and if so, define "region." Commenters stated that § 5.154(d)(2) requires analysis of various data "within the jurisdiction and region." Commenters stated that the mandated nature of this provision, "that the program participant must identify, within the jurisdiction and region, integration and segregation patterns and trends across protected classes; racially or ethnically concentrated areas of poverty; whether significant disparities in access to community assets exist across protected classes within the jurisdiction and region; and whether disproportionate housing needs exist across protected classes" appears to require a participant to in effect conduct a regional AFH effort and eventual plan without drawing any distinctions between a community's jurisdiction where it practices a higher level of responsibility and influence than for a "region." Commenters stated that for many participants this provision will be burdensome and ineffectual especially for larger metro

regions of a large number of diverse and independent governmental entities. The commenters stated that the provision as worded will mandate a high level of added expense and administrative burden. The commenters asked HUD to clarify whether the intention of the rule is to require a regional analysis only when there is a regional plan, or for every AFH.

Other commenters stated that a regional analysis should only be required when a regional AFH is prepared. The commenters recommended that HUD modify the rule so that it is clear that the analysis applies to the jurisdiction or, if a regional AFH is prepared, the region consisting of the regional AFH participants.

Commenters stated that if HUD is requiring a regional analysis for every entity submitting an AFH, then HUD must define what is meant by a "region." Commenters stated that the definition of a region indicated in HUD's proposed rule is that a region is the area in which two or more program participants collaborate on a single AFH. Commenters stated that this definition is problematic for many reasons, one of the most important being that it could perpetuate a core problem with current strategies to affirmatively further fair housing. The commenters stated that under current regulations, communities can form a consortium for purposes of obtaining HUD funds subject to the requirement to affirmatively further fair housing, but that it is often the case that asset-rich communities – often times communities greatly in need of affirmatively furthering fair housing – have little incentive to join a consortium.

Commenters asked whether a region for State AFH planning purposes is the State and surrounding States, or all the regions within a State, however those are defined. Other commenters also asked that HUD exempt states from analyzing data for regions.

<u>HUD Response</u>: All program participants must use HUD-provided data and that data will include regional data. A look at regional data is important because the demographic makeup

of a program participant's population may be very different from the demographic makeup of the larger region's population. For example, certain communities within a region may have large concentrations of persons with disabilities when compared to the broader region, or a disproportionately small percentage of families with children when compared to the larger region, or contain most of the region's racially or ethnically concentrated areas of poverty. Therefore, an examination of such data is important in order to accurately assess the factors that contribute to a program participant's own fair housing issues.

With respect to the set of comments requesting that HUD clarify the definition of a region when referring to "regional data" or a "regional analysis," the Assessment Tool will address this request.

With respect to the set of comments requesting that HUD require particular communities to participate in a regional AFH, HUD declines to impose such a requirement. Program participants should determine whether they want to collaborate with other program participants and, if so, who they want to collaborate with.

Comment: HUD must provide incentives to achieve regional collaboration because regional collaboration is difficult. Commenters stated that many fair housing issues transcend local jurisdictions but they are not convinced that increased collaboration will result from HUD's rule. Commenters stated that the proposed rule encourages regional collaboration in the development of AFHs, but stated that there are many factors that make regional collaboration difficult. Commenters stated that without these incentives, jurisdictions may be reluctant to take on the challenge of inter-jurisdictional collaboration. Commenters stated that policies adopted by one jurisdiction or region are not simply voted on by another jurisdiction. Commenters stated that the difficulty is that decisions are made within the boundaries of the jurisdictions, and

though collaboration can be attempted, the politics of ideology and money often get in the way of noble regional efforts.

Commenters also stated that HUD must ensure that all program participants that participate in regional AFHs identify priorities, set goals appropriate to the needs in individual jurisdictions, adopt spending plans and strategies to achieve goals, and establish timetables, benchmarks and measurable outcomes for each goal. Commenters stated that they are concerned that regional collaboration efforts over the past 15 to 20 years have more often resulted in overly-generalized analyses which fail to provide accountability for individual jurisdictions, and recommend few, if any, meaningful actions to overcome fair housing barriers. Commenters stated that HUD must take care to avoid this result in the proposed rule. Commenters stated that § 5.156 (d) of the proposed rule states only that "A Regional AFH does not relieve each regionally collaborating program from its obligation to analyze and address local fair housing issues and determinants that affect housing choice within its respective jurisdiction." Commenters expressed concern about the sufficiency of this provision and recommended that this section should be amended to require that regionally collaborating programs, especially those exercising land use and zoning powers, are required not just to analyze barriers within their own boundaries but also to adopt jurisdiction-specific actions to overcome those barriers. Commenters stated that HUD might also provide more detail about how such regional planning would work in non-contiguous jurisdictions.

Other commenters stated that the need to analyze and address local fair housing issues and contributing factors creates burden and does not relieve collaborating regions from burdens as suggested by HUD's promotion of regional collaboration. Commenters stated that it is counterintuitive to suggest or even encourage participants to engage each other in developing a

regional AFH if participants are still required to provide an analysis of local issues as stated in § 5.156(d). Commenters stated that a regional AFH would only benefit from reduced burden if the issues at the regional and local level are consistent to the extent that one analysis would cover both levels, but that participants would not know this until well into the AFH process. Commenters stated that this may result in increased costs and use of resources, as well as delays in completion of the AFH, which is the opposite of HUD's promotion of regional collaboration on AFHs. Commenters stated that they agree that any regional analysis must tie back to each collaborating community with specific actions it will take to affirmatively further fair housing, but that given the goal of connecting the AFH with future consolidated plans, this requirement could be better crafted to incentivize partnership. Commenters stated that with the tight timeframe for the completion of the AFH within one year before the submission of the consolidated plan, communities are developing recommendations for fair housing twice within a 2-year period, creating redundancy.

Commenters suggested the rule include stronger language recommending the creation of regional AFHs in large metropolitan regions that focus on robust analyses of fair housing conditions and include broader regional recommendations, and that the rule not include recommendations specific to individual program participant jurisdictions. Commenters suggested that for each consolidated plan completed by jurisdictions within the region covered by the regional AFH, the AFH should include strategic plan recommendations to affirmatively further fair housing tied both to the analysis and recommendations included in the regional AFH. Commenters stated that under this model the regional AFH becomes the "existing conditions report" for multiple communities on the state of fair housing in the region, with each community using the consolidated planning process to develop local implementation in response. The

commenters stated that since only one regional AFH would be needed in each of these regions, the reporting burden for individual program participants within each region would be reduced, but clarified that in recommending this model of a regional AFH, the regional AFH would be developed in active collaboration with program participant jurisdictions.

Other commenters stated that for regional collaboration to be meaningful it must not be conducted exclusively by jurisdictions consisting of uniform or near-uniform demographics.

Other commenters stated that, as proposed, the rule encourages only narrow partnerships, primarily among existing CDBG or HOME consortia, and given the regional scope needed to properly analyze and contextualize the provided data, these small collaborations will need to use scarce administrative dollars to find outside assistance. The commenters stated that while there is some efficiency to be gained from these types of collaborations, the most effective AFHs will be based on regions defined by the boundaries of MPOs or Regional Councils.

Commenters stated that regional jurisdictions do not necessarily conform to MSA boundaries, and that many have the capacity to perform the analysis and policy recommendation tasks necessary to complete a regional AFH. Commenters stated that none of the materials released by HUD in association with the proposed rule mention the FHEA or the RAI being developed by participants in the Sustainable Communities Regional Planning Grant program, and this is a mistake on HUD's part. Commenters stated that these regions are large enough to capture the dynamics that create both RCAPs and areas of opportunity, and that they also have existing agencies with the capacity to provide rigorous data analysis and community engagement, linking fair housing efforts with other Federal planning efforts, such as transportation.

Other commenters expressed concern that the rule would allow non-contiguous

jurisdictions to collaborate on a regional AFH. The commenters stated that as proposed, the rule would allow any two jurisdictions across the nation to form a regional AFH, and this allows for illogical and counterproductive collaborations. The commenters stated that this would allow a partnership of all-white communities to submit a regional AFH that could mask the fair housing issues in their jurisdictions. The commenters stated that this risk is intensified given that the proposed rule does not require specific outcomes and allows AFHs to identify only one issue.

Other commenters stated that the importance of assessing housing needs on a regional basis should be emphasized, including in the definitions of "disproportional housing needs," "segregation" and "fair housing choice."

HUD Response: HUD understands that regional collaboration can be challenging, but believes that, in many cases, the benefits will outweigh the challenges, and HUD will continue to encourage regional collaboration and provide incentives, such as bonus points in HUD notices of funding availability (NOFAs), where feasible.

With respect to commenters' concern that regional collaboration will produce overly generalized analyses and fail to provide accountability for individual jurisdictions, the proposed rule specifies that a regional AFH must include barriers to fair housing at both the local and regional levels, and that participating in a regional AFH does not relieve program participants from analyzing and addressing fair housing issues and contributing factors within individual jurisdictions.

As the rule makes clear, when collaborating to submit a joint or regional AFH, program participants may divide work as they choose, but all participants are accountable for the analysis and any joint goals and priorities. Program participants are also accountable for their individual analysis, goals, and priorities. (See § 5.156(a)(3).) For example, in a regional collaboration

involving two entitlement jurisdictions and two PHAs, the entitlement jurisdictions may conduct certain parts of the joint analysis and the PHAs may conduct other parts. HUD believes it is best left to the program participants in a joint or regional collaboration to decide how their individual expertise may best contribute to a joint or regional AFH. However, notwithstanding the division of labor that program participants may choose, each program participant is accountable for the joint analysis, goals, and priorities in a joint or regional AFH, as well as being accountable for any individual analysis, goals, and priorities that the participant includes in the joint or regional AFH.

Rule clarification. HUD has revised the final rule to clarify that joint participants and regionally collaborating participants must not only analyze and address local fair housing issues and contributing factors that affect choice but must also set goals within their respective geographic areas of analysis. (See § 5.156(e).)

With respect to commenters suggestion that regional collaboration will not be as meaningful if collaboration is only among regions with like demographics, and those that stated that regional jurisdictions do not necessarily conform to MSA boundaries, HUD declines to impose additional requirements for jurisdictions that choose to collaborate on regional AFHs, in order to require a particular demographic mix. HUD notes that all program participants must conduct an analysis of fair housing barriers both within a local jurisdiction and at the regional level, which will prevent jurisdictions from conducting a narrow analysis of patterns solely within the jurisdiction.

With respect to the comments regarding FHEAs prepared with support from the HUD Sustainable Communities Initiative, HUD encourages communities that have prepared a FHEA to use this process and analysis to inform the creation of a RAI. HUD will provide guidance to

grantees on how to convert a FHEA to a successful Regional AFH.

With respect to the comments regarding RAIs prepared with support from the HUD Sustainable Communities Initiative, HUD noted earlier in this preamble that a RAI prepared in connection with an FY 2010 and FY 2011 Sustainable Communities Initiative award will be accepted by HUD as the program participant's first AFH due under the submission requirements of § 5.160. (See § 5.160(a)(2).)

With respect to commenters' concern that allowing noncontiguous jurisdictions will result in ineffective collaborations, HUD has revised § 5.156(a)(1) to clarify that regionally collaborating participants need not be contiguous but must be located within the same CBSA, as defined by OMB at the time of submission of the regional AFH. Alternatively, if the program participants are not located in a CBSA, the program participants may submit a request in writing to HUD seeking approval as regionally collaborating program participants for the reasons stated in the request. The term "Combined Statistical Area" was removed from the final rule due to concerns with adding an unnecessary level of complexity and administrative burden in the provision of Federal data for program participants.

While all forms of regional collaborations are greatly encouraged, HUD acknowledges that there may be administrative challenges to providing the data, maps, and tables for some elements in the Assessment Tool that will need to be provided to some types of regional collaborations. For instance, program participants seeking to do a regional AFH, that are not in the same CBSA, could likely have numerous issues with aggregating different types of data. HUD notes that it will work with program participants to address such challenges, but may be limited by considerations with the format in which the data may be realistically provided. HUD

will nevertheless endeavor to provide such collaborations with appropriate leeway in submitting their AFHs in a manner so that they can be accepted by HUD.

Whatever form of collaboration is selected by program participants and approved by HUD, HUD reiterates that the rule specifies that a regional AFH must include barriers to fair housing at both the local and regional levels, and that participating in a regional AFH does not relieve program participants from analyzing and addressing fair housing issues and contributing factors within individual jurisdictions. (See § 5.156(e).)

With respect to commenters' request that the definitions of "disproportionate housing needs," "segregation" and "fair housing choice," emphasize the importance of assessing housing needs on a regional basis, please see HUD's earlier response to comments about suggested revisions to these terms.

Comment: Mandate that municipalities consider regional needs for members of a protected class. A commenter stated that the most crucial omission in the proposed rule is allowing municipalities the option of taking a regional approach to affirmatively furthering fair housing rather than mandating consideration of regional needs for increased housing opportunity for members of protected classes. The commenter stated that this flaw allows affluent communities that have excluded members of protected classes to continue excluding because they have no existing concentrations of class members who are being denied fair housing. A program participant could argue that it has no need to allow the development of additional subsidized housing that might be affordable for protected class members because it had no existing residents who would be income-eligible.

Other commenters stated that the rule should require participants to analyze the regional impacts of local decisions and implement strategies that make measurable progress toward

promoting integration and reducing disparities in access to community assets across jurisdictional lines. The commenters stated that in many cases this will require the sort of regional collaboration that the proposed rule encourages.

HUD Response: All program participants submitting an AFH must take regional needs into consideration. The regulatory text at § 5.154(d)(2), entitled "Analysis of data" requires identification of various issues "within the jurisdiction and region" (emphasis added). With respect to commenters' request that participants analyze regional impacts of local decisions, HUD believes that the requirement that participants analyze issues and impacts of both a jurisdiction and a region addresses the commenters' concern.

Comment: Regional assessment is at odds with consultation requirements. Commenters stated the proposed rule at § 5.156(a) (Regional assessments and fair housing planning) indicates that consultation with adjacent units of general local government, while encouraged, is not mandatory. The commenters stated that the rule provides that two or more program participants (regionally collaborating program participants) may, and are encouraged to, collaborate to conduct and submit a single regional AFH to evaluate fair housing issues and contributing factors from a regional perspective (Regional AFH). The commenters stated that, however, proposed regulations in 24 CFR part 91 regarding the formulation of a locality's consolidated plan require consultation with adjacent localities. The commenters stated that HUD's regulation at § 91.100(a)(5) (Consultation; local governments., General) provides that "[t]he jurisdiction also *shall consult* with adjacent units of general local government, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and solutions that go beyond a single jurisdiction." (Emphasis added.) The commenters stated that to require a central city in a metropolitan area, such as New York City, to consult with

adjacent local governments, and by implication, request that such localities use their limited entitlement grant funds to assist the central city to meet its fair housing goals, may not be practical or financially feasible.

The commenters requested that § 91.100(a)(5) be amended to be consistent with the proposed regulation § 5.156(a). The commenters stated that § 91.100(a)(5) should be revised to read as follows: "The jurisdiction *may also consult* with adjacent units of general local government, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and solutions that go beyond a single jurisdiction." (Emphasis added.)

HUD Response: HUD agrees with commenters and is maintaining existing consultation requirements, which provides in § 91.100(a)(5) that jurisdictions should consult with adjacent units of general local government.

Comment: Allow PHAs to participate in a regional AFH. Commenters stated that an option for PHAs to participate in a regional AFH should be specifically stated in the rule and cited to § 5.156 and § 903.15. The commenters stated that most PHAs in cities that are HUD 'entitlements' should collaborate in their city's AFH, but that for PHAs in cities participating in a regional AFH, an additional option should be added to the list in § 903.15.

HUD Response: HUD agrees with the commenters and has made explicit that PHAs have the option to participate in a regional AFH.

Rule change. The final rule revises the proposed definition of "regionally collaborating program participants" in § 5.152, now entitled "regionally collaborating participants," to state that "A PHA may participate in a regional assessment in accordance with PHA Plan participation requirements under 24 CFR 903.15(a)(1)."

Comment: Allow States to participate in a regional AFH. It is not clear from the proposed rule whether or not States are able to be a partner in a regional AFH and what that collaboration would look like.

HUD Response: States are encouraged to participate in joint or regional AFHs, particularly with program participants within their own jurisdictions. In cases where the participants are not located in the same State or CBSA, the participants must submit a written request to HUD for approval stating why the collaboration is appropriate.

Rule change. The final rule provides that program participants, whether contiguous or noncontiguous, that are either not located within the same CBSA or that are not located within the same State and seek to collaborate on an AFH, must submit a written request to HUD for approval of the collaboration, stating why the collaboration is appropriate. The collaboration may proceed upon approval by HUD. (See § 5.156(a)(2).)

Comment: Regional councils of governments, Metropolitan Planning Organizations and other regional planning bodies should be permitted to serve as the lead entity for Regional AFHs. Commenters stated that regional councils of government should be explicitly permitted to serve as the "lead entity." The commenters stated that the preamble to the draft rule calls for a "lead entity," but states that the lead entity must be a "member." The commenters stated that regional councils serve all local governments in the region and are in a strong position to oversee and administer preparation of an AFH.

The commenters also stated that the opportunity presented by the revisions of the AFH process for HUD grant participants is an opportunity to build on existing capacities in regional partnerships which would further the intentions of the proposed rule to include incorporation of fair housing issues across the spectrum of regional decisions. The commenters stated that

specifically, many regional planning commissions, MPOs and/or councils of government already prepare detailed assessments of housing needs within a region, utilizing many of the same data sets, assessment tools, and public participation techniques envisioned for AFH planning in the proposed rule, but that because these institutions are not formally participants in the consolidated planning process, they have not traditionally been involved in consolidated planning nor in coordinating consolidated plans with other regional land use and transportation plans.

The commenters stated that HUD should add language at the final rule state to maximize the opportunity and flexibility for a variety of regional institutions to be involved in AFH planning processes. The commenters stated that HUD should make it reasonably easy for participants to designate other agencies or institutions (including county governments, MPOs, Regional Planning Commissions, etc.) as lead agencies in development of AFH plans and assessments, and that HUD should support a wide range of institutional partnership structures at the regional and state levels in the preparation of AFHs, even to the extent of including non-participants in the governance structure of these organizations. The commenters stated that the exact institutional configuration of regional AFH planning agencies should be allowed to vary from state to state, with states encouraged to utilize existing structures of regional governance and collaboration.

The commenters further stated that like other Federal agencies which administer grant programs with regional entities (and the commenters cited to EPA, DOT), HUD should strive for flexibility in the form of regional collaborative partnerships for AFH preparation, both to leverage existing partnerships in AFH development, but also to catalyze increased integration between housing and community development issues with larger regional development plans, and noted that participation in regional AFHs would be voluntary. The commenters stated that

rather than writing rules and policies with a "one-size-fits-all" approach standardized across the country, HUD should be flexible in encouraging AFH preparation on a regional level and working with existing regional institutions, but noted that this flexibility must be combined with strong standards to ensure that regions and individual communities are making progress in their goals to affirmatively further fair housing.

HUD Response: HUD agrees with the commenters that a variety of regional institutions should be involved in AFH planning processes. For this reason, HUD requires consultation with local and regional government agencies with metropolitan-wide planning and transportation responsibilities in § 91.100. HUD also agrees that collaboration to prepare a regional AFH can take many forms and that the rule should be flexible to allow for a range of regional collaborations, which is provided for in § 5.156(a).

HUD declines to expand the definition of a "lead entity," at § 5.156(a), to include any entity that is not a program participant. HUD has revised the final rule to clarify that the lead entity need not be responsible for the preparation of an AFH (by deleting "the development" of the regional AFH from the "lead entities" responsibilities). A lead entity is responsible for overseeing the submission of a regional AFH and obtaining the express consent of all other regionally collaborating program participants who join in the regional AFH. In addition, where alignment of program years and/or fiscal years is not possible, the submission deadline for a regional AFH will be based on the lead entity's program years and/or fiscal years. Regional councils of governments, MPOs, and other regional planning bodies may lead and coordinate the development of a RAI, as long as a regionally collaborating participant serves as a lead entity for submission purposes.

19. Bonuses and Incentives

a. Bonuses and Incentives, Generally

Comment: Reward HUD program participants that show progress in affirmatively furthering fair housing. Commenters suggested that HUD reward participants that can demonstrate integration within their jurisdiction or substantial efforts to promote integration within their jurisdiction. The commenters stated that such rewards could include bonus points awarded under competitive funding, additional or set aside funds, and/or reduced regulatory burdens for such participants. The commenters stated that these rewards would be communities that are moving in a positive direction; that is, they are at, near, or moving closer to the demographics of their region. The commenters stated that diverse communities should be offered higher marks for their progress (intentional or not) and be given preference over exclusionary communities for Federal investments. The commenters stated that would be a much stronger incentive if it were tied to regional plans that included the potential for other Federal agencies (especially those of the Sustainable Communities Partnership - HUD, EPA, DOT - and the Department of Education) to consider a community's ranking or score related to inclusion and integration. Other commenters stated that HUD should provide priority scoring on competitive grants for projects and activities that implement stated goals in adopted AFHs (similar to Preferred Sustainability Status adopted by some Partnership for Sustainable Communities agencies, but with inclusion of additional agencies that have authority over issues related to fair housing, including Treasury, DOJ, EDA, USDA.

HUD Response: HUD appreciates these suggestions and will take them into consideration.

Comment: Include the Qualified Allocation Plan (QAP) in the AFH analysis. Commenters stated a QAP should be included in an AFH analysis, and that the QAP should

include incentives and/or bonuses for proposals that will affirmatively further fair housing.

HUD Response: A QAP is the mechanism by which state housing finance agencies establish the criteria by which applicants will be awarded low-income housing tax credits (LIHTC). QAPs are required by statute to include certain specified criteria and preferences; however, states are permitted discretion in other program design elements. Because the LIHTCs are the largest producer of affordable housing in the country today, QAPs have a significant impact on the location and occupancy of new affordable housing units. Accordingly, QAPs play a key role in shaping local fair housing issues. Program participants, including States, will be required in the Assessment Tool to analyze data on the location and occupancy of affordable LIHTC units and to consider the impact of a QAP on fair housing issues in their jurisdiction. HUD welcomes innovative approaches by States to encourage state housing finance agencies to affirmatively further fair housing through benefits and incentives.

Comment: States can provide incentives for their subgrantees to affirmatively further fair housing. Commenters stated that a State can choose to fund non-entitlement communities that plan to address fair housing issues that are identified in the AFH. The commenters stated that States can also, to the extent feasible, use HOME funds to directly address fair housing issues in non-entitlement areas.

HUD Response: HUD welcomes innovative approaches by States to ensure that subgrantees effectively affirmatively further fair housing.

b. Bonuses and Incentives for Regional Collaboration

Comment: Incentives are necessary to achieve regional collaboration because of the difficulties involved in collaborating beyond regions. Commenters stated that encouragement of regional collaboration by HUD is an important acknowledgement that segregation does not stop

at a community's borders. The commenters stated that it is also important because there are many factors that make regional collaboration difficult, and if HUD wants to encourage regional AFHs, HUD should provide incentives - financial or non-financial- for such efforts. The commenters stated that without these incentives, jurisdictions may be reluctant to take on the challenge of inter-jurisdictional collaboration. Commenters stated that because of the difficulties of collaborating regionally, incentives will need to be of great worth. Some commenters stated that the best incentive is money, but recognized that HUD's ability to provide financial incentives is limited. Some commenters stated that awarding bonus points for collaborative and cooperative approaches is an excellent idea to increase the potential for diverse input into the document, especially for competitive funding, such as has been done in HUD's Continuum of Care and Sustainable Communities competitions.

Other commenters suggested non-financial incentives that HUD should consider to encourage regional collaboration among local governments and States and greater engagement with public housing planning, including: (1) National level partnerships: The commenters stated that HUD should continue to build strong partnerships at the national level, opening the doors to encourage collaboration at the local and regional level. The commenters stated that national level partnerships can be effective in setting the tone at the local and regional levels and can catalyze regional planning in partnership with other public and private agencies. The commenters stated that partnerships develop and increase capacity, ensure coordination among stakeholders, increase program efficiency and sustainability and, most importantly, help to meet the needs of the community. As an example of such national partnerships, the commenters cited to the partnership between HUD and DOL, under the American Recovery and Reinvestment Act, 2009, which was created to encourage PHAs and local Workforce Investment Boards (WIBs) to

collaboratively identify opportunities to train and place public housing residents into jobs created by PHAs' Recovery-funded capital improvement projects. (2) Grant Application Bonus Points: The commenters stated that awarding bonus points in HUD grant applications for creating partnerships with other local governments and Federal grant programs will assist in increasing capacity, avoid duplication of services, and create sustainability. As an example of this effective grant bonus points, the commenters cited to the recent NOFA in which HUD awarded bonus points for applicants that have received Preferred Sustainability Status.

Other commenters stated HUD should request the Department of Treasury to provide incentives for states to grant regions a direct allocation of low-income housing tax credits if: (1) they have an approved regional AFH that is aligned with their Regional Transportation Plan; and, (2) their QAP will help implement goals of the AFH. However, the commenters did not provide suggestions on what incentives should be offered.

HUD Response: HUD appreciates these suggestions offered by all commenters, and will take them into consideration.

Comment: Reward regional collaboration by giving priority in the provision of HUD technical assistance. Commenters stated that regional collaborations and large urban counties should be allowed to have some priority in the provision of HUD fair housing technical assistance. Commenter stated that these potential collaborations may be more complicated in nature and may have a greater need for technical assistance, especially at the planning stage.

PHA commenters submitted similar comments stating that HUD needs to consider that the governance of public housing agencies varies from state to state. The commenters stated that not all local governments have authority over their local PHA or even the ability to require the PHA to engage in any type of collaborative effort or planning, nor do many local governments

financially support (or have the means to financially support) the local PHA. The commenters stated that one way to promote regional collaboration would be to provide the technical assistance needed to bring all parties to the table and then assurance that the work product will be accepted by HUD. The commenters stated that in large regions with many HUD-funded jurisdictions, including multiple PHAs, there are often multiple HUD representatives assigned to the local jurisdictions. The commenters further stated that when local jurisdictions meet to discuss common issues, they sometimes find that the guidance they have been given by their various HUD representatives is not consistent. The commenters stated that a consistent message from HUD would be one way to promote regional collaboration.

HUD Response: With respect to commenters seeking first priority for HUD technical assistance, HUD will not commit to prioritize which program participants receive technical assistance, but as HUD has stated in its proposed rule and reiterates in this final rule, HUD is committed to providing technical assistance to all program participants throughout the process and as promptly as possible.

Comment: Consider a broader meaning of regional collaboration, and require AFHs to include entire metropolitan regions. Commenters stated that the rule considers a "regional" collaboration to be a collaboration of two or more program participants. The commenters stated that the most obvious collaborations would arise from jurisdictions that are members of HOME consortia, but that a two-community "region" or even a HOME consortium is hardly a true region. The commenters stated that housing discrimination may be localized, but public policies that discourage housing choice occur over a much broader area. The commenters stated that while they would not discourage such smaller collaborations if such collaborations are the only ones possible, the commenters felt that HUD should encourage program participants to consider

broader regional collaborations that align with other regional planning processes, such as those of a metropolitan planning organization or regional planning council.

The commenters stated that § 5.156(b) requires that entitlement jurisdictions coordinate program years and submission deadlines. The commenters stated that this requirement works well for existing HOME consortia as these entities have already aligned their program years, but that many urban counties have discovered, during negotiations over HOME consortia, the adjusting of program years can be a barrier to collaboration, particularly for smaller jurisdictions that fear the fiscal and budgeting impacts of such a change. The commenters stated that steps should be taken to ensure that this issue does not prevent regional collaboration in the development and implementation of AFHs.

The commenters also stated that § 5.156(d) states that the preparation of a regional AFH "does not relieve each regionally collaborating program participant from its obligation to analyze and address local fair housing issues and contributing factors that affect housing choice within its respective jurisdiction." The commenters stated that they agree that any regional analysis must connect each collaborating community with specific actions it will take to affirmatively further fair housing, but that given the goal of connecting the AFH with future consolidated plans, this requirement could be better crafted to incentivize partnerships. The commenters stated that with the tight timeframe for the completion of the AFH within one year before the submission of the consolidated plan, communities are developing recommendations for fair housing twice within a 2-year period, and this creates redundancy.

Conversely, other commenters recommended that the final regulations allow regional AFHs to focus on robust analyses of fair housing conditions and to include broader regional recommendations for implementation, leaving recommendations for actions specific to

individual entitlement jurisdictions to the consolidated planning process. The commenters stated that such local recommendations should be consistent with the analysis included in the regional AFH, and supportive of the implementation steps included in the regional AFH. The commenters stated that under this model the regional AFH becomes the "existing conditions report" for multiple communities on the state of fair housing in the region, along with steps that can be taken throughout the region, with each community using the consolidated planning process to develop recommendations for response within their own jurisdiction. The commenters stated that these two efforts will be connected and supportive of one another, but not redundant.

Other commenters suggested that HUD strengthen its regional emphasis by requiring AFHs to include entire metropolitan regions (working through MPOs, large PHAs, and/or counties) and to measure existing conditions (housing segregation, poverty concentration and opportunity assets) as well as the goals and progress of the consolidated plan based on a region's demographics and opportunity structures. The commenters stated that while metropolitan regions should be the scope and scale for assessing and addressing integration and housing opportunity, local jurisdictions cannot be let "off the hook." The commenters stated that each community within a metro region (and unincorporated areas that aren't within local jurisdictions but part of the metro area) must be included in both the analysis of available data in the AFH and the plans and goals reflected in a regional consolidated plan, and that each local community's current situation as well as its goals and progress should be measured against regional demographics, trends, and assets. The commenters suggested that a community's progress should be assessed and measured in connection with its region.

The commenters further stated that a community's goals should be based on regional goals, which should be based on regional demographics and opportunity structures. The

commenters stated that, in this way, the most pressure for making progress toward greater inclusion would be put on communities that have done the least (the most exclusive), have the most (community assets - schools, jobs, tax base, etc.), and whose racial and economic demographics are the farthest away from the region's demographics. The commenters stated that, at the same time, communities that are moving in a positive direction (becoming increasingly diverse and inclusive and closer to the region's demographic and economic mix) should be viewed in a more positive light and given credit for their progress. The commenters concluded by stating the need to ensure that communities with fewer assets (in relationship to its region) such as lower fiscal capacity, lower incomes, and struggling schools are not viewed in the same light as their wealthier neighbors.

HUD Response: With respect to the set of comments regarding timing of submissions, HUD encourages program participants preparing a regional AFH to align submission deadlines using procedures already available for changing program year and fiscal year start dates. Where such alignment is not practicable, program participants may still collaborate but may require incorporation into their respective plans at different time periods that more closely align with their consolidated plan or PHA Plan cycle.

With respect to the set of comments requesting that HUD require all or a majority of jurisdictions within a metropolitan area to participate in a regional AFH, HUD declines to impose this as a requirement in the rule. HUD prefers to preserve flexibility in the rule and believes that program participants should determine the other program participants with which they collaborate on a regional AFH.

HUD agrees with the comment that it should encourage program participants to consider broader regional collaborations that align with other regional planning processes, such as those

of a metropolitan planning organization or regional planning council. HUD will work with the DOT to include guidance on partnering with metropolitan planning organizations in the guidance it provides to program participants.

With respect to the set of comments requesting that HUD clarify whether regionally collaborating participants must set fair housing goals specific to individual jurisdictions included in the regional AFH, HUD has changed the language of the rule to make clear that they must do so.

Rule clarification. In § 5.156, HUD clarifies that each regionally collaborating program participant must set goals for its geographic area of analysis.

Comment: Incentives for regional collaboration may harm rural communities. Commenters stated that providing incentives to program participants that engage in regional collaboration can work to the disadvantage of rural communities that are in critical need of resources because they will not be able to gain bonus points for competitively distributed funding, and therefore may not be rated sufficiently high in a funding competition to secure funding.

HUD Response: HUD appreciates commenters raising this concern. HUD will seek to encourage jurisdictions to collaborate with rural communities. As HUD's final rule provides, a regional AFH does not require regions to be contiguous, subject to HUD approval. In addition, in its funding competitions, HUD structures any bonus points in a manner that avoids precluding any applicant from the ability to obtain bonus points.

Comment: Allow States to award bonus points to subgrantees. Commenters stated that HUD should allow States to structure "bonus points" and criteria for awarding bonus points to subgrantees. The commenters stated that State grantees would be better served by allowing them

to structure their evaluation of applications from subgrantees to consider the degree to which the applicant's proposal encourages regional collaboration.

HUD Response: HUD welcomes innovative approaches by States to ensure that subgrantees effectively affirmatively further fair housing, consistent with program requirements.

Comment: Reward bonus points for regional AFHs that are effective not simply because they are regional AFHs. Commenters stated that rather than merely allowing regional AFHs, the final rule should give incentives to jurisdictions that are willing to reach out and work together to improve housing choice. The commenters stated that it may require more time and political leadership from a jurisdiction to be part of a meaningful regional AFH process, but it also could result in a more effective fair housing strategy. The commenters stated that regions often work together on transportation planning, so it would make sense to give incentives for regional fair housing planning as well.

HUD Response: The reason that HUD strongly encourages collaboration by program participants (whether regionally collaborating program participants or joint participants) is that HUD expects that jurisdictions working together will more effectively affirmatively further fair housing, and may be able to reduce costs by sharing resources. HUD already strongly encourages collaboration by program participants (whether regionally collaborating participants or joint participants) because HUD expects that the very fact that jurisdictions are working together will lead them to more effectively affirmatively further fair housing.

Comment: Provide an incentive for PHAs to participate in Regional AFHs by providing an Option 4 similar to Option 3. HUD could provide an Option 4, similar to Option 3, which would allow any PHA that primarily serves an area covered by a regional AFH to be bound by the regional AFH, whether or not the PHA participates in its preparation. The commenters stated

that an Option 4 concerning regional AFHs would go further to incentivize regional collaboration, as well as make this option more viable to PHAs. The commenters recommended that HUD incorporate in § 903.15, in a new Option 4 or such other section as HUD determines best, the option for two or more PHAs to join together to submit a regional AFH, with or without Con Plan jurisdictions.

HUD Response: HUD has reordered and substantially revised PHA options to participate. HUD is now providing a new Option 2 entitled "Assessment of Fair Housing with PHAs," which allows PHAs to engage in joint collaboration in the preparation and submission of the AFH. PHAs may also engage in an AFH with a group of PHAs under Option 2, or may engage with State or relevant CDBG jurisdictions under Option 1, entitled "Assessment of Fair Housing with Units of General Local Government or State Government Agencies."

20. Public Housing Issues and Options 1, 2, and 3.

a. PHA Certification

Comment: PHA's certification, in particular, is subject to challenge. Commenters stated that proposed § 903.2(d)(3)(i)(A) Validity of Certification, which is moved to § 903.15(d) in this final rule, indicates that a PHA's certification that it is affirmatively furthering fair housing is subject to challenge if it "does not reduce racial and national origin concentrations in developments or buildings and is perpetuating segregated housing." The commenters stated that there is danger that this provision could be interpreted to preclude the use of capital funds or other resources to rehabilitate, modernize, or otherwise improve the living conditions for existing residents of public housing who choose to remain in their homes and communities. The commenters stated that they are especially concerned because challenges may occur after HUD has accepted an AFH completed by a jurisdiction required to submit a consolidated plan, by PHA

that elects to prepare its own AFH, or by a State; and after HUD has approved a Consolidated Plan or a Public Housing Agency Plan. The commenters stated that therefore, after PHAs have complied with these requirements in good faith, and after HUD has reviewed documents and determined that they meet fair housing requirements, PHAs remain at risk of being found out of compliance with fair housing requirements, as a result of the certification. The commenters stated that PHAs should not be burdened with having to prove they are accomplishing tasks or outcomes which HUD does not define, nor should HUD be authorized to challenge civil rights certifications on the basis of general or ill-defined grounds.

Commenters recommended that to overcome the vagueness in the PHA civil rights certification, and to tie the assessment of compliance more to results, the rule should state that an action or set of actions qualifies as "meaningful" only if the PHA explains in its PHA Plan the measurable results it expects to see within a specified timeframe, explains how the anticipated results would further the goals identified in the applicable AFH, and then reports and assesses the actual results in a subsequent Plan. The commenters stated that these changes would advance the overall purpose of the rule, as stated in § 5.150, to provide "a stronger accountability system governing fair housing planning, strategies, and actions." The commenters stated that their suggested changes also are consistent with language in proposed § 903.2(d)(3) and § 903.7(o)(3)(vii) that emphasize that compliance with the obligation to affirmatively further fair housing depends on the implementation of the plan and the results of actions.

HUD Response: Section 903.15(d) (formerly, § 903.2(d)) of this final rule applies to PHAs generally and is not limited in time to HUD's review of an AFH or PHA Plan (which includes the civil rights certification). HUD has clarified the validity of certification language to correspond with a PHA's civil rights and fair housing requirements, as well as the duty to adhere

to the AFFH regulations in §§ 5.150-5.180.

Comment: Exempt certain program participants from submitting certifications. Commenters encouraged HUD to exempt certain agencies from submitting the certifications required by 24 CFR 903.2. Commenters stated PHAs operating under a consent decree pursuant to a court order, PHAs that have received a SEMAP deconcentration bonus, or PHAs that have otherwise made acceptable deconcentration certifications should be exempt as HUD has already determined that the PHA is acting in accordance with the goals of the proposed rule.

HUD Response: HUD will not exempt certain participants from submitting the statutorily required civil rights certification, which incorporates an AFFH certification, as implemented by HUD's rule at § 903.7(o). The fact that a PHA has received a deconcentration bonus is commendable but is not a basis for exemption from the AFFH certification.

Comment: Clarify that a PHA's AFFH certification applies to a PHA's Housing Choice Voucher Administrative Plan. Commenters stated that proposed § 903.7(o)(2) adds the specification that the certification applies to any plan that is incorporated in a PHA's annual or 5-year plan under other regulations. The commenters recommended that HUD state specifically that the AFFH certification applies to a PHA's HCV Administrative Plan, which includes numerous policies that are central to the obligation to affirmatively further fair housing, such as payment standards, occupancy standards, policies on housing search time, and how the PHA Plans to expand housing choices.

HUD Response: The AFFH rule provides that the civil rights certification implemented at§ 903.7(o) applies to all PHA plans and any plan incorporated therein. No category of PHAs has been excluded.

Comment: Clarify what "contribution" means in § 903.7(o)(3)(vi). Commenters stated that in the civil rights certification required in § 903.7(o), paragraph (3) states that a PHA shall be considered in compliance with the certification requirement to affirmatively further fair housing if the PHA fulfills the requirements of § 903.2(d) and, among other things, complies with any contribution or consultation requirement with respect to any applicable AFH under 24 CFR 5.150–5.166. The commenters stated that it is not clear what is meant by "contribution."

HUD Response: The rule at § 5.156 sets out the roles PHAs may play when contributing to joint or regional AFHs, as well as setting out specific consultation requirements.

b. Planning Efforts Required of PHAs

Comment: Other planning efforts go beyond activities that PHAs can handle; other planning efforts should not be part of the AFH requirement. Commenters stated that the proposed rule takes an expansive view of the scope of a program participant's obligations entailing activities and strategies well beyond the usual scope of activities for a consolidated plan agency. Commenters stated that these include actions to influence local land use and zoning, social service delivery, public transportation, etc., and that while these actions may have some utility where a program participant is a unit of a local government that has a greater degree of direct control over these and other areas, they do not fit as well with the varied scope of powers and responsibilities of PHAs and housing finance agencies (HFAs), especially those whose activities are limited to voucher administration. Commenters stated that this suggests that the other planning efforts and programs should not be tied in to the AFH requirement. The commenters stated that related to this concern is HUD's statement in the rule that it plans to use transportation and other data, and whether local/regional transportation agencies or other agencies agree with the data could be problematic. The commenters stated that if there are

disagreements over not only data but also the goals or methods to be used, the process for reconciling these differences only adds to the administrative complexity and potential cost of implementation. The commenters stated that it is unclear how much leverage or authority the HUD programs associated with the AFH would have in these other areas.

HUD Response: HUD understands that the scope of activities in any program participant's jurisdiction, not only that of a PHA, that may impact fair housing choice and access to opportunity are broad and the rule acknowledges such broad scope. However, the Assessment Tool helps program participants to determine which activities or factors have greater impact than others, prioritize these factors, and establish goals to address those that are designed by the program participant as priorities.

c. Options for AFH Submission

Comment: Clarify which PHAs may participate under each of the three options. Commenters stated that PHAs are required to submit an AFH (and to conduct an AI) and the current rule limits Option 3 to PHAs "covered by state agencies," but all PHAs are covered by one State agency or another. It appears that all PHAs have the option of participating in the State AFH and consolidated plan. If that is not the case, HUD must clarify language to indicate which PHAs may participate under a State's AFH. Finally, the regulation seems to permit agencies within jurisdictions subject to consolidated plan requirements and those which are not to conduct their own AFH. However, although PHAs outside of jurisdictions that are required to submit consolidated plans, "may choose whether to participate or not with the State in the preparation of the state agency's AFH," they, "will be bound either way by the state agency conclusions contained in the State's AFH." HUD should clarify this language. If PHAs have 3 options available, as it appears, the rule should state those choices clearly. If PHAs have only 2 options

available, the rule should state so clearly. If PHAs outside local jurisdictions that are required to submit consolidated plans have only 1 option available, HUD should amend the proposed rule to allow those PHAs discretion to conduct their own AFH.

HUD Response: HUD agrees and has clarified the three options available to PHAs. The final rule collapses the proposed rule's Option 1 and Option 3 into a revised Option 1 entitled "Assessment of Fair Housing with Units of General Local Government or State Governmental Agencies." As such, HUD is indicating that a PHA may participate in the development of an AFH with either a unit of general local government or a State governmental agency, as applicable, under Option 1. HUD has further clarified in § 91.110(a)(1) that only PHAs that operate on a State-level or that certify consistency with a State consolidated plan will participate with State Governmental Agencies under Option 1.

i. Option 1

Comment: The final rule must reinforce the acceptability of option 1. Commenters stated that the final rule must clearly reinforce the acceptability of the first option throughout the text of the final rule, including in the definition of "affirmatively furthering fair housing", the definition of "fair housing choice," and in the opening subsection pertaining to the Assessment of Fair Housing. The final rule must recognize that affirmatively furthering fair housing may entail devoting resources to improve areas of concentrated racial and ethnic poverty by preserving and improving affordable housing, and by implementing investment policies that augment access to essential community assets for protected class residents who wish to remain in their communities – while protecting them from the forces of displacement.

HUD Response: As noted earlier in this preamble, the "Purpose" section of the rule and the definition of "affirmatively furthering fair housing" have been clarified in this final rule in a

manner that indicates preserving affordable housing may be part of an appropriate strategy for addressing fair housing issues and contributing factors raised in the assessment of fair housing. The concept of affirmatively furthering fair housing embodies a balanced approach in which additional affordable housing is developed in areas of opportunity with an insufficient supply of affordable housing; racially or ethnically concentrated areas of poverty are transformed into areas of opportunity that continue to contain affordable housing as a result of preservation and revitalization efforts; and the mobility of low-income residents from low-opportunity areas to high-opportunity areas is encouraged and supported as a realistic, available part of fair housing choice.

Comment: Give PHAs the discretion to collaborate with whatever jurisdiction the PHA chooses. Commenters stated where a PHA operates in more than one jurisdiction, the agency must collaborate with the jurisdiction within which 60 percent of its housing is located unless, "the majority is closer to 50 percent," in which case the agency may choose the locality with which it collaborates. Commenters stated that since PHAs will be attending to local political and policy relationships, they should have the discretion to collaborate with any jurisdiction within whose boundaries it operates housing, and that such jurisdiction will likely be the one where most of the PHA's housing is located, but there may be good reasons for PHAs to collaborate with other jurisdictions. The commenters stated that HUD's rule does not address agencies operated under forms of consortia in several jurisdictions, and that the agency may prefer to operate under a single AFH and may need to collaborate with one jurisdiction that includes 60 percent of its housing stock. Commenters stated that HUD should grant PHAs discretion to choose a jurisdiction without Federally-imposed conditions.

Similarly, commenters stated that HUD should modify standards in § 903.15(a)(1) which allows a PHA to participate in the AFH of "its" local jurisdiction rather than submit its own AFH. Commenters stated that the following changes ensure PHAs and localities consider use of all resources and reduce burdens for PHAs. The commenters recommended that which jurisdictions can collaborate should not be determined only with regard to where majority of "hard units" are located – that PHAs should have discretion to decide whom to collaborate with, so long as the PHA has some "hard units" or vouchers in the same geographical area as the chosen jurisdiction, and the joint AFH covers all the PHA's units and vouchers. Commenters stated that focusing on hard units will narrow the assessment and could lead to overlooking how changes in policies that affect where families use HCVs to rent homes could help overcome barriers to fair housing choice and promote desegregation and deconcentration.

Similarly, other commenters stated that amending Option 1 in § 903.15 to allow a PHA to participate in an AFH with a broad choice of program participants is one way that HUD can best encourage collaboration. Commenters stated that this would allow PHAs flexibility and control of the AFH process. Commenters stated that HUD should define "hard units" to include all Federally-assisted owned and managed units subject to a PHA's control including but not limited to Section 202 Supportive Housing for the Elderly, Section 8 Moderate Rehabilitation, project-based vouchers and RAD conversions. Commenters stated that many PHAs are currently converting their public housing stock to RAD project-based Section 8 or project-based vouchers, and that if HUD does not broaden the definition in the final rule, then formerly public housing units that will not be considered in PHAs' AFH processes. Commenters stated that in some cases a PHA's vouchers may be utilized primarily or substantially in an adjacent jurisdiction, which should be considered a basis for determining an applicable jurisdiction. Commenter stated that

Option 1 does not accurately reflect HUD's intent to implement a full range of regionalization options, and needs to be clarified to allow and encourage two or more PHAs to work together on an AFH, within a regional boundary. Commenters stated that Option 1 is meant to cover PHAs that wish to file an AFH with another PHA in the region, although the language is unclear, and therefore must be modified to explicitly allow for PHAs that wish to submit an AFH with other PHAs in its region.

HUD Response: HUD appreciates the concerns raised by the commenters and agrees that PHAs should be given the option to choose a jurisdiction with regard to all units in their inventory, and that HUD should not question that selection unless the PHA is required under a VCA to participate with a specific jurisdiction.

Rule change. This final rule revises § 903.15(a) to incorporate these provisions.

Comment: PHAs should determine which Unit of General Local Government to work with. PHAs choosing Option 1 should have the discretion to decide which consolidated plan jurisdiction to work with in developing a joint AFH, provided the PHA has some "hard units" or some vouchers in the same geographic area as the consolidated plan jurisdiction, and provided the joint AFH covers all of the PHA's hard units and vouchers. Commenters stated that it is unclear if "hard units" means only public housing units or PHA-owned units that have PBVs or PBRA, or PBV units in properties that the PHA does not own. Commenters requested that HUD define "hard units" to include all PHA-owned units that have HUD-funded rental assistance, and all units, regardless of ownership, that have PHA-administered PBVs. Commenters stated that paragraph (a)(1) of § 903.15 assumes one jurisdiction "governs the PHA's operation" for HCV-only agencies, but that is untrue for some agencies, and the rule should allow an HCV-only PHA

administering vouchers in the area of a sub-state consolidated plan jurisdiction to participate in the locality's AFH.

HUD Response: HUD agrees that PHAs should be given the option to choose a jurisdiction with regard to all units in their inventory, regardless of the type of HUD assistance attached. HUD has clarified Option 1 in § 903.15 to address this concern. However, if a PHA is under a VCA and such PHA chooses to participate with a unit of general local government or a State governmental agency, then it shall participate with the entity specified in its VCA.

Comment: Are PHAs administering HCV programs only limited to Option 1? Commenters stated that changes to the proposed § 903.15(a)(1) indicate that a Section 8 only PHA would choose Option 1 and coordinate with the jurisdiction that governs PHA's operation for developing the AFH. The commenters asked whether Section 8 only PHAs are precluded from choosing Option 2 or Option 3.

HUD Response: HCV-only PHAs will have all available options open to them. In addition, like all participating PHAs, HCV-only PHAs will have the ability to choose their level of involvement in the planning process.

Comment: Why not adopt preamble language on dissenting views in Option 1? Commenters stated that it appears that the difference between Options 1 and 3 is that the PHA can submit dissenting views under Option 1. The commenters asked why was the verbiage found in the Summary of Proposed Rule regarding submission of dissenting opinions for Option 1, but not included in the regulatory text at § 903.15(a)(1) of the proposed rule. The commenters stated that the rule takes an expansive view of the scope of a program participant's obligations that entails activities and strategies well beyond the span of a state HFA's control or involvement, such as actions to influence local land use and zoning, social service delivery and public

transportation. The commenters stated that the proposed requirements may make sense where the program participant is a unit of local government, but they do not fit the powers and responsibilities of PHAs and state HFAs, that are without any oversight or management of public housing.

HUD Response: After receiving significant comment on dissenting opinions and on program participant disputes, HUD has removed the dissenting opinion from the rule. Instead, HUD encourages that jointly participating entities execute a MOU to govern the dispute resolution process.

ii. Option 2

Comment: Option 2 is a burdensome option. Commenters stated that in the case of PHAs who choose Option 2, documenting and analyzing the PHA programs and policies has been running at least 500 hours. Commenters stated that imposing this burden when there have been significant cuts in agency funding is a real cause for alarm. Commenters stated that, in particular, for HOME agencies which bore the brunt of budget cuts, the available Administrative funds have been cut severely and makes this added "unfunded mandate" almost impossible to take seriously.

Similarly, commenters stated that Option 2 permits PHAs to do their own AFH, but a PHA would still be required to contribute or consult in the formulation of the separate AFHs of jurisdictions that overlap with the PHA, and to implement initiatives that require their involvement. The commenter stated that § 903.15(c) would require PHAs doing their own AFH to update their AFH annually, and this is unnecessarily burdensome. All other PHAs would be required to update their AFHs every 5 years. The commenters stated that PHAs should be subject to the same 5-year AFH requirement as required of all other entities.

Other commenters stated that if the PHA selects Option 2 then the PHA must update its AFH yearly. The commenters stated that due to the comprehensive nature of the AFH plan, the AFH should be completed with the 5-Year PHA Plan. The commenters stated that the PHA Annual Plan would provide updates of agency's progress furthering the goals of the AFH. The commenters stated that the requirement for an annual update to the AFH should be removed because an PHA Annual Plan can meet the same objective as an annually updated AFH for the following reasons: (1) The Annual Plan will continue to focus on the goals of the AFH as it provides a progress report on both the successes achieved and adjustments made related to the AFH goals; (2) It will retain an ongoing focus on the attainment of the AFH goals; and (3) It will streamline the process while achieving the intent of the AFH planning process.

HUD Response: HUD agrees with the commenters that if PHAs are engaging in the Independent PHA Planning Option, they do not have to engage in the exercise with a consolidated plan participant but may still be consulted for data; and if PHAs are engaging in the Independent PHA Planning Option, they may still engage in community participation with the consolidated plan entity's AFH preparation and may submit comments to allow a disagreement to be known.

Rule change. This final rule revises the paragraph on PHAs submitting an independent AFH and moves it from proposed § 903.15(a)(2) to § 903.15(a)(3), and removes proposed § 903.15(c), which had required such PHAs to update annually.

Comment: Small PHAs have no option other than Option 2, which is burdensome. Commenters stated that a PHA may conduct its own AFH with Option 2 and update its AFH every year. Commenters stated that small PHAs and consortia of PHAs that operate in communities are not subject to the consolidated plan requirement, and that these agencies may

find that collaborating with development of a statewide plan is inappropriate. Commenters stated that they should not be burdened with a requirement to update AFHs annually nor be forced into an AFH collaboration that may not be in the agency's best interests or those of its participants. The commenters recommended that PHAs preparing an AFH under Option 2 should be subject to the same revision requirements as imposed on all other program participants.

Similarly, others commenters stated the proposed rule would require PHAs preparing their own AFH to update that assessment annually without any justification for this differential treatment. The commenters stated that while many PHAs may elect to participate in an AFH with their locality, many smaller agencies are located in localities which do not receive grants covered by this proposed rule and so do not prepare consolidated plans. The commenters stated that the only choices available to them are to participate in their state's AFH or prepare their own assessment, and the latter alternative carries with it the unreasonable burden of revising the assessment annually rather than quinquennially. The commenters stated that with Federal funding for PHAs at unprecedented low levels, PHAs simply will not have the funds or other resources to implement an exceptionally burdensome requirement for annual reviews and revisions. The commenters stated that HUD should not impose revision and updating requirements on PHAs that are more burdensome than requirements imposed on other program participants that are required to prepare an AFH and consolidated plan.

HUD Response: HUD agrees that PHAs should not have a higher burden under the Independent PHA Planning Option than consolidated plan participants engaged in drafting the AFH. However, HUD disagrees with the suggestion of only one option and reiterates that PHAs always have three options. They may always perform the AFH with units of general local

government or State governmental agencies (as applicable), other PHAs in the region, or independently.

Comment: A PHA in a metropolitan area administering an HCV program should be required to consider the entire metropolitan area. Commenters stated that any PHA in a metropolitan area administering an HCV program that chooses Option 2 should be required to consider the entire metropolitan area as its geographic scope for the AFH and in certifying that it is affirmatively furthering fair housing choice. Commenters also recommended that, in § 903.15(a)(2), the PHA be required to consider the whole metro area as its scope for analysis and action.

HUD Response: PHAs choosing to conduct and submit an independent AFH, that are engaging in the HCV program, must include an analysis for the PHA service area and region, in a form prescribed by HUD in accordance with § 5.154(d)(2). This may include an entire metropolitan area or not, depending upon the state and locality. Their strategies and actions will address contributing factors, related fair housing issues, and goals in the applicable AFH, consistent with § 5.154, in a reasonable manner in view of the resources available. PHAs actions shall be related to the geographic scope of their operations. HUD encourages PHAs to collaborate with relevant entities.

Comment: A PHA choosing Option 2 must certify that it has reviewed and considered existing regional or statewide AFHs. Commenters stated that a PHA that chooses Option 2 and submits its own AFH should be required in the final rule to demonstrate and certify that it has reviewed and considered existing regional or statewide AFHs for the area.

HUD Response: This is not a requirement of the rule but a best practice.

iii. Option 3

Comment: Clarify which PHAs can opt for Option 3. Commenters stated that this section must be redrafted to spell out to whom this option is applicable and whether these agencies have any options for preparing AFHs or not. The commenters stated that most agencies not located in local jurisdictions required to submit consolidated plans may choose to participate in the States' AFHs and comply with goals in their consolidated plans, these agencies deserve the same set of choices as are available to agencies in a local jurisdiction. The commenters stated that this section is confusing as it pertains to agencies operating jointly with other agencies as consortia or simply under a memorandum of understanding concerning joint administration and management. The commenters stated that this section does not discuss options available to PHAs that may operate in more than one jurisdiction, one of which may prepare a local consolidated plan and one which may not. The commenters urged HUD to permit all PHAs the ability to perform their own AFH and certify their plans consistent with that assessment.

Commenters also stated it is unclear to which agencies HUD intends Option 3 to apply. The commenters stated that this option is likely attractive to some PHAs that overlap with a sub-state entitlement jurisdiction and are not interested in spending the staff time that Options 1 or 2 require. The commenters stated that any PHA (except one that administers only public housing that is located primarily or wholly within a sub-state jurisdiction that submits an AFH) should be able to opt to be covered by the state AFH, unless there is a regional AFH that covers its service area. The commenters stated that PHAs must still submit the civil rights certification and should have to explain how they will address fair housing issues and contributing factors in their own programs, even if the state AFH does not include goals or strategies directly applicable to the PHA. The commenters stated that AFHs of many local jurisdictions may not have appropriate

regional focus to cover PHAs that serve suburban cities or towns too small to be entitlement jurisdictions.

HUD Response: HUD has removed Option 3 as a separate option and has incorporated Option 3 into Option 1.

Comment: Option 3 may result in a more cumbersome process for States. Commenters stated that this language (§ 903.15(a)(3)) seems to be an effort to entice local PHAs to participate in the statewide AFH process by requiring annual updates of local PHA developed AFHs. The commenters stated that they are concerned that the AFH process could become somewhat more cumbersome for States, depending on the expectations of the State when local PHAs opt into the state AFH and on the number of participating local PHAs.

HUD Response: HUD has clarified both the consultation requirement for States under § 91.110(a)(1) and the options for PHA assessment to provide greater clarity on State/PHA interactions. The obligation for States to consult with the applicable PHAs has been clarified and further instruction will be provided when HUD publishes a State entity AFH template for public comment in accordance with the Paperwork Reduction Act.

Comment: Option 3 indicates that PHAs need not assess administration of a PHA's HCV program. Commenters stated that the rule states PHAs choosing Option 3 "must demonstrate that their development related activities affirmatively further fair housing…." which implies that these PHAs have no obligation to demonstrate that how they administer their HCV programs, which many have, meets the obligation to affirmatively further fair housing. The commenters stated that HUD should revise the final sentence of § 903.15(a)(3) to include the administration of HCV programs.

HUD Response: HUD disagrees that PHAs need not assess their HCV program, as it is covered by fair housing and civil rights laws and regulations. HCV-only PHAs will be required to participate in cooperation with a State, jurisdiction, or insular area as provided in Option 1, participate with other PHAs as provided in Option 2, or participate alone under Option 3.

d. Additional Options for HUD Consideration

Comment: Allow one or more PHAs to submit a joint AFH. Commenters stated that there should be an additional option available to PHAs explicitly allowing one or more PHAs in a region to work together to develop a joint AFH. The commenters stated that each PHA should maintain its own obligation to affirmatively further fair housing and to set its own PHA-specific goals and report on its progress in meeting these goals. The commenters stated that HUD should modify § 5.154(e)(1), which addresses what happens when a PHA and a Con Plan jurisdiction collaborate on a joint AFH and disagree over some elements. The commenters stated that HUD should reference § 5.154(e)(1) in the parenthetical at the end of § 903.15(a)(1).

HUD Response: HUD agrees that regional partnerships of consolidated plan participants may conduct a regional AFH, and has clarified that PHAs participating under Option 1 in § 903.15 may also be part of a regional collaboration if the unit of general local government or State governmental agency that they are participating with is part of a regional collaboration. In addition, HUD agrees with commenters and has explicitly indicated that PHAs may conduct an AFH under Option 2 in § 903.15. In all cases where a PHA is jointly participating in conducting an AFH , the PHA must incorporate any joint and individual goals developed in the AFH into its PHA Plan, as per the requirements in § 5.154. As HUD has noted earlier in this preamble, whether a PHA or another program participant, all collaborating program participants are also

accountable for their individual analysis, goals, and priorities to be included in the collaborative AFH.

v. Other Comments

Comment: The PHA Plan does not appropriately reference the AFH. Commenters stated that unlike the proposed changes to the Consolidated Plan's public participation provisions, the proposed rule did not insert references to the AFH in the key provisions of the PHA Plan rule, especially those relating to resident and public participation. The commenters stated that the AFH and consideration of its goals with respect to a PHA's programs, policies, and practices should be integrated into the PHA Plan.

HUD Response: HUD disagrees but has clarified § 903.15 to clarify the impact of the AFH on the PHA Plan. HUD has also clarified its regulations in §§ 5.150 – 5.180 to provide that strategies and actions to effectuate the goals and priorities in the AFH must be reflected in PHAs' and jurisdictions' planning documents.

Comment: Remove the requirement that a PHA notify HUD of selected option 60 days before AFFH certification is due. Commenters stated that the proposed rule would require PHAs to notify HUD 60 days before their PHA Plan AFFH certification is due to HUD of which option they are following. Commenters recommended HUD remove this notification requirement, stating that it serves no apparent purpose. The commenters stated that this time frame seems inconsistent with the requirement that an initial AFH be submitted to HUD at least 270 days before the start of the program year. The commenters stated that if HUD believes that it is important to make sure each PHA has thought about which option it will follow, HUD could require PHAs to include in the Annual PHA Plan submitted after the effective date of the rule its decision about which option it intends to choose for the AFH, which would allow public and

resident input into the decision. In that case, the initial AFH should not be due until at least one year later.

HUD Response: HUD agrees with the commenters. The selection should be made earlier, but should not have a required deadline. PHAs must notify HUD of the option they choose.

Comment: Clarify what is meant by "differentiated sections" in § 5.154(e)(1). Commenters stated that HUD should clarify the proposed language of § 5.154(e)(1). The commenters stated that it is not clear what "differentiated sections" means, and what the consequences are of HUD's decisions on which provisions are approved in the case of a disagreement. Commenters stated that if HUD approves the jurisdiction's AFH despite the PHA's dissent on some portion, the PHA should be bound by the approved provisions from which it had dissented, and that conversely, if HUD agrees with the PHA's alternative, the jurisdiction should be bound by it. The commenters stated that because of the potential consequences for jurisdictions in such a case, HUD should make clear that jurisdictions can include in their submission to HUD their response to a PHA's disagreements.

HUD Response: HUD agrees that differentiated sections of an AFH, due to one or more PHA dissents, is untenable for review. As such, HUD has removed the dissenting opinion from the joint participation option and instead encourages MOUs to govern dispute resolution amongst jointly participating entities.

Rule change. This final rule removes § 5.154(e) and thus all references to "differentiated sections."

Comment: Allow a PHA that disagrees with any aspect of a jurisdiction's AFH to propose alternative priorities and strategies. Commenters recommended that HUD require a PHA

that disagrees with any aspect of the jurisdiction's AFH to propose an alternative strategy or priority, and explain why the alternative is better designed to achieve the joint goal(s).

HUD Response: As provided in the response to the preceding comment, HUD has removed the dissenting opinion provision.

Comment: Additional guidance is needed on collaboration on AFHs. Commenters stated that the rule provides no guidance on notice requirements of program participants seeking to collaborate with other program participants in an AFH. The commenters stated that, at minimum, consolidated plan jurisdictions should be required to publicly notice other program participants within their regional boundaries of the AFH process. The commenters stated that § 5.156 should be amended to add a section encouraging program participants that plan to submit a joint AFH to notify consolidated plan jurisdictions and PHAs within their region of their intention to file a regional AFH and who to contact for more information about the regional process.

HUD Response: Additional guidance is forthcoming on such issues.

Comment: A regional approach to AFH does not exempt PHAs from an individual affirmatively furthering fair housing obligation. Commenters stated regionalization must not relieve program participants of individual obligations to affirmatively further fair housing. The commenters stated that the final rule must reflect that each collaborating PHA has an obligation to affirmatively further fair housing, to set local PHA-specific goals, and to report on progress. The commenters recommended that the final rule add language as follows at § 5.156(d) Content of the Regional Assessment: "Each collaborating member must set its own goals to affirmatively further fair housing, take its own meaningful actions to affirmatively further fair housing and report on its progress to affirmatively further fair housing." The commenters stated that an AFH

submitted by a PHA independently should not be too narrow in scope that it precludes consideration of regional fair housing issues. The commenters stated that currently a PHA is required to certify that its PHA Plan is consistent with the consolidated plan of overlapping jurisdictions.

HUD Response: HUD agrees that each program participant, including each PHA, has its own duty to affirmatively further fair housing, which is not reduced by participation in a collaborative AFH. HUD disagrees with the commenters as to the specific language suggested and does not incorporate this language into this final rule. However, the rule has been clarified to indicate that all program participants must perform the AFH and that any relevant fair housing issues, contributing factors, and goals for each program participant must be addressed in their joint AFH, and strategies and actions to address the AFH goals and priorities must be included in planning documents.

Comment: 5-Year Plan Should Align with Applicable AFH. Commenters recommended that HUD modify § 903.6 to clarify that the 5-year Plan should align with the applicable AFH. Commenters stated that his change integrates the AFH into already-required planning processes. The commenter stated that HUD should include a provision that requires PHAs to incorporate in their next 5-year Plan after the preparation of the AFH goals and objectives consistent with the AFH, and adopt quantifiable measures for achievement over the 5-year period. The commenter stated that this is consistent with § 903.15(e) which would require PHAs to modify their 5-year PHA Plans if a significant change in the applicable AFH "necessitates a PHA Plan amendment."

HUD Response: HUD recommends aligning the 5-year planning cycle, if possible, for purposes of ensuring consistency with the most current AFH. Also, HUD has clarified in 24

CFR part 5 that strategies and actions to address contributing factors and related goals and priorities identified in a PHA's AFH must be included in PHA plan documents.

Comment: Clarify consultation requirement when a PHA is under a voluntary compliance agreement. Commenters cited the proposed rule language that states: "The State shall consult with any PHA concerning consideration of public housing needs, planned programs and activities for the AFH, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing, and proposed actions to affirmatively further fair housing. If a PHA is required to implement remedies under a VCA, the State should consult with the PHA and identify the actions it may take, if any, to assist the PHA in implementing the required remedies." The commenters stated that this may be interpreted to force States to assist PHAs financially, potentially in conflict with a state consolidated plan method of distribution of Federal funds. The commenters stated that this language appears to have no legal basis under the QHWRA or the Fair Housing Act, and the language should be removed from the rule.

HUD Response: HUD disagrees with the commenters. The language in the proposed rule provided only that a State jurisdiction may assist, if possible. The language is therefore permissive and not mandated or required.

21. Access to Opportunity

Several commenters expressed opposition to the rule's objective to provide access to opportunity on the basis of statements that included the following: access to better neighborhoods should depend on hard work and not on government give away programs; adequate mechanisms exist through the free market for access to areas where equal opportunities exist for all persons regardless of any special emphasis status that significantly lag actual conditions; that the preamble to the rule itself acknowledges that improving educational

outcomes for disadvantaged children relies upon the family structure and that illegitimacy is the most important factor in children's educational attainment; and that the rule runs the risk of encouraging reformers to pursue policies that will hurt communities because any policy that seeks to make homes in a higher income area accessible to lower income families (disproportionately minority) could do so only by functionally decreasing the value of some homes or providing them some sort of assistance.

Other commenters expressed strong support that the Fair Housing Act should be a tool for creating equal opportunity in our country. The commenters stated that the Fair Housing Act requires that housing and community development programs be administered in a way to help overcome problems associated with racial segregation and expand the housing choices available in America, and that, in the proposed rule, HUD clarifies that this also means expanding access to important community assets and resources that have an impact on the quality of life for residents.

Specific issues raised by commenters on access to opportunity include the following:

Comment: Program participants should not be required to examine data beyond that required under the Fair Housing Act. Commenters stated that while they understand that the availability of certain data is necessary for program participants to examine certain fair housing issues in their community, they do not agree that requiring program participants to examine data surrounding access to education, employment, low-poverty, transportation, and environmental health are required as part of the Fair Housing Act. Commenters stated that these social and physical improvement indices represent HUD's selection of relevant factors, but there are significant questions as to the viability of those factors in judging the results of efforts to

affirmatively further fair housing. Commenters stated that HUD should list these data elements as an option for program participants to use in their AFH, not a requirement.

HUD Response: HUD understands the commenters' concerns surrounding the type of data to be used in the AFH. HUD will provide program participants with data, which will be more fully addressed in the Assessment Tool. The HUD-provided data will need to be supplemented with local data, which is subject to a HUD determination of statistical validity and relevance to the program participant's geographic areas of analysis. As noted earlier in this preamble, the phrase "subject to a determination of statistical validity by HUD" clarifies that HUD may decline to accept local data that HUD has determined is not valid but not that HUD intends to apply a rigorous statistical validity test for all local data. This local data should be readily available to the program participant at little or no cost and can be found through a reasonable amount of search.

Analyzing data and incorporating local knowledge on community assets is an important part of a fair housing analysis. As currently proposed, this data will include information on segregation, racially or ethnically concentrated areas of poverty, disproportionate housing needs and disparities in access to opportunity among protected classes. Disparities in access to opportunity – which includes "substantial and measurable" differences in access to educational, transportation, economic, and other important opportunities in a community – affects fair housing choice and patterns of segregation and integration. Measuring these differences is vital to understanding fair housing issues and furthering fair housing choice in a community.

Comment: Allow program participants to use the Integrated Disbursement and Information System performance measurement system. Commenters stated that HUD should allow program participants to use the Integrated Disbursement and Information System (IDIS)

Performance Measurement System, which allows one to select a Goal, Outcome, Objective, and a Goal Outcome Indicator for each activity, and qualitative performance is then reported in narratives in the CAPER. The commenters stated that this process should continue to be allowed as it is manageable, and that HUD should be careful to not develop unrealistic outcome measures that are based on theory and may not accurately reflect the impact of a particular activity.

HUD Response: HUD appreciates the commenters' suggestion. Consolidated plan participants will continue to use IDIS to report on their performance under the consolidated plan, which includes actions taken to affirmatively further fair housing.

Comment: HUD must validate idiosyncratic measures it has selected ahead of their use on a national basis. Commenters stated that while some measures and indices in HUD's rule are commonly used, other unique measures have been developed by HUD, and in particular, the idiosyncratic measures must be validated ahead of their use on a national basis for such an important task. The commenters asked about the following: (1) for RCAPs and ECAPS, why has HUD chosen the thresholds it describes, because, the commenters stated, they do not seem consistent with other commonly used measures of the concentration of poverty, race or ethnicity, and HUD should justify and validate these thresholds; (2) for the Indices of Dissimilarity and Isolation, the commenters stated that although both are common measure of spatial segregation, it is not clear why program participants should use both, and commenters asked what values HUD used to define low, moderate and high segregation using the dissimilarity index; (3) for Predicted Racial/Ethnic Composition Ratio, the commenters asked why HUD proposed using income brackets in this ratio because they appear to be irrelevant to the measure, and the ratio appears to treat higher than predicted proportions of high income minorities and lower than predicted proportions of low income minorities as a problem. The commenters asked that since

the income brackets described are, "notional," how does HUD propose to develop actual brackets, and how are those brackets related to the predicted racial/ethnic composition ratio; (4) for Community Asset Exposure Indices, the commenters stated that the descriptions of these indices and their uses implies that there may be more or different indices used in the future: and (5) for Disproportionate Housing Needs, the commenters asked the basis for the threshold of 10 percent as defining "disproportionate."

HUD Response: HUD recognizes that particular thresholds and measurements may not apply equally to all program participants. However, most of the issues raised by these specific comments are better addressed through the Assessment Tool and related guidance and not through direct changes to the regulatory text itself. In terms of the comment on the 10 percent threshold for disproportionate housing needs that was present in the proposed rule text, HUD agrees with the commenter and has changed the definition of the term to delete the threshold from the regulatory text.

Rule Change. As noted earlier in this preamble, the definition of "disproportionate housing needs" in § 5.152 of this final rule has been revised to remove the 10 percent threshold. This final rule states that disproportionate housing needs exist where there are significant disparities in the proportion of members of a protected class experiencing a category of housing need when compared to the proportion of members of any other relevant groups or the total population experiencing that category of housing need in the applicable geographic area.

Commenters: Indicators of effectiveness should be measurable and show progress of improved integration over time. Commenters stated that HUD should identify long-term indicators and short-term performance measures for program participants to meet fair housing goals. The commenters stated that performance measures could include metrics related to the

number of jurisdictions in high-opportunity areas that revise zoning codes to reduce fair housing issues; strategic investments made in high-poverty communities that expand multiple aspects of opportunity (besides affordability); and the number of affordable housing units for families with children that are located near schools with high educational opportunity. The commenters stated that long-term indicators could be borrowed from segregation, concentrated poverty, and opportunity data that HUD provides, in addition to some of the housing choice indicators that the Partnership for Sustainable Communities have identified for their grantees – but disaggregated to evaluate housing choice for protected classes.

Other commenters stated that the primary indicators of effectiveness in a jurisdiction and its region are changes over time, in the rates of segregation and percentage of families of color living in high poverty neighborhoods, and the comparative distribution of government assisted housing resources by neighborhood poverty rates and levels of racial concentration.

Commenters stated that indicators must be matched to the program implemented and stated, for example, that if a jurisdiction implements a homeownership program to disperse the minority population into non-minority areas one measure of effectiveness is the time it takes to market and fill a vacant unit. The commenters stated that this would assist in evaluating the advertising effectiveness as well as the receptivity of minorities willing to relocate their families possibly out of their comfort zone into a non-minority neighborhood.

HUD Response: HUD appreciates the commenters' suggestions and will consider them in developing guidance that will assist program participants in complying with this rule.

Comment: Compare the number of fair housing complaints filed in one year to the prior two years. Commenters stated that one indicator that could be used to determine effectiveness would be to compare the number of fair housing complaints filed within a certain jurisdiction in

a year, in comparison to previous years. The commenters stated that it would also be useful to compare the number of units created in higher income areas over a period of time – perhaps 5 years – to see if the state/locally conceived and implemented policies are providing for greater housing choice for lower income households.

HUD Response: HUD appreciates the suggestion and will give consideration as to whether such comparison is helpful in determining the effectiveness of the new AFH approach and in creating guidance for program participants on effective goals and the metrics and milestones that program participants will use to measure and report on their success in meeting goals. HUD notes, however, that individuals decide to file or not file fair housing complaints for a variety of reasons, so a simple comparison of the number of complaints in various years may not be very meaningful when considered in isolation from other factors.

Comment: The job access index is not applicable to rural areas. Commenters stated that one of the key measures provided in the proposed rule is the job access index, which pertains to the accessibility of a given residential neighborhood as a function of its distance to all job locations, with distance to larger employment centers weighted more heavily. The commenters stated that the job access index may not be appropriate for rural areas, where the real distance to the job location is from the house to the barn. The commenters stated that community assets are fewer in rural areas, but that does not mean this situation needs to be corrected. The commenters stated that population density needs to be considered in the application of key measures, and that communities with a population density that would classify the area as “rural” should be exempt from this regulation.

HUD Response: HUD acknowledges the unique issues and challenges in applying the rule to rural communities and intends the implementation of the rule to be flexible and adaptable

to meet those challenges. The commenter is correct that some of the data on community assets, including access to jobs, transportation, and education may very well appear different when mapped or incorporated into an index to measure those assets. The purpose of the indices is to provide an easy-to-use simple measure, in part to reduce the burden on program participants in developing an AFH. However, where the usefulness of the index itself is limited, either by data limitations or how it is applied in certain areas, including rural areas, those limitations can be acknowledged by the program participant in the AFH by supplementing HUD-provided data with local data and knowledge.

The larger question is what goals, strategies, and actions the program participant can design and adopt to meet the fair housing and equal opportunity needs of its jurisdiction. In many rural areas, for instance where poverty is much more widespread than in an urban or metro area, the strategies will often be different. HUD's rule already acknowledges that place-based strategies can be adopted to address problematic issues identified in the needs analysis portion of the AFH Plan. In the case of rural areas, this is particularly important to acknowledge. For instance, in making decisions about where an affordable housing development or assistance is needed, the fact that poverty is often spread over large geographic portions of rural America will be a key consideration in deciding how to best allocate housing resources.

Valuable research and guidance on the topic of poverty in rural areas and the unique challenges and potential strategies that can be employed to address it is available from a variety of private sources as well as different Federal agencies and offices. Among the Federal sources of information on this issue are: CPD's Rural Housing and Economic Development Gateway website; the U.S. Department of Agriculture's Economic Research Service; and the Federal Reserve, which has sponsored and produced studies on rural poverty issues.

Comment: The rule should support a multi-agency approach to access to opportunity. Commenters stated that "the proposed rule acknowledges that the prospects for individual or familial success are influenced by a variety of neighborhood features far more extensive than just housing." The commenters ask why a multi-agency approach, such as a Federal interagency working group, has not been formulated to address these issues, as has been done in the areas of environmental justice and healthy homes.

HUD Response: HUD agrees with the premise of the question and takes this proposal under advisement. It is consistent with the approach adopted by the current Administration, which has convened Federal interagency working groups on both affordable housing and neighborhood issues.

The Neighborhood Revitalization Initiative included staff from HUD, and the Departments of Education, Justice, HHS, and Treasury. It examined and made recommendations for place-based revitalization initiatives and combining Federal programs with similar goals to do so. Out of these recommendations, these agencies were able to achieve better coordination with respect to HUD's Choice Neighborhoods Initiative, Education's Promise Neighborhoods Grant Program, and DOJ's Byrne Criminal Justice Innovation Grant Program. See also OMB Memorandum M-09-28, Developing Effective Place-Based Policies for the FY 2011 Budget, dated August, 11, 2009, available online at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-28.pdf.

A related Rental Policy Working Group convened staff from Federal agencies – HUD, USDA's Rural Housing Service, and Treasury – to reduce and streamline regulatory requirements, and to help preserve the existing affordable rental housing stock. For more information, see: http://archives.huduser.org/aff_rental/home.html. HUD's Strong Cities, Strong

Communities (www.huduser.org/portal/sc2/home.html) provides capacity building resources and technical assistance to local governments and helps coordinate programs and reduce regulatory burden when combining funding from different Federal agencies.

Comment: Access to the community asset of public education is not the same thing as access to high-performing schools. Commenters stated that HUD needs to make clear that access to educational opportunities that should be pursued is access to high-performing schools. Commenters stated that consistent with settled civil rights law in the areas of education and fair housing, the rule must make clear that access to education means access to stably-integrated or majority white schools with at least average standardized test scores, graduation rates, and college or technical training matriculation rates. Access to educational opportunity cannot involve high poverty, non-white schools with lower than average test scores, higher than average dropout rates, and/or lower than average college or technical training matriculation.

HUD Response: HUD agrees that access to high-performing schools is a critical neighborhood component that should be considered in efforts to affirmatively further fair housing. The neighborhood school proficiency index includes school-level data on the percent of elementary school students who are proficient in reading and math according to state exams, to determine which neighborhoods have high-proficient and low-proficient elementary schools.

Comment: Access to transit alone does not satisfy the duty to affirmatively further fair housing. The commenters stated that performance of schools near segregated central city projects continues at very low levels, while unemployment and crime are higher in these areas than in any other part of the region. The commenters stated that many public health measures are also the worst in the region, but because these areas are near transit, color-blind community

developers have persuaded state and local authorities that locating housing in these declining segregated neighborhoods is consistent with their obligation to affirmatively further fair housing.

The commenters stated that transit does a poor job of connecting low-wage workers with available jobs because most new jobs are scattered and beyond the access of even the best transit systems. The commenters stated that many of the most exclusive and wealthiest communities will rank poorly on the transit access index. The commenters stated that using access to and distance from bus or rail transit could have the unintentional effect of undermining regional fair housing goals by reducing the responsibility of some of the highest opportunity communities to promote fair housing and achieve more inclusive communities. The commenters stated that, in too many cases, this was an intentional and common tactic to discourage low-income residents from moving into such communities. The commenters stated that lack of transit should not be allowed to reduce a community's responsibility or steer a region's plan away from communities with strong assets such as schools and jobs and toward higher poverty communities or even diverse communities. The commenters stated that access to transit is not a substitute for good schools and strong diverse neighborhoods and should not be used to encourage more affordable housing in places impacted by poverty while exclusionary communities with less transit are let "off the hook."

The commenters stated that the proposed rule must clarify that neighborhoods, which are impoverished and segregated, but proximate to transit cannot be considered areas of opportunity for which access ranks high.

HUD Response: HUD agrees that a racially or ethnically concentrated area of poverty is not an area of opportunity simply because it is served by a public transportation system or any single indicator of opportunity. However, access to public transportation may be one indicator of

access to opportunity. The comments address the manner in which HUD will provide data on transportation rather than the language of the regulation itself. This final rule continues to reference transportation as a key community asset that program participants should take into consideration in developing their AFH.

Transportation is a key factor in assessing total housing affordability, and, specifically, access to public transportation options can be critical to providing access to jobs, education, health care, and other amenities and community assets for low-income families, the elderly, and persons with disabilities. Increasingly, planners and policymakers are taking transportation into account for purposes of both new development and prioritizing preservation of existing affordable housing. Reviewing available data can also assist planners in identifying existing communities in need of improved transportation options.

HUD has worked to identify a comprehensive set of data that allow a multisector assessment. Moreover, because research on measuring access to community assets is continually evolving, HUD is committed to reviewing the data on an ongoing basis for potential improvements. As with all data metrics, the measures in each category have strengths as well as limitations, and no criteria should be assessed in isolation from the other measures or required assessments.

The specific measures and data to be used to assess transportation issues as one possible source of disparities in access to opportunity will be determined through guidance, including the Assessment Tool.

<u>Comment: Access to employment alone does not satisfy the duty to affirmatively further fair housing</u>. As with access to transit, access to employment opportunities cannot alone satisfy the duty to affirmatively further fair housing. The rule must make clear that access to

employment means access to jobs that could actually be filled by low-income, low-skilled, non-white citizens. As a result, residents have been less likely—not more likely—to be employed and far more likely to become incarcerated. "Access to employment neighborhoods" must be defined as areas where new entry-level jobs are increasing and where there is evidence that these jobs will actually be filled by poor, low-skilled, non-white citizens. Throughout the country the growth of jobs—and particularly the growth of jobs for poorly educated, low-skilled, non-white citizens—is at the edge of metropolitan areas. Segregated and unequal education received in segregated neighborhoods prevents workers from accessing existing employment opportunities.

The commenters stated that the final rule must clarify that, when neighborhoods are proximate to clusters of employment but have high rates of unemployment and comparatively low wages, these neighborhoods cannot be considered areas with access to employment opportunity for purposes of the proposed rule.

HUD Response: As stated above, HUD agrees that a racially or ethnically concentrated area of poverty is not an area of opportunity simply because of any single indicator of opportunity. However, HUD declines to include in the final rule the commenters' proposal. Economic factors, including access to jobs, are key considerations in assessing neighborhood opportunity. As with transportation, HUD-provided data will help program participants better assess local needs and frame appropriate strategies, which can encompass both mobility and place-based investment approaches. The specific data sources and indices used to measure access to employment opportunities will be determined through the Assessment Tool and guidance.

Comment: Access to quality food is an important community asset that helps build strong neighborhoods. Commenters stated that areas with restricted access to affordable, healthy food

options are heavily concentrated in communities of color and low-income neighborhoods. The commenters stated that lack of access to quality foods increases the prevalence of obesity, diabetes, and other diet-related conditions, and that this is a problem with racial and economic dimensions. The commenters stated that wealthy neighborhoods have three times the number of supermarkets as their low-income counterparts, and that this disparity becomes even more dramatic when comparing predominantly white neighborhoods with black neighborhoods. The commenters asked that access to quality food be a community asset measure.

HUD Response: While HUD agrees with the commenters about the importance of access to high-quality and affordable food options at the neighborhood level, this final rule does not adopt the suggestion that this topic be added as an additional separate measure of access to community assets in the Code of Federal Regulations. This and other important neighborhood factors will be addressed in guidance and in the data that HUD will provide to program participants. Moreover, lack of access to affordable, high-quality sources of food is the type of information that could be expected to be identified through community participation, which is a required part of the AFH process. Program participants must summarize comments made in the community participation process and explain why any such comments are not addressed in the AFH.

22. Data and Mapping Issues

a. Data and Index Issues

In the preamble to the proposed rule, HUD solicited comments on a number of specific issues. Among the questions posed by HUD were the following two questions (#1 and #9) regarding data that will be used for completing an AFH:

1. The field of geo-coded data is rapidly evolving and, as HUD works to refine data related to access to important community assets, it welcomes suggestions for improvement. Such comments can include the description of cases or situations where the indicators may or may not appropriately portray neighborhood qualities. Are the nationally uniform data that HUD is providing to assist in the assessment of segregation, concentration of poverty, and disparities in access to community assets appropriate? Do these data effectively measure differences in access to community assets for each protected class, such as persons with disabilities? To what extent, if at all, should local data, for example on public safety, food deserts, or PHA-related information, be required to supplement this nationally uniform local and regional data? (See 78 FR 43724.)

9. An analysis of disproportionate housing needs is currently required as part of the consolidated plan, and this proposed rule would make disproportionate housing needs an element of the AFH as well. If a disproportionate housing needs analysis is a part of the AFH, should it remain in the consolidated plan as well? Is this analysis most appropriate in either the AFH or the consolidated plan, or is it appropriate, as the current proposed rule contemplates, to have the analysis in both places, assuming the analysis is the same for both planning exercises? (See 78 FR 43724.)

In response to these requests for public input and to the information on the data methodology posted online, HUD received a large volume of public comments and questions on data issues.

Comments: The public comments received included the views, recommendations, and further questions as follows:

- States and rural areas require a different level of data and analysis as compared to metropolitan areas and urban counties.
- The format in which data are provided − HUD should provide the data as either raw data or tabular datasets.
- HUD should allow groups to upload additional data to the data tool.
- HUD should provide additional datasets, such as HMDA data, foreclosures, fair housing complaint data, testing results, local surveys, and citizen narratives.
- Some specific types of data on access measures may not be effective. The education data may not capture local enrollment policies. In terms of the transportation data, many localities do not have this data reported or publicly available. Job access data does not capture actual commute time.
- Many commenters noted that since the proposed rule did not contain the data tool, or the AFH Assessment Tool, the commenters could not make more specific points on what they will, should, or should not contain.
- HUD should provide data on concentrations of poverty by protected class other than race/ethnicity.
- HUD should preview the tool and make the data tool available to the public, in addition to grantees (this will help in the public's participation in the local AFH process).
- Program participants should be required to post the data they are using on their own websites and do so prior to any public hearing.

- The data that HUD is requiring is excessive, and the data may also be duplicated in the consolidated plan and action plans.
- HUD should provide one composite index to assess neighborhood access to community assets and stressors, rather than HUD's approach to provide separate indices represented independently.

HUD Response: In regard to commenters' requests for greater specificity in the regulatory language itself, HUD continues to take the position that it is appropriate that many of these items are better addressed in the Assessment Tool and as guidance and should not be included in the regulatory text itself. This will allow flexibility and further refinements to be made on a timelier basis in response to public input and in response to experience gained through program participants' use of the Assessment Tool in preparing and submitting an AFH.

In response to the numerous comments that the data tool as originally presented for public comment was not effective for all types of program participants, including smaller jurisdictions and States, HUD has made numerous changes and improvements. The public comments in this area were extremely valuable, and HUD expects to make further refinements during the guidance and implementation process.

Program participants and the public have had additional opportunity for providing comments on both the Assessment Tool, as that document went through the Paperwork Reduction Act process and, in the case of the data tool itself, HUD will continue to refine the data tool based on ongoing public input and future research and analysis.

HUD is incorporating nationally available data determined to be statistically valid by HUD after conducting thorough research and analysis, as well as extensive consultation between HUD staff and external research and policy experts. Many comments requested that additional

types of data be added to the types to be provided by HUD. The data are not intended to be exhaustive but are intended to provide a baseline for program participants to use and HUD encourage program participants to supplement with local data and knowledge. HUD also expects that as more nationally uniform sources of data become available the types of data provided to program participants for their planning purposes can be added to.

The manner in which the assessment of data should be used to inform local decision making will be provided in the Assessment Tool and through technical assistance and guidance. These will be particularly important for State-level, as well as smaller, nonmetro and rural program participants.

Comment: Definitions are not effective in capturing important racially or ethnically concentrated areas of poverty in a particular community. Commenters stated that the rule should allow participants to propose an alternative definition, which should be subject to public comment as part of the AFH process and approval by HUD before they can be adopted.

HUD Response: HUD has not adopted this proposal because of the need to provide for some level of consistency in the way program participants conduct an AFH. HUD notes, however, that the rule affords program participants the flexibility to supplement the HUD-provided data with relevant, statistically valid State and local data, qualitative analysis and explanation, and information received during the public participation and outreach process. In addition, program participants have latitude to adjust their goals and strategies in the local decisionmaking process in order to select the most effective ways to address the issues and contributing factors identified by the data and analysis.

Comment: HUD should clarify how it will use and evaluate any supplemental local data. Commenters stated that localities should have the opportunity to explain how the data should be

properly interpreted and would welcome a dialogue with HUD regarding this data. Commenters recommended that HUD explicitly offer this level of transparency and suggest this type of exchange. Commenters stated that, at a minimum, the rule should clarify that when localities submit supplemental data that is more accurate or telling, HUD will rely on that local source in place of the standard indices.

HUD Response: HUD will grant considerable weight to any convincing showing from a program participant that adds to the AFH, particularly with additional data sources used to supplement the HUD-provided data, where these are found HUD to be accurate, statistically valid, and relevant. HUD expects to provide additional guidance to assist program participants as they conduct their AFHs.

Comment: The rule should require program participants to survey local opinions about diversity. Several commenters made this recommendation.

HUD Response: Program participants are encouraged to undertake active outreach efforts such as this, but the rule does not require it outside of the public participation requirements in the rule.

Comment: Make local data publicly available. Commenters stated that program participants should make all the data they are using available for public review prior to a hearing and opportunity for comment.

HUD Response: The final rule includes this requirement in the citizen participation section of the regulations. (See §§ 91.105(b)(1)(i) and 91.115(b)(1)(i).)

Comment: Revise § 5.154(d) and (e) to establish different requirements that are appropriate to State governments. Commenters stated that the level of data analysis required of

state governments must cover broader areas of geography, but should not require the same level of geographic specificity as local governments.

HUD Response: HUD agrees that the requirements of the rule should be appropriate for different types of HUD program participants, including States, and the definition of "geographic area" in the final rule reflects this fact. Also, HUD believes § 5.154 is appropriate as presented in the rule. HUD anticipates that the level of data analysis for different types of program participants is best addressed through the Assessment Tool, the associated data tool, and guidance rather than in the final rule.

b. Data Documentation.

Comment: Comments received on the AFFH Data Documentation paper were as follows:

- Where did HUD discover the values it uses to define low, moderate, and high segregation using the dissimilarity index? Are these arbitrary values?
- The definition of RCAPs/ECAPs will be problematic for many regions. The 40 percent threshold is too high in many rural and smaller regions.
- HUD should use an alternative to the 40 percent poverty threshold for RCAPs/ECAPs.
- The proposed rule was vague about the proposed weights to various input categories for accessing fair housing neighborhoods. For example, does "transportation access" rate higher, lower, or the same as school proficiency index scores?
- HUD should provide data at the census tract level.

HUD Response: The comments refer not to the rule itself, but to the AFFH Data Documentation paper that was posted online concurrently with the proposed rule. HUD appreciates the very useful feedback that commenters provided on the Data Documentation

paper. These comments will be used in developing and refining the Assessment Tool and the related data tool.

While HUD's final rule and the Assessment Tool rely heavily on the use of census tracts in identifying areas of concentration as well as opportunity areas, among researchers there are well known limitations to the use of census tracts. A census tract with relatively high poverty may actually be located within a larger area experiencing significant economic improvement. Moreover, HUD recognizes that while census tracts are often used in the research literature in part due to their value in quantitative analysis and the existence of relevant data, there are known limitations, including the fact that they are not always synonymous with neighborhoods as understood at the local level and their varying relevance in different geographies, for example, between central cities and rural areas.

In interpreting the presence of RCAPs/ECAPs, program participants should take into account the characteristics of adjoining or nearby census tracts, for instance, that may indicate a particular tract is located in a more desirable area or an area that is experiencing improved overall economic conditions or residency patterns. In addition, HUD notes that the definitions of segregation and RCAPs/ECAPs are not new legal thresholds based on a bright line test alone. Further, it is not HUD's intent that the current regulation inadvertently lead to decisions based strictly on an overly strict application of the various definitions and thresholds in the regulations and the Assessment Tool. The program participant's AFH can and should expand on both through qualitative discussion, and the legal definitions themselves are restricted in purpose to the rule (as provided in § 5.152 that has been revised to clarify that the definitions apply only to the AFH planning process in §§ 5.150 through 5.180). On a related note, the regulation, in the definition of "geographic area," allows for the use of census block groups, although HUD notes

and recognizes that doing so can often carry even more caveats in terms of possible limitations than do census tracts but nevertheless the rule retains the flexibility for program participants to include the use of block groups, at their discretion.

Comment: Clarify that statistical measurements do not apply to individuals. Commenters asked that the regulatory text clarify that the new statistical measurements are not intended to apply to private persons.

HUD Response: HUD believes the rule is sufficiently clear on this point as is, and, therefore, the change suggested by the comment is not adopted.

Comment: No funding should be denied for disparities revealed by HUD data. Commenters stated that, because of the unreliability of HUD data, no funding should be denied to a program participant where data or other information in an AFH shows either a failure to meet affirmative obligations or a prima facie case of intentional or disparate impact discrimination. Commenters stated that HUD must further investigate the matter and not act on the basis of its data.

HUD Response: The AFH is an analysis to be used by program participants in setting priorities and goals and informing strategies on how to affirmatively further fair housing. The identification of a fair housing contributing factor or issue in an AFH is meant to aid program participants in fulfilling their duty to affirmatively further fair housing, and is not intended to result in the nonacceptance of an AFH or deny funding. While the data provided in an AFH may assist HUD in understanding some of a program participant's fair housing successes and challenges, HUD's findings of noncompliance with fair housing and other civil rights requirements, and its acceptance or nonacceptance of an AFH, are not based solely on demographic data. HUD findings are the result of investigations that are consistent with

statutory and regulatory standards. Furthermore, HUD will not undertake an enforcement action without affording the program participant due process, which could include the program participant's questioning HUD's investigative findings and conclusions.

The AFH is intended primarily as a planning document to assist program participants in planning appropriate strategies to address the challenges that may be present in their jurisdiction or region. The definition of fair housing issues provided in the regulation and any numeric thresholds associated with it that HUD provides in guidance for the AFH document do not create separate new legal thresholds for the purposes of enforcement, establishing prima facie findings of violations of civil rights laws or similar new legal requirements. They are for the purposes of guiding program participants in identifying potential fair housing issues in the State, locality, or region that should be addressed in the AFH itself.

Comment: Deference should be given to local data. Other commenters stated that when a program participant has more recent data, even if it contradicts HUD's data, deference should be given to the participant's data so that HUD is not substituting its judgment for that of the program participants. Commenters stated that the final rule should explicitly allow for deference to each entity's choices of data used to support the AFH.

HUD Response: Program participants are not limited to the use of data provided by HUD but, for consistency purposes, they must include data provided by HUD in their analysis of fair housing issues and contributing factors. Indeed, where relevant local data is available to a program participant, the program participant must consider it in conducting its AFH.

Comment: Establish a process to resolve disputes over data. Commenters stated that a process should be established for settling disputes over the use of certain data or inaccurate data analysis. Commenters stated that HUD data varies in its reliability, citing fair market rents that

do not reflect current actual market rents and the lack of data with respect to persons with disabilities, and suggested creating a process for a participant to challenge the HUD data.

HUD Response: The use of local data is subject to HUD review for statistical validity. reliability, and relevance. Any questions HUD may have regarding the use of local data would arise as HUD reviews a program participant's AFH. In the review process, HUD may ask questions about the local data used by a program participant or HUD may decide not to accept an AFH if it determines that the data used are not valid, reliable, or relevant. The rule provides a process for HUD and a program participant to communicate and resolve AFH deficiencies leading to HUD's nonacceptance of an AFH. (See § 5.162.) Disputes over data would be addressed in this process.

Comment: Advise how frequently HUD will update its data. Commenters stated that HUD should advise how frequently it will update the data it provides. Commenters stated that the proposed rule stated that HUD would update the data periodically, but program participants need more specificity as to when the updates will occur. Commenters stated that HUD should update the data annually or biannually. Commenters stated that if jurisdictions are to use the data to track the progress of their policies, they will need to have updates at regular, timely and predictable intervals.

HUD Response: HUD will keep program participants advised as to updates to the data it provides and any other data-related enhancements to the AFH Assessment Tool. HUD declines to specify an interval for periodic updating of data – in part, because it does not always control the source of data and, in part, because enhancements to the data are likely to occur without particular regularity.

Comment: Local data should be an option not a requirement to supplement other data. Commenters stated that local data should not be required to supplement the national uniform local and regional data. It should be used at the program participant's discretion. Commenters stated that supplementing HUD's data with their own data collection efforts will be expensive and time-consuming, undermining one of the agency's goals for the new rule. The commenters stated that they want to be sure that they are addressing their most pressing fair housing needs and issues, but they do not want to be required to participate in a data analysis exercise that will not provide useful guidance about how to proceed.

HUD Response: HUD agrees that obtaining and compiling data could be a resource-intensive pursuit. HUD will only require program participants to obtain data that is readily available at little or no cost, including in terms of staff time. HUD believes that local data should be used to supplement HUD-provided data and is requiring program participants to include such data in their AFH. Where useful local data exists, it can be a valuable means of supplementing the national data and could be quite important to an AFH that applies to a particular area. Therefore, this rule balances these competing values by not requiring data to be compiled or obtained if it does not exist (although doing so is not prohibited), but where useful data exists, is relevant to the program participant's geographic area of analysis, and is readily available at little or no cost, the rule requires that it be considered.

Rule Change. This final rule adds new definitions for the terms, "local data" and "local knowledge" in § 5.152.

c. Rural Data Issues

Comment: HUD must provide reliable data for rural areas. Commenters expressed concern about the reliability of HUD's available data for rural areas. The commenters stated that

their experience has been that assessing social, economic, and housing characteristics is often complicated in rural areas due to sparse populations, limited sampling, undercounts, and exclusion. The commenters stated that there is a clear relationship between the population size of a geographic area and the reliability of data: as the population in rural areas is smaller, the likelihood of reliability within survey data is lower.

The commenters stated that while the ACS provides more timely data than its predecessor, the decennial long-form, it has a somewhat smaller sample and therefore less reliable results for less populated areas, potentially distorting the actual picture of segregation or isolation. Commenters further stated that the ACS provides only pooled estimates (five years' worth of data) for jurisdictions with 20,000 or fewer people, and that as a result, the figures may not show some important details, especially when things change markedly as they did at the beginning of the recent recession. The commenters stated that data averaged over a period "masked" the dramatic change. The commenters stated that the best solution for this problem would be to expand the ACS sample size, or alternatively, calculate and provide a data reliability indicator to accompany the datasets.

HUD Response: HUD appreciates the valuable feedback provided by commenters on these and other issues specific to rural America. As stated above in the response to comments on the community assets section, HUD acknowledges the unique issues and challenges in applying the rule to rural communities and intends the implementation of the rule to be flexible and adaptable to meet those challenges.

While HUD does not believe specific changes are required to the regulatory text, it does plan to take into account specific issues related to data concerns in developing and refining the Assessment Tool over time. In addition, HUD plans to provide guidance and technical

assistance recognizing that different strategies will be appropriate in different places. Jurisdictions in nonmetropolitan areas can also work with state grantees which will have a role in developing AFHs. Program participants will also have flexibility in developing their AFH to explain actual local conditions in qualitative terms that may not be reflected by data.

Comment: Rural areas will be required to rely on local data, which will be burdensome and costly and will force rural areas to use inaccurate or incomplete information. Commenters stated that useful data from other Federal sources either is not available for rural jurisdictions or is not recent enough to be reliable. The commenters stated that, for example, it is more difficult to obtain residential building data for sparsely populated counties or smaller geographic units, but this information is readily available in metropolitan areas. The commenters stated that Home Mortgage Disclosure Act information, too, is limited for rural, nonmetropolitan areas because banks operating entirely outside of metropolitan areas are not required to provide lending data, and that out-of-date data sources include HUD's Picture of Subsidized Housing data, currently available only for 2009.

The commenters stated that the net effect of these data issues is that rural jurisdictions preparing AFHs must supplement the data HUD provides with locally sourced information such as tax records, building permits, etc., to ensure as complete a picture as possible, verifying, clarifying, or challenging what the HUD data sets indicate., and that compiling such data will be burdensome and costly. Commenters stated that jurisdictions in rural areas be given additional resources to conduct research and gather local data.

Similarly, commenters stated that because of the concerns with accuracy of data to be provided by HUD for rural areas, HUD should not require rural jurisdictions to use HUD data but be provided the option to use such data or only local data.

Other commenters reiterated the concerns about the accuracy and reliability of HUD-provided data for rural areas, and asked HUD to provide guidance on what additional information should be sought and considered by rural areas. Commenters stated that HUD could aid rural jurisdictions by providing a data guide explaining these issues and suggesting alternative sources, such as the Census Bureau's Small Area Income and Poverty Estimates.

HUD Response: HUD appreciates this valuable feedback and the time and effort made by commenters to present their valid concerns with applying data to different parts of the nation, including rural areas. While HUD does not believe that specific changes in the regulatory text are needed, it does plan to take these and other points into consideration during the development of the Assessment Tool.

23. Transparency

Comment: All AFH and related documents and the availability of such documents for public viewing should be provided to the public through all available means. Commenters stated that the key to making the AFH process work is to maximize public participation and that is achieved by having AFHs and related documents available to the public using all available means, including posting online and having hard copies available at program participants' offices or libraries. Many commenters requested that AFH information be posted on program participants' websites. Commenters recommended that a program participant's proposed and final AFHs and all relevant data and other information used in preparing the AFH be made available on an easily identifiable page of the participant's website. Commenters recommended that the consolidated plan and all performance reports, including all attachments and supporting data be posted in full length in a searchable format, easily downloadable, on a dedicated page of the participant's website. Commenters stated that the availability of AFH documents should be

made through social media.

HUD Response: HUD understands the importance of the Internet when communicating with the public and has made rule changes to update the outreach requirements for program participants.

Rule change. HUD has revised § 5.158 to explicitly state that, in order to ensure that the AFH, the consolidated plan, and the PHA Plan are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. This final rule says that such communications may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet – on the program participant's official government website – as well as at libraries, government offices, and public places. Further, the rule requires program participants to ensure that all aspects of community participation are conducted in accordance with fair housing and civil rights laws, including title VI of the Civil Rights Act of 1964 and the regulations at 24 CFR part 1, Section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8, and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable.

Rule Change. HUD has revised §§ 91.105(b)(1) and 91.115(b)(1) to provide that a jurisdiction may make the HUD-provided data available to the public by cross-referencing to the data on HUD's website.

Comment: Publicly post AFHs. Some commenters also proposed that HUD should post the completed and accepted AFHs on its own website as an information clearinghouse. Commenters stated that this could be a valuable resource for best practices, as an aid and guide for other program participants in completing their own AFHs and for practitioners, industry

professionals, researchers and advocates in assessing fair housing issues and strategies. Other commenters suggested that HUD should post all submitted AFHs.

HUD Response: HUD thanks the commenters for this proposal and will explore options for posting completed AFHs online, along with additional guidance that may be helpful to program participants, affordable housing advocates and organizations, fair housing groups, and the general public.

Comment: All relevant documents should be translated by program participants into other languages and be accessible to persons with disabilities. Commenters stated that relevant documents, AFHs, consolidated plans should be translated by program participants into languages other than English for LEP residents, and should be made available in newspapers or other media serving non-English speaking stakeholders or interested members of the community, or that summaries of the documents should be provided through such news outlets. Commenters also stated that outreach for public engagement should be either conducted in other languages or with interpretation services. Other commenters asked that HUD ensure that these documents are available to persons with disabilities.

HUD Response: Federal law pertaining to ensuring that persons with limited English proficiency (LEP) can participate in Federal and Federally-funded programs is well established, and HUD does not need to further address this matter in its rule. Title VI of the Civil Rights Act of 1964 protects individuals from discrimination on the basis of their race, color, or national origin in programs that receive Federal financial assistance. The failure to ensure that persons who are LEP can effectively participate in, or benefit from, Federally-assisted programs may violate Title VI's prohibition against national origin discrimination. Executive Order 13166, signed on August 11, 2000, directs all Federal agencies, including HUD, to work to ensure that

programs receiving Federal financial assistance provide meaningful access to LEP persons. All programs and operations of entities that receive Federal financial assistance from the Federal Government, including, but not limited to, state agencies, local agencies, and for-profit and non-profit entities, must comply with the title VI requirements. With respect to persons with disabilities, section 504 of the Rehabilitation Act of 1973 requires HUD recipients to make information accessible to persons with disabilities, and the Americans with Disabilities Act requires State and local governments to provide equal access and effective communication with individuals with disabilities by, inter alia, providing information in accessible formats (e.g., accessible electronic formats, large print, Braille, audio recordings); providing sign language interpreters and computer-assisted real time transcription, as needed, to persons who are deaf or hard of hearing; and holding meetings in venues that are accessible to persons with disabilities, including individuals who use wheelchairs.

Comment: Program participants should report their progress and outcomes from their AFH. Commenters stated that program participants should report their progress and outcomes from the AFH in their various grant reports, just as they do for individual grant activities. Commenters stated that the rule should specify what information program participants are required to provide about the progress they have made, including their use of financial resources and any actions they have taken with respect to their policies, practices, and non-financial resources. Other commenters stated that assessment and compliance reports should be posted promptly on the jurisdiction's website.

HUD Response: HUD's consolidated plan regulations already provide for performance reports and the opportunity for the public to comment on performance reports. (See § 91.105(d).)

Comment: HUD should have a webpage devoted to AFHs. Several commenters stated that HUD should have a page on its website with information on the AFH submission deadlines and copies of all AFHs. Another commenter stated that for each AFH submission HUD should assign a number that should be used to track the submission status on HUD's website.

HUD Response: HUD appreciates these recommendations. While HUD cannot commit at this time to have a website that provides this information, HUD will definitely explore this recommendation.

Comment: Make uniform data available to the public. Commenters ask that the nationally uniform local and regional data be made available to the public, including via HUD's website to encourage research.

HUD Response: HUD's data will be available on HUD's website for all the public to view and access. The data will not be limited to program participants that must prepare an AFH.

24. Technical Assistance

Comment: HUD-provided technical assistance will be critical to the success of the new AFH process. Many commenters stated that HUD-provided technical assistance will be critical as program participants adapt to dramatic changes in regulatory requirements, not to mention reduced HUD funding that has had a significant impact on the ability of local jurisdictions to maintain adequate staffing levels. Commenters stated that, as suggested by the GAO report addressing the duty to affirmatively further fair housing, HUD, and its field offices have not provided sufficient technical assistance or conducted adequate monitoring. Commenters stated that even conscientious, experienced staffs of program participants are challenged by the lack of direction, assistance and oversight from field offices, and that imposing new regulations is not going to solve this problem; rather, it will only serve to exacerbate it.

HUD Response: HUD reiterates the commitment made in the proposed rule to provide technical assistance to program participants as they transition to the new AFH process.

Comment: Types of technical assistance that would be helpful. In the proposed rule, HUD solicited comment on what forms of technical assistance would be most helpful to program participants. In response to this question, commenters suggested regional meetings hosted by HUD, webinars, audio-visual materials, and other online training, face-to-face training, classroom training, and guidance that includes numerous examples of how to undertake the analysis required and complete the Assessment Tool.

HUD Response: HUD appreciates the suggestions and will strive to provide as much and as varied assistance as possible.

25. Administrative Burden

a. Duplication and Redundancy

Comment: Eliminate the duplication between the AFH and Consolidated Plan. Commenters stated that the proposed rule added duplication between the AFH and elements currently required to be included in the consolidated plan. Commenters stated that given the avowed desire of HUD to simplify and shorten these key planning documents with a view toward making them more accessible to affected parties, this duplication of publication seems unnecessary.

Other commenters state that, at the outset, former Secretary Donovan stated that one of his goals was reducing redundancy and conflicting Federal planning requirements and making plans more integrated and effective. Commenters stated that the proposed rule, if adopted, threatens to move further away from the goal of integrated planning and places a significant new burden on localities at time when support and resources from HUD are shrinking.

Commenters stated, as proponents of local comprehensive planning, they understand and support the concept of looking broadly at the multiple factors that affect housing and community development. Commenters stated that it is less clear that the AFH is best suited for this analysis and could create both needlessly duplicative planning processes and uncertainty about enforcement and local control of key policies and regulatory functions. Commenters stated that this uncertainty could, ironically, actually slow the adoption of effective housing policies in many communities.

Other commenters stated that to reduce the redundancy between the AFH and the consolidated plan, the consolidated plan should fully incorporate the AFH. Commenters stated that the AFH community participation process is duplicative of the citizen participation process in the consolidated plan process. Commenters stated that the rule is silent as to whether the community engagement process for the AFH can be combined with the consolidated planning community engagement process. If the process for both plans cannot be consolidated, this poses a potential burden on program participants and could lead to community members growing fatigued with duplicative events.

Commenters stated that to fully integrate all planning processes, the AFH must be part of the consolidated plan process to more directly and effectively incorporate fair housing planning into the comprehensive housing and community development planning that program participants undertake through the consolidated plan. Commenters stated that the incorporation of the AFH into the consolidated plan would allow a single community participation process, and would reduce duplicative analyses. Commenters stated that a single plan would support the goal of closely linking the AFH with funding priorities, and could help avoid delays in funding and implementing fair housing and community investment strategies. Commenters stated that the

incorporation of the two plans will save time and resources, and increase efficiency and consistency in the planning process. Commenters stated that the obligation to affirmatively further fair housing will be strengthened by a clearer and more direct inclusion of affirmatively furthering fair housing considerations and the AFH in the consolidated plan and PHA Plan processes for establishing fund allocation priorities.

Commenters stated that the AFH should not separately precede the consolidated plan, but should be developed as part of the consolidated plan. If the AFH is submitted significantly ahead of the consolidated plan, program participants would be in a constant planning and reporting cycle which would drain staff time and resources from effective implementation and monitoring of identified goals and objectives of both the AFH and consolidated plan. Commenters stated that if the AFH is developed separately from the consolidated plan there would be unnecessarily redundant analysis, and public confusion resulting from separate duplicative citizen participation hearings.

Commenters stated that having the fair housing goals right next to the data in the consolidated plan where the issues exist would fully integrate fair housing planning with the consolidated plan without requiring two entirely separate documents and planning periods. Commenters stated that this would also substantially ease the burden on program participants of having to prepare different submissions and would avoid having the fair housing discussion essentially separate from the Plan. Commenters stated that any nonduplicative elements that HUD felt was missing between the AFH and the Plan could be added to the Plan, but the need for separate documents would no longer exist.

<u>HUD Response</u>: HUD appreciates the concerns and recommendations made by the commenters. HUD has previously addressed the importance of having the AFH precede and not

be undertaken concurrently with the consolidated plan and PHA Plan. An analysis of barriers to fair housing choice has always been an analysis separate from the consolidated planning or PHA planning processes. The purpose of the separate analysis is to inform the broader scope in planning undertaken for the consolidated plan and PHA Plan. At the start of this new approach to analyzing fair housing issues HUD believes such analysis is more effective as a separate process. As the new AFH process is implemented and HUD has the opportunity to review how the new AFH process has worked among program participants following the first AFH submissions, HUD may consider greater integration in the consolidated planning and PHA planning processes, or other changes based on the experience with the first round of AFH submissions.

b. Placement of Disproportionate Housing Needs

HUD's proposed rule sought comment regarding the inclusion of an analysis of disproportionate housing needs in the AFH and the consolidated plan. Specifically, the proposed rule asked: "If a disproportionate housing needs analysis is a part of the AFH, should it remain in the consolidated plan as well? Is this analysis most appropriate in either the AFH or the consolidated plan, or is it appropriate, as the current proposed rule contemplates, to have the analysis in both places, assuming the analysis is the same for both planning exercises?"

Comments: Commenters presented the following answers to this question:

No duplication of analysis: Several commenters recommended that an analysis of disproportionate housing needs be included in either the AFH or the consolidated plan, but not in both. Commenters stated that given HUD's desire to simplify and shorten planning documents, the inclusion of a disproportionate housing needs analysis in both the AFH and the consolidated plan seems unnecessary and duplicative. Commenters suggested combining the AFH and the

consolidated plan to create one plan. Commenters stated that it would be wasteful to put forth twice the effort in two different planning cycles to reach the same results, and instead recommended the analysis be completed once to avoid redundancy of process and minimize the possibility of unintentional inconsistencies. Commenters recommended that, wherever possible, the requirements should be nonduplicative.

Analysis should be in AFH only. Commenters stated that an analysis of disproportionate housing needs is an essential element of fair housing planning, and should appear in the AFH. Commenters stated that an analysis of disproportionate housing needs is most relevant to the AFH, which can then influence the consolidated plan without being repeated. Commenters stated that understanding housing conditions and housing cost burdens of persons who are members of protected classes under the Fair Housing Act is a principal factor in planning for fair housing and for making decisions regarding the relative level of funds to allocate for activities targeted at populations in specific income categories. Commenters stated that if the AFH is to become a component of the consolidated plan, the analysis of disproportionate housing needs should be covered only once in the AFH component of the consolidated plan. Commenters stated that if the AFH is to become the major analytical tool for assessing this aspect of housing, then "serving a warmed over version in the consolidated plan accomplishes little" and could simply be addressed through a reference in the consolidated plan to the AFH.

Analysis should be in consolidated plan only. Several commenters recommended that an analysis of disproportionate housing needs only be included in the consolidated plan.

Commenters stated that because disproportionate housing needs does not always mean 'fair housing' the disproportionate housing needs analysis should not be a part of the AFH. Other commenters stated that disproportionate housing needs is not covered by the Fair Housing

Act. Commenters stated that a disproportionate housing needs analysis is appropriate for inclusion in consolidated plans and PHA Plans, but is inappropriate for inclusion under affirmatively furthering fair housing standards.

Analysis should be in both planning documents. Several commenters recommended including a disproportionate housing needs analysis in both the AFH and the consolidated plan. Commenters stated that the centrality of this data to the decision making process in both the AFH and consolidated planning process means that it belongs in both planning areas, and that inclusion in both will not result in added cost and will help decision makers focus on this piece of essential planning data. Commenters recommended that a disproportionate housing needs analysis should be in both the AFH and the consolidated plan, because the consolidated plan regulation calls for such an analysis to be based on the income categories of extremely low income, low income, moderate income, and middle income, and without that analysis in the consolidated plan, it would be even easier for jurisdictions to set consolidated plan priorities that do not address the critical need for housing programs and policies that serve extremely low income people. Commenters recommended that the analysis of disproportionate housing need appear in both the consolidated plan and the AFH, and recommended incorporating the AFH Assessment Tool and data into the Integrated Disbursement and Information System (IDIS) with the consolidated planning and reporting templates. Another commenter stated that if HUD does not incorporate fair housing directly into the consolidated plan, then the analysis of disproportionate housing needs should be in both the consolidated plan and the AFH.

HUD Response: HUD appreciates the feedback in response to HUD's question about placement of the analysis of disproportionate housing needs. HUD agrees with the commenters that the analysis of disproportionate housing needs should not be in both documents. Since the

analysis for disproportionate housing needs in the AFH and the consolidated plan would be almost identical, inclusion in both would be duplicative. The final rule provides for placement of the analysis of disproportionate housing needs in the AFH. HUD also agrees with the commenters who stated that analysis of disproportionate housing needs is an essential element of fair housing planning and that understanding the housing conditions and costs of housing for persons who are members of protected classes under the Fair Housing Act is a principal factor in fair housing planning.

In this final rule, HUD requires program participants to identify disproportionate housing needs for members of racial and ethnic groups in their AFH, and to assess any such needs for fair housing issues.

Under HUD's Consolidated Plan regulations, jurisdictions must include disproportionate housing needs in their consolidated plan. The regulations state that for any of the income categories enumerated in paragraph (b)(1) of the section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. (See § 91.205(b)(2).) The Consolidated Plan regulations also require the jurisdiction to identify and describe any areas within the jurisdiction with concentrations of racial/ethnic minorities and/or low-income families, stating how it defines the terms “area of low-income concentration” and “area of minority concentration” for this purpose. (§ 91.210(a).)

The disproportionate housing needs analysis required in the AFH is a broader analysis than must be done in connection with the consolidated plan since, for AFH purposes, the analysis must include groups with protected characteristics beyond race and ethnicity. HUD has determined that the disproportionate housing needs analysis is necessary to inform the AFH and

that it therefore makes sense for the analysis to be performed at the time the program participant is preparing the AFH, rather than waiting until it prepares the consolidated plan. When a consolidated plan jurisdiction has conducted the requisite analysis on disproportionate housing needs of racial and ethnic minorities in an AFH, it will not be required to conduct a new analysis for purposes of the consolidated plan. In addition, HUD makes a similar change to reduce to the PHA Plan regulations. Section 903.7(a) provides that were a housing needs assessment undertaken as part of the AFH, it is not required as part of the analysis conducted for the PHA Plan.

Rule Change. HUD makes conforming changes to the Consolidated Plan regulations to provide that where a disproportionate housing needs assessment is undertaken as part of the AFH it is not required as part of the analysis conducted for the consolidated plan (see §§ 91.205(b)(2), 91.305(b)(2)).

c. Consultants

Comment: Program participants will be forced to hire consultants to comply with the reporting requirements of the rule. Commenters stated that program participants will be forced to hire consultants to comply with the requirements of the rule. Commenters stated that because of the extensive analysis required by the proposed rule, it will be impossible for program participants to avoid hiring consultants, and because consultants will be needed by program participants to prepare their respective AFHs, the cost of hiring a consultant will rise because of increased demand for such services. Commenters stated that the costs associated with the hiring of a consultant will offset much or all of the cost benefit from the HUD-provided data, because such data is not sufficient for compliance. Commenters stated that consultants will also be expensive in rural areas because of the poor quality of HUD data in such rural areas.

HUD Response: In the notice published in the Federal Register on September 26, 2014, soliciting public comment on the AFH Assessment Tool (79 FR 57949), HUD stated, "With the data that HUD provides for use with the Assessment Tool supplemented by available local data and local knowledge, HUD does not anticipate the need for any program participant to turn to outside consultants to collect data and conduct the assessment." However, HUD appreciates the commenters' concern about the new AFH process and acknowledges that, in some cases, program participants may hire consultants, as they had when conducting the AI. HUD believes that by providing the data in a more systematic and accessible manner, most program participants will not require consultants. To this end, HUD commits to tailor its AFHs to the program participant in a manner that strives to reduce burden and create an achievable AFH for all involved. HUD intends to provide, in the Assessment Tool, a set of questions in a standard format to clarify and ease the analysis that program participants must undertake. The Assessment Tool, coupled with the data provided by HUD, is designed to provide an easier way to undertake a fair housing assessment. With respect to concerns about data, the final rule invites program participants to supplement HUD's data with local data or with local knowledge.

This final rule adopts new definitions of the terms "local data" and "local knowledge" to clarify that these terms refer to readily available information that requires little or no cost to obtain.

In addition, HUD has committed to provide technical assistance with preparation of the AFH. These features and the approach of the AFH should result in an effective but not costly or burdensome assessment.

Rule Change. Section 5.152 adds the definition of the terms "local data" and "local knowledge."

Comment: Program participants can and should hire consultants to provide objective and expert analysis. In contrast to the preceding commenters, other commenters recommended that HUD make clear in the final rule that program participants may, and should, use independent outside consultants when preparing the required assessment. Commenters articulated the following reasons that consultants should be used. First, the commenters stated a self-assessment involves an inherent conflict and an independent assessment is necessary to generate an accurate and disinterested report. Commenters stated, for example, employees of a program participant may fear consequences of calling out a participant's practices that do not affirmatively further fair housing, or that reflect poorly on the local government or the community generally. Second, the commenters stated not every program participant has in-house resources or knowledge to complete an assessment. Commenters stated that program participants may not have sufficient staff to undertake the assessment, and even if they have sufficient staff, such staff may not have the skills or experience needed to conduct the assessment and accurately analyze and evaluate the data. Commenters stated that, in essence, the consultants are the best equipped to prepare the required analysis. Commenters stated that, if utilized, the consultants should be hired through an open and competitive bidding process. Commenters stated that, alternatively, HUD could maintain a registry of qualified consultants.

HUD Response: HUD has designed the AFH process so that an AFH can be completed without the use of consultants. HUD intends to develop an Assessment Tool to bring certainty to the questions and issues that a program participant must explore to achieve a meaningful AFH. Therefore, program participants may, but are not required to, use consultants in preparing their AFHs, though HUD believes that a consultant will not be necessary to complete an AFH.

Regarding the issue of requiring a competitive bidding process to hire consultants, regulating bidding procedures is outside the scope of this rulemaking. There are existing HUD and Federal guidelines concerning acquisition of services by program participants using Federal funds, and the program participant that seeks to obtain consultant services will need to determine whether these Federal guidelines apply and, if so, the applicable procedure for obtaining consultant services. HUD also declines to maintain a registry of consultants qualified to prepare AFHs.

d. Scarcity of Resources

Comment: Additional resources are needed for the rule to succeed. Commenters stated that limited resources, economic conditions, the location of existing affordable housing, competing priorities for resources, and inability of states to impact local government and individual decision making to affect fair housing are just a few reasons that the rule will not succeed. Commenters stated that HUD underestimates the resource investment that will be necessary on the part of program participants. Commenters stated that, contrary to HUD's claim, simply providing data does not mean that the requirements will not be extremely burdensome to program participants. Commenters stated that HUD is presuming that the data will show a clear, consistent, and easily comprehensible picture – a highly unlikely outcome in most communities, and that the more plausible outcome is a muddled picture showing various needs in various locations, which program participants will have to parse and interpret in order to make use of the data.

Other commenters stated that local governments and States are not responsible for individual differences, and should not be blamed for the results of those differences. The commenters stated that they should not be forced into the business of spending limited resources

and forcing the private market into building or offering housing, infrastructure and transportation that have questionable benefit, and possibly negative consequences, for targeted groups.

HUD Response: As stated in the proposed rule, HUD's approach to fair housing planning envisions a process that is structurally incorporated into the consolidated planning and PHA planning processes, building upon what is already familiar to HUD program participants – supported by HUD technical assistance, HUD-provided data, and an Assessment Tool. HUD is aware that the provision of data alone will not necessarily reduce burden, but data provided by HUD and utilization of familiar planning processes, in conjunction with use of an Assessment Tool, will make for a more effective and less burdensome fair housing planning process.

The rule itself establishes four broad categories of fair housing-related issues that must be addressed in the AFH and for which HUD will provide relevant data, including maps and tables for the jurisdiction. The four categories, as provided in § 5.154, are: integration and segregation; racially or ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs. The specific criteria for how to address each of the main categories of needs and potential issues will be provided in greater detail in the Assessment Tool and related guidance. HUD intends to refine and improve the Assessment Tool on an ongoing basis, with the goal of effective implementation while minimizing the burden on HUD program participants.

HUD also agrees that many AFHs will not always present one clear picture with only one obvious available solution. By its very nature, the AFH is a planning document intended to help inform and guide local decisionmaking in addressing complex physical, social, and economic problems, including a greater need for affordable housing, and addressing neighborhood conditions with limited budgets. By providing data and a framework for analysis, however, the

AFH is intended to assist program participants in their own prioritization of how best to allocate scarce resources to meet identified local needs and comply with their duty to affirmatively further fair housing. The goal is not to create difficulties for program participants, but to empower participants to fulfill their legal obligation to affirmatively further fair housing.

A basic tenet of planning and performance management is recognition of "external factors" and other barriers to achieving goals, and which are beyond an organization to control (See, e.g., the Federal Government Performance and Results Act). This rule allows grantees to identify such barriers. Included in such considerations is the identification of funding dependencies and contingencies.

Comment: HUD should delay implementation of AFH until there is an improved economic environment. Commenters stated that regardless of how well-meaning this rule may be, it is the worst possible time to impose new regulatory burdens on housing authorities and other program participants. PHA commenters stated that most, if not all of PHA programs, are currently funded at an all-time low level. Commenters stated that public housing operating subsidy is funded at 82 percent, that Section 8/HCV administrative fees are funded at 69 percent, that voucher subsidy is at 94 percent which is resulting in voucher programs serving fewer families nationwide, forcing agencies to terminate families. PHA commenters stated that the capital fund grants to address the $25 billion capital repair backlog is now below $2 billion which HUD admits does not even keep up with annual accrual. Commenters stated that PHAs are struggling to meet payroll and keep their units leased as housing authorities' waiting lists grow, much less meeting the myriad existing regulations on the books. Commenters stated that HUD proposed an approach to the duty to affirmatively further fair housing that will increase workload and regulatory burden at a time program participants cannot handle such increased

workload. Commenters stated that former HUD Secretary Donovan himself testified to Congress that HUD was finding it difficult to meet its own obligations due to funding cuts.

HUD Response: HUD understands the constraints of the funding environment. The intent of HUD's rule is to provide for a meaningful AFH, while minimizing burden on PHA staff and acknowledging the diversity of PHAs in terms of capacity. By providing the data to the program participants and creating an Assessment Tool that allows program participants to perform the assessment themselves rather than hire consultants, this rule should ensure that PHAs can complete the AFH within their current funding environment. Also, the AFH may assist program participants in making choices as to the uses of their funding that will affirmatively further fair housing. In addition, as discussed earlier, HUD has decided to implement staggered submission deadlines for different categories of program participants in § 5.160.

Comment: HUD should have taken modest steps to improve fair housing planning. Commenters stated that since 1995, HUD has not been able to oversee and monitor program participants' compliance with or performance related to HUD's existing requirement to affirmatively further fair housing, its requirement to conduct an AI, or determine whether program participants were successful in affirmatively furthering fair housing. Commenters stated that the GAO report and HUD's internal report on the matter included suggestions for improving the HUD's performance of these tasks without a wholesale revision of the affirmatively furthering fair housing process or a radical expansion of the concepts involved in affirmatively furthering fair housing. Commenters stated that those approaches appeared to be well within HUD's reach and could have finally provided a baseline against which HUD could measure the effectiveness of the rule's approach to affirmatively furthering fair housing. The

commenters stated that rather than taking those modest steps to improve affirmatively furthering fair housing performance and outcomes, HUD has proposed a dramatic expansion and modification to the rule governing affirmatively furthering fair housing. The commenters stated that HUD's proposal imposes new and burdensome tasks on program participants and on HUD at a time when the resources needed to administer existing programs are inadequate for HUD program participants and for HUD. Commenters stated that they are concerned that this regulatory expansion will have the same impact on affirmatively furthering fair housing and fair housing goals as HUD's 1995 rule and its amendments, which is that program participants and HUD will complete additional analyses, submit additional reports to HUD in prescriptive formats, report on outcomes or the lack thereof, to approximately the same effect. Commenters stated that this is not the time to implement a new rule on affirmatively furthering fair housing – not for HUD and not for the HUD program participants.

HUD Response: HUD previously addressed comments asking why HUD took the direction it did to improve the effectiveness of affirmatively furthering fair housing.

HUD's rule responds not only to the recommendations of the 2010 GAO study, but HUD's own internal 2009 review, which included requiring that the required fair housing analyses AFHs be submitted to HUD for review, and for HUD to accept or not accept them within specific timeframes according to a clear standard of review. HUD's rule also places a duty upon HUD to provide data in a reliable and accessible format to reduce the burden on program participants in completing their AFHs.[16]

[16] See: "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905 (September 2010), GAO; and "Analysis of Impediments Study," (Washington, DC, 2009) HUD, Policy Development Division, Office of Policy Development and Research, HUD.

Comment: The rule must clearly state that the AFH does not create an obligation to fund a specific project. Commenters stated that the rule must clearly state that the AFH does not create an obligation to fund a specific project, program, need, or geographic area and that the final rule should contain a statement acknowledging that program participants have limited resources and must make choices how to allocate funds in a manner that may not address all needs.

HUD Response: The commenters are correct, the AFH, which is a planning process does not create an obligation to fund a specific project, program, need, or geographic area. The final rule, takes into consideration that a program participant in all likelihood will not be able to address all fair housing issues it may want to tackle and, therefore, prioritization will be necessary. The AFH process established by this rule allows for a flexible approach that permits program participants to consider a variety of available strategies to meet a wide range of local needs and housing market conditions consistent with the duty to affirmatively further fair housing with limited programmatic resources. The AFH is intended to aid rather than supplant local decisionmaking, and the various policy options adopted by program participants will depend fundamentally on the local context and the particular circumstances that prevail when the issues are considered.

Comment: Fair housing planning should be considered a CDBG eligible activity so that it can be properly funded. Commenters stated that there is added stress on declining CDBG budget to do more with less money. Commenters stated that if this rule is put in place there needs to be clear expectations for what smaller communities can do as opposed to larger communities. Commenters stated that this rule creates additional burdens for program participants trying to make a community better with activities when they have only two staff persons able to

administer the entire program. Commenters stated that making a difference in a small community can only be done in incremental steps and a community of 50,000 compared with a community of 1.5 million must be considered differently, and that for a small community the tactics to deal with segregation are limited by funding. Commenters stated that for the new AFH process to be successful fair housing planning should be considered a CDBG activity instead of being an eligible expense under the CDBG administrative cap.

Commenters recommended that fair housing be identified as a separate or stand-alone eligible activity, not subject to the 20 percent administrative and 15 percent public service caps, so that more funding may be directed to these activities. The commenters stated that in addition, fair housing programs and planning should automatically be presumed to meet the low- and moderate-income national objective.

Other commenters stated that HUD must be realistic about the cost implications of its proposed rule, especially on small organizations, and ensure that the requirements are consistent with the capacity of agencies to implement them. The commenters stated that this might mean a phase-in of requirements for smaller program participants, or providing technical assistance or funding to program participants to carry out their responsibilities.

HUD Response: HUD recognizes that smaller program participants do not have the same capacity as larger participants and therefore burdens can be greater. HUD has strived in this final rule to reduce costs and burdens involved in implementation of the new AFH as much as possible, especially for smaller program participants. The guidance that HUD intends to provide will further refine the application of the rule's requirements to specific types of program participants, especially smaller PHAs and local government agencies with limited staff and resources. In addition, HUD plans to provide technical assistance to program participants where

requested, which will help smaller program participants that may have small staffs to complete the AFH. HUD has provided for later submission deadlines for CDBG entitlement jurisdictions receiving an FY 2015 grant of $500,000 or less and "qualified PHAs" in this final rule in an effort to reduce burdens on smaller program participants and jurisdictions in conducting the AFH.

Comment: Paperwork costs will increase under the new AFH process. Commenters stated that costs, not solely paperwork costs, but travel costs, advertising costs, and costs for administrative staff would increase under the new AFH process. Commenters stated that the costs of advertisements alone, to meet the additional public hearing requirements at the State level are significant. Commenters stated that in addition to the requirement to spend resources for more hearings and advertising, program participants will have to: dedicate huge amount of staff time to prepare an AFH (1,150 hours, or about 29 work weeks for the average State as per the record keeping requirements in the proposed rule); work with 15 local PHAs that are not in entitlement jurisdictions in developing their plans, and attend numerous requested meetings to undertake the require consultations. The commenters stated that the result of such burden is to draw staff away from effectively operating their programs to preparing the AFH instead.

Other commenters stated that the addition of another series of public meetings, time consuming consolidation of documentation, drafting and staffing a report through city channels, and numerous meetings, outside of the consolidated plan cycle is extremely discouraging to a burdened staff with limited resources at their disposal. The commenters stated that the cost burden identified on Federal Register page 43728 with 1,637,200 hours for this should be enough to shelve this idea for a long time.

Commenters stated that the process of holding public hearings around a state, especially a

large state, would generate transportation, lodging and food costs as well as advertising to try to generate participation. Commenters stated that there also will be changes to internal processes that will result in additional paperwork needed during the eligibility review process to connect each funded activity to the AFH goals, and that there will be additional time and funding needed for various funded activities to support the AFH.

Commenters stated that while they appreciate enhanced public participation requirements and the mandate that that Federal program participants consult with organizations representing members of protected classes as well as public and private fair housing agencies, they are concerned about the capacity of such organizations to have the time to offer meaningful input - especially if plan submission cycles result in multiple simultaneous requests. The commenters stated that it takes repeated effort to build rapport with their communities, and that it takes a significant investment in increasing civic participation among historically under represented community members. The commenters reiterated that this effort, although worthwhile, is very time consuming and requires more than one full-time employee, which for some communities, is more than the entire CDBG staff.

Commenters stated that the proposed rule has the appearance of reducing the time spent by program participants in data collection but it increases the time spent in preparing a written analytical report. Commenters stated that given the volume of data presented combined with what the commenters stated appears to them to be an increase in the analysis expected, the commenters anticipate an increase to the paperwork costs associated with the AFH and stated that any efforts going toward increased paperwork could result in decreased financial resources available to serve tenants.

HUD Response: HUD is cognizant of the additional costs that some aspects of the new

process may present, such as the costs of public hearings, travel, and ensuring outreach to members of the community. However, HUD believes that the fact the AFH is submitted every 3 to 5 years, and is not an annual submission, allows for greater planning on the part of the program participant with respect to how and where to conduct public hearings, which hopefully mitigates expenditures. With respect to time spent preparing the analysis, HUD believes that the Assessment Tool reduces such burden. HUD's Assessment Tool aides program participants in their analysis by providing a series of questions about fair housing issues and contributing factors and providing menus for several responses to certain questions, which decreases rather than increases paperwork. HUD also believes that the revised process for conducting an assessment will reduce or eliminate many program participants' view that they must rely on consultants, as many did in creating AIs under prior requirements set out in regulations and the Fair Housing Planning Guide.

V. Findings and Certifications

Regulatory Planning and Review – Executive Orders 12866 and 13563

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 OMB in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a "significant

regulatory action," as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action under the order). HUD submits that the approach to fair housing planning proposed by this rule is consistent with the objectives of Executive Order 13563 to modify regulations that are outmoded and ineffective. HUD completed a Regulatory Impact Analysis for this final rule, which can be found at www.regulations.gov, under the docket number 5173-F-03-RIA. This section summarizes the findings of that analysis.

Summary of Analysis

As more fully addressed earlier in this preamble, this rule establishes an integrated assessment and planning process, the Assessment of Fair Housing (AFH) approach, to give HUD program participants a more effective means to affirmatively further the purpose of the Fair Housing Act. The AFH replaces the analysis of impediments (AI) approach long used by HUD to aid its program participants in affirmatively furthering fair housing but ultimately determined not to be as effective as HUD envisioned. The new approach being established by this rule is accompanied by more support from HUD. HUD will provide States, local governments, and PHAs with data on patterns of (1) integration and segregation; (2) racially and ethnically concentrated areas of poverty; (3) access to education, employment, low-poverty neighborhoods, transportation, environmental health, and other assets that comprise areas of opportunity; and (4) disproportionate housing needs of protected classes. HUD will provide such data from nationally standardized datasets to local entities for the planning process. States, local, governments and PHAs will supplement HUD-provided data with local data and local knowledge they have of such fair housing issues. . Although HUD is providing more support to its program participants through this new approach, HUD recognizes that the AFH process will be a substantial change from the current AI process.

While the final rule imposes increased costs of data collection and paperwork on participating jurisdictions and PHAs, most of the positive impacts entail changes in equity, human dignity, and fairness. HUD's primary estimate of compliance costs for its program participants is $25 million per year. HUD estimates that it will incur costs of $9 million to review participants' analyses and provide guidance and feedback.

Need for the Rule

Despite genuine progress and a landscape of communities transformed in the more than 40 years since the Fair Housing Act was enacted, the ZIP code in which a child grows up all too often remains a strong predictor of that child's life course. There are communities that remain segregated by classes protected by the Fair Housing Act. Racially-concentrated areas of poverty exist in virtually every metropolitan area. Disparities in access to important community assets prevail in many instances.

Efforts to not only combat ongoing discrimination, but increase housing choice and access to opportunity are at the core of HUD's fair housing efforts. However, HUD's efforts to date to have its grantees engage in fair housing planning, by undertaking an analysis of impediments (AI) to housing choice, have not been as effective as HUD intended. Under the AI planning process, HUD did not specify or provide grantees relevant information, and did not clearly link grantees' AIs to community planning efforts, such as the Consolidated Plan and the PHA Plan. Under the GAO report referenced earlier in this preamble, the GAO's analysis of 30 AIs highlighted the most common impediments to fair housing choice: zoning and site selection, inadequate public services in low- and moderate-income areas, less favorable mortgage terms from private lenders, and lack of access to information about fair housing rights and responsibilities (GAO, 2010).

Barriers that inhibit community improvements are as costly as barriers that prevent people from settling in their preferred community. The assets offered by a neighborhood can influence the number and profile of people and families who want to live in such a neighborhood. These assets include good schools; safe streets; access to good jobs; a good health infrastructure; available services such as childcare, parks and open space; diverse and healthy food choices; and a range of transportation options (including accommodations for disabilities). As an alternative, increasing a neighborhood's appeal to families, families with different income and ethnic profiles, can encourage a more diversified population and reduce isolation, thus advancing fair housing goals.

GAO's report recommended that HUD establish rigorous standards for submission, checking, and verification of AIs, and GAO recommended measuring grantees' progress in addressing fair housing impediments. HUD's new regulations being promulgated by this final rule adopt these recommendations.

The new regulation provides a fair housing planning process that builds upon the Consolidated Plan and the PHA planning process, utilizing planning procedures familiar to HUD's program participants. As noted earlier, the regulations provide for grantees to submit their AFHs to HUD, every 5 years, and for HUD to review and evaluate AFHs to determine whether to accept or not accept. Although HUD will provide nationally available data to program participants, the regulations recognize the value of local data, which may be more relevant and current than HUD-provided data. Accordingly, program participants must describe any local data utilized in development of their AFH. The regulations also impose a separate community participation process for the AFH, but using the procedures already in place for the community participation process required by the Consolidated Plan and PHA Plan.

Benefits

The benefits of this rule can be significant. HUD and its grantees have a statutory duty to affirmatively further fair housing. This is not an administrative requirement that can be waived by HUD. As the preamble to the proposed rule provided and reiterated in the preamble to this final rule, the AI process, utilized to date, has been highly criticized as not an effective AFFH tool. The outcomes that HUD seeks from this rule are those intended by the Fair Housing Act – overcoming historic patterns of segregation, promoting fair housing choice, and fostering inclusive communities that are free from discrimination.

Executive Order 13563 (Improving Regulation and Regulatory Review, issued in January 2011) allows regulatory agencies "where appropriate and permitted by law" to "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." While the final rule imposes increased costs of data collection and paperwork on participating jurisdictions and PHAs most of the positive impacts entail changes in equity, human dignity, and fairness. If the rule prompts communities to promote a more racially and socio-economically equitable allocation of neighborhood services and amenities, residents would enjoy the mere sense of fairness from the new distribution. Elevating communities out of segregation revitalizes the dignity of residents who felt suppressed under previous housing and zoning regimes. Quantifying such factors as fairness and dignity is likely impossible, yet these values are the crux of the final rule. Since the rule primarily results in such unquantifiable impacts, it is appropriate to consider many of its effects in qualitative terms.

The new AFFH regulations are designed and intended to improve the process for carrying out a statutory mandate, potentially improving the lives of protected classes who face barriers to

fair housing choice. The best outcome of the rule would be for each program participant to have the capacity and a well-considered strategy to affirmatively further fair housing. The regulations, however, do not prescribe, compel, or enforce concrete actions that must be taken by HUD's program participants. The regulations instead encourage a more engaged and data-driven approach to assessing the state of fair housing and planning actions.

Increasing a neighborhood's appeal to families with different income and ethnic profiles can encourage a more diversified population and reduce isolation, thus advancing fair housing goals. A key challenge in transforming neighborhoods and promoting integrated communities is preserving their affordability and highlighting their appeal without radically changing their character. Transformation, particularly of lower income neighborhoods, can induce gentrification, which can help advance fair housing goals and integration, but it can also change the ethnic mix to the extent that the minorities who originally populated the neighborhood are no longer present, and thus do not accrue the benefit of the initial investments. The rule strives to establish a balanced approach, as discussed earlier in this rule, to avoid such outcomes that could negate the progress strived to be achieved by the new regulations.

Costs

The rule's impacts on program participants are associated with executing the envisioned planning process. Though HUD estimates new costs exceed new cost savings, the final rule makes several key changes that will reduce costs and burden while replacing the AI process with the new AFH process. First, the final rule advises that HUD will provide versions of the Assessment Tools (or Template), the document by which a program participant will document its assessment of fair housing issues in its geographic area, that are tailored to the roles and responsibilities of the various program participants covered by this rule. HUD agreed with

commenters that a one size Assessment Tool does not fit all and that Assessment Tools tailored to the roles and responsibilities of the various program participants, whether they are entitlement jurisdictions, States, or public housing agencies (PHAs), will eliminate examination of areas that are outside of a program participant's area of responsibility. Second, HUD recognizes that all program participants do not have the same recourses and capacity and HUD provides additional time for small entities, qualified PHAs (as defined by statute) and jurisdictions that receive a Community Development Block Grant (CDBG) of $500,000 or less, to complete their first AFH. Third, HUD provides a staggered submission deadline for program participants to submit their first AFH. As reflected in the proposed rule, HUD intends to provide all program participants with considerable time to transition from the current AI approach to the new AFH approach. Fourth, the final rule provides that a program participant that undertook a Regional AI in connection with a grant awarded under HUD's Fiscal Year 2010 or 2011 Sustainable Communities Competition is not required to undertake an AFH for the first AFH submission stage.

While these significant changes reduce burden and costs and while the new AFH approach builds upon the existing Consolidated Planning and PHA Planning processes, HUD recognizes that there will be costs. The new AFH will involve additional document preparation. Costs associated with such preparation are not significantly increased because States, local governments, and PHAs are already required to address analyses comparable to those required by the AFH, such as disproportionate housing needs, and undertake activities to offer fair housing choice, and maintain records of the activities and their impact. However, the new AFH involves a separate community participation process, and HUD recognizes that this new participation process entails additional costs. Accordingly, the aggregate compliance cost on

local entities is expected to be in the range of $25 million per year after the second year of implementation, $9 million for HUD, for a total of $34 million.

There will also be costs associated with the strategies and actions program participants take to address the goals of the AFH. However, the rule covers program participants subject to a diversity of local conditions and economic and social contexts. Therefore, this analysis is unable to quantify the outcomes of the process to identify (1) barriers to fair housing, (2) program participants' decisions on which barriers to address, (3) the types of policies to address those barriers, and (4) those policies' effects on protected classes. The precise outcomes of the AFFH planning process are uncertain, but the rule will enable each jurisdiction to plan meaningfully.

The net change in burden for specific local entities will depend on the extent to which they have been complying with the planning process already in place. The local entities that have been diligent in completing rigorous AIs may experience a net decrease in administrative burden as a result of the revised process. Many program participants spend considerable time and funds trying in good faith to comply with the existing AI requirements, given the absence of specificity, and for those program participants, the new AFH process, given its specificity should be easier and less costly.

PHAs, which are not required to prepare AIs, may already spend considerable time cooperating with local governments by drawing upon the information and housing needs analysis in the local Consolidated Plan to inform the PHA plan and assessing the potential effectiveness of strategies such as local preferences. Indeed PHAs are currently required to certify that the PHA Plan is consistent with the consolidated plan applicable to the PHA. However, the demands of the new process are expected to result in a net increase of administrative burden for entities that have not regularly conducted an analysis of impediments to barriers to fair housing choice.

For these entities, the new AFH process will result in an increase in burden and cost. Similarly, the burden of the rule will vary by data aptitude and resources of the program participant. Entities that have invested in data systems and are able to access more easily relevant local data would in all likelihood have a reduced burden. A program participant that already collects data and employs analysts who study local trends will be able to respond with little additional effort compared to a program participant that does not have this capacity.

Summary Tables

The primary compliance costs are for the HUD program participants to prepare a more rigorous five year plan. The cost will depend upon on the difficulty of preparation for a participant as well as how different the new fair housing planning process is from current practices. About $3 million annually of these costs are comprised of training and public participation costs. In addition to the burden on HUD program participants, HUD itself will need to hire staff to implement the rule; provide data support; and review submitted AFHs.

Table: Annual Compliance Costs

Compliance Costs in a Typical Year ($millions)			
Costs to all Grantees			
	Primary Estimate	Lower Bound	Upper Bound
Analysis	22	4	39
Training	2.2	0.8	2.2
Participation	1.2	1.2	1.2
Total	**25.4**	**6.0**	**42.4**

*Note: Compliance Costs in first two years are less.

Table: Annual Total Costs and HUD Resource Costs

Annual Costs to HUD			
	Primary Estimate	Lower Bound	Upper Bound
HUD Costs	9	---	---
Annual Total Costs to Grantees and HUD			
	Primary	Lower Bound	Upper Bound

	Estimate		
Total	**34.4**	**15.0**	**51.4**

HUD judges the merits of this rule by the value it can create for protected classes. Ultimately, that value will be created by new program participant policies that result from the improved planning and analytical process. Section 5 of HUD's Regulatory Impact Analysis assesses several examples of policies that may be pursued by program participants in response to the new AFFH process. While this list is far from exhaustive, it does provide insight into the types of impacts we can expect from this rule. As such, the impacts are summarized in the table below.

Table: Summary of Impacts of New Grantee Policy Examples.

Potential Rule Outcome	**Potential Benefits and Transfers**	**Potential Costs**
Inclusionary Zoning Policies	Transfer: Housing units and associated locational amenities that would have otherwise been market-rate are transferred to protected classes.	Costs: Reductions in consumer and producer surplus (deadweight loss) associated with increased prices and reduced quantities.
Removal of Harmful Regulations that act as Barriers to Fair Housing (e.g. minimum lot size requirements)	Benefit: Increased consumer surplus from reduction in prices and increased quantities.	None.
Creation of New Amenities (Transit Stop Example)	Benefit: Reductions in commute times or costs.	Costs: Construction, maintenance, and operating costs.
Mobility Policies	Transfer: Units and associated locational amenities that otherwise would have been market-rate, are transferred to protected classes.	Costs: Administrative costs associated with implementing mobility programs (e.g. paperwork costs and outreach to target landlords.)

Summary of Impact

The AFFH regulations being promulgated by this final rule are designed and expected to improve the process for carrying out a statutory mandate, potentially improving the lives of protected classes who face barriers to fair housing choice. As presented above, HUD's Regulatory Impact Analysis estimates compliance costs for its program participants and costs to HUD to implement the rule.

Actions taken by program participants as a result of this rule may result in new local approaches to reducing segregation, eliminating racially concentrated areas of poverty, reducing disparities in access to opportunity, and reducing disproportionate housing needs. HUD believes that some of these new approaches would better achieve the goals of fair housing, meaning that communities would be more integrated, fewer people would live in high-poverty, segregated neighborhoods, and access to high-quality education, job opportunities, and other community assets would be more equal.

The preceding provides an overview of the analysis that is more fully discussed in HUD's Regulatory Impact Analysis, and which can be found at HUD's docket for this rule at www.regulations.gov. HUD's Regulatory Flexibility Analysis below highlights changes made at the final rule stage to minimize burden on small entities.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The undersigned certifies that this rule would not have a significant economic impact on a substantial number of small entities.

HUD anticipates that the final rule will strengthen the way in which HUD and its program participants will take affirmative steps to further fair housing under the Fair Housing Act. Although local governments, States, and PHAs must affirmatively further fair housing independent of any regulatory requirement imposed by HUD, HUD recognizes its statutory responsibility to provide leadership and direction in this area under the Fair Housing Act, while preserving local determination of fair housing needs and strategies.

To help program participants more effectively meet their statutory obligation to affirmatively further fair housing, this rule establishes a fair housing planning process, the AFH process, to assist program participants in identifying barriers to fair housing choice in their areas. The AFH approach replaced the prior AI process, which did not work as effectively as HUD initially envisioned. Although the fair housing planning process established by this rule presents a more comprehensive approach than the prior AI process, HUD designed the approach to minimize burden to the extent feasible. The rule minimizes burden by coordinating the AFH with existing planning processes, the consolidated plans for State and local governments, and PHA Plans for PHAs.

The AFH approach requires program participants to complete a fair housing analysis using factors stated in the rule along with HUD-provided data, which is national in scope, and to supplement the HUD-provided data where relevant and easily obtainable, with local data. This analysis will then be updated every 3 to 5 years through the consolidated plan for States and local governments, and every 5 years through the PHA Plan for PHAs, as a basis for strategies to address identified factors that contribute to or impede fair housing choice and access to opportunity, such as quality schools or improved transportation. Thus, part of the burden minimization presented by this approach is to require such analysis not annually but every 3 to 5

years. HUD believes that given the comprehensive nature of this new approach, the analysis should sustain a multi-year span.

In addition to building upon existing planning processes, this rule further strives to minimize burden by HUD by providing program participants with data on access to opportunity through categories such as education, employment, low poverty exposure, and transportation, as well as patterns of integration and segregation, racially or ethnically concentrated areas of poverty, disproportionate housing needs based on protected class, and data on national trends in housing discrimination. The national data will be provided at the time of the issuance of the Assessment Tool, which is currently undergoing the approval process under the Paperwork Reduction Act. The 60-day notice, required under the Paperwork Reduction Act, can be found at 79 FR 57949 (September 26, 2014).

With HUD-provided data and any additional local data provided by program participants, program participants can better identify, in their areas, patterns of integration and segregation, disparities in access to opportunity by members of protected classes, racially or ethnically concentrated areas of poverty, and disproportionate housing needs based on protected class. With such identification, program participants can focus on areas for improvement, develop strategies to address barriers to fair housing choice, and prioritize where resources will be deployed first. To further ease burden on program participants, through this rule, HUD commits to be available to provide technical assistance to program participants in the development of their AFHs.

The provision of data by HUD, and the agency's active role in assisting program participants with an AFH, will minimize burden for all program participants, large and small, in meeting their statutory obligation to affirmatively further fair housing.

At this final rule stage and in response to public comment, HUD has taken additional

steps to reduce burden on entities that are small in size or may, notwithstanding size, have less capacity to perform the assessment of fair housing as provided in the rule. HUD recognizes that small program participants may have extremely limited staff or, as a result of funding shortages, currently struggle to effectively carry out program requirements. This final rule provides that, while all participants will be given significant lead time to complete their first AFH, program participants that are PHAs, entitlement jurisdictions receiving an FY 2015 CDBG grant of $500,000 or less, States (including State PHAs submitting alone), and Insular Areas are all provided with the option to submit their first AFH at a date later than that required for entitlement jurisdictions that receive an FY 2015 CDBG grant of more than $500,000.

This submission structure extends the time that the staff of these program participants have to complete their first AFH, submitted through the Assessment Tool as provided in the rule. The delayed submission date for the first AFH not only extends the time in which staff of these program participants may work with HUD on addressing any issues that arise in completing the Assessment Tool, but they will have the benefit of the experience of those program participants that were the first to submit their AFHs. It is expected that after submission of the first AFH, program participants will have both experience and a system in place, making future submissions an easier task.

HUD also intends to design an Assessment Tool that is tailored for program participants other than entitlement jurisdictions that receive an FY 2015 CDBG grant of more than $500,000, another measure designed to minimize burden. HUD believes that through the measures taken in this rule – HUD-provided data, technical assistance, a delayed submission deadline for the first AFH, and a planned tailored Assessment Tool – HUD has minimized burden associated with the new AFH approach, without, however, minimizing the effectiveness of the new approach. As a

result of these measures, this rule does not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ‘‘Federalism’’) prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the executive order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the executive order. HUD anticipates that the rule will assist program participants of HUD funds in undertaking their actions and strategies to affirmatively further fair housing. As HUD has noted in the preceding section discussing the Regulatory Flexibility Act and in the Background section of this preamble, the obligation to affirmatively further fair housing is imposed by statute directly on local governments, States, and PHAs, as the agencies charged with administering the Fair Housing Act.

HUD is responsible for overseeing that its programs are administered in a manner that furthers the purposes and policies of fair housing and entities receiving HUD funds fulfill their affirmatively furthering fair housing obligation.

The approach taken by HUD in this rule is to help local governments, States, and PHAs meet this obligation in a way that is meaningful, but without undue burden. As noted throughout this preamble, HUD will provide local and regional data on patterns of integration and segregation and access to community assets in education, neighborhood stability, credit, employment, transportation, health, and other community amenities, as well as national trends in

housing discrimination. This approach, in which HUD offers data, clear standards, guidance, and technical assistance, is anticipated to reduce the burden and cost that are involved in current regulatory schemes governing affirmatively furthering fair housing. Since Federal law requires states and local governments to affirmatively further fair housing, there is no preemption, by this rule, of State law.

Paperwork Reduction Act

The information collection requirements of this rule are those largely contained in the Assessment Tool. The Assessment Tool consists of questions to the grantees to solicit information to help grantees in the fair housing planning required by this rule. The Assessment Tool is undergoing the required notice and solicitation of public comment process required by the Paperwork Reduction Act. This process commenced with the first notice published by HUD on September 26, 2014. When this process has been concluded, HUD will submit the information collection requirements to OMB for approval. 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.

List of Subjects

24 CFR Part 5

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

24 CFR Part 91

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

24 CFR Part 92

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs--education, Grant programs--housing and community development, Guam, Indians, Lead poisoning, Loan programs--housing and community development, Low and moderate income housing, New communities, Northern Mariana Islands, Pacific Islands Trust Territory, Pockets of poverty, Puerto Rico, Reporting and recordkeeping requirements, Small cities, Student aid, Virgin Islands.

24 CFR Part 574

Community facilities, Disabled, Grant programs—health programs, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Homeless, Housing, Low and moderate income housing, Nonprofit organizations, Rent subsidies, Reporting and recordkeeping requirements, Technical assistance.

24 CFR Part 576

Community facilities, Emergency solutions grants, Grant programs—housing and community development, Grant program—social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 903

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

Accordingly, for the reasons described in the preamble, HUD amends parts 5, 91, 92, 570, 574, 576, and 903 of title 24 of the Code of Federal Regulations as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for 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.

Subpart A—Generally Applicable Definitions and Federal Requirements; Waivers

2. Add an authority citation for part 5, subpart A, to read as follows:

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

3. Subpart A is amended by adding §§ 5.150-5.152, 5.154, 5.156, 5.158, 5.160, 6.162, 5.164, 5.166, 5.168, and 5.169-5.180 under an undesignated center heading to read as follows:

AFFIRMATIVELY FURTHERING FAIR HOUSING

Sec.

5.150 Affirmatively Furthering Fair Housing: Purpose.

5.151 Affirmatively Furthering Fair Housing: Implementation.

5.152 Definitions.

5.154 Assessment of Fair Housing (AFH).

5.156 Joint and Regional AFHs.

5.158 Community participation, consultation, and coordination.

5.160 Submission requirements.

5.162 Review of AFH.

5.164 Revising an accepted AFH.

5.166 AFFH certification.

5.168 Recordkeeping.

5.167-5.180 [Reserved]

AFFIRMATIVELY FURTHERING FAIR HOUSING

§ 5.150 Affirmatively Furthering Fair Housing: Purpose.

Pursuant to the affirmatively furthering fair housing mandate in section 808(e)(5) of the Fair Housing Act, and in subsequent legislative enactments, the purpose of the Affirmatively Furthering Fair Housing (AFFH) regulations in §§ 5.150 through 5.180 is to provide program participants with an effective planning approach to aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination. The regulations establish specific requirements for the development and submission of an Assessment of Fair Housing (AFH) by program participants (including local governments, States, and public housing agencies (PHAs)), and the incorporation and implementation of that AFH into subsequent consolidated plans and PHA Plans in a manner that connects housing and community development policy and investment planning with meaningful actions that affirmatively further fair housing. A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the

development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.

§ 5.151 Affirmatively Furthering Fair Housing: Implementation.

Section 5.160 of the AFH regulations provides the date by which program participants must submit their first AFH. A program participant's AFH submission date is the date by which the program participant must comply with the regulations in §§ 5.150 through 5.180. Until such time, the program participant shall continue to conduct an analysis of impediments, as required of the program participant under one or more of the HUD programs listed in § 5.154, in accordance with requirements in effect prior to **[Insert date 30 days after date of publication in the Federal Register]**.

§ 5.152 Definitions.

For purposes of §§ 5.150 through 5.180, the terms "consolidated plan," "consortium," "unit of general local government," "jurisdiction," and "State" are defined in 24 CFR part 91. For PHAs, "jurisdiction" is defined in 24 CFR 982.4. The following additional definitions are provided solely for purposes of §§ 5.150 through 5.180 and related amendments in 24 CFR parts 91, 92, 570, 574, 576, and 903:

Affirmatively furthering fair housing means taking meaningful actions, in addition to

combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.

Assessment of Fair Housing (assessment or AFH) means the analysis undertaken pursuant to § 5.154 that includes an analysis of fair housing data, an assessment of fair housing issues and contributing factors, and an identification of fair housing priorities and goals, and is conducted and submitted to HUD using the Assessment Tool. The AFH may be conducted and submitted by an individual program participant (individual AFH), or may be a single AFH conducted and submitted by two or more program participants (joint AFH) or two or more program participants, where at least two of which are consolidated plan program participants (regional AFH).

Assessment Tool refers collectively to any forms or templates and the accompanying instructions provided by HUD that program participants must use to conduct and submit an AFH pursuant to § 5.154. HUD may provide different Assessment Tools for different types of program participants. In accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35) (PRA), the Assessment Tool will be subject to periodic notice and opportunity to comment in order to maintain the approval of the Assessment Tool as granted by the Office of Management

and Budget (OMB) under the PRA.

Community participation, as required in § 5.158, means a solicitation of views and recommendations from members of the community and other interested parties, a consideration of the views and recommendations received, and a process for incorporating such views and recommendations into decisions and outcomes. For HUD regulations implementing the Housing and Community Development Act of 1974, the statutory term for "community participation" is "citizen participation," and, therefore, the regulations in 24 CFR parts 91, 92, 570, 574, and 576 use this term.

Consolidated plan program participant means any entity specified in § 5.154(b)(1).

Contributing factor. See definition of "fair housing contributing factor" in this section.

Data. The term "data" refers collectively to the sources of data provided in paragraphs (1) and (2) of this definition. When identification of the specific source of data in paragraph (1) or (2) is necessary, the specific source (HUD-provided data or local data) will be stated.

(1) HUD-provided data. As more fully addressed in the Assessment Tool, the term "HUD-provided data" refers to HUD-provided metrics, statistics, and other quantified information required to be used with the Assessment Tool. HUD-provided data will not only be provided to program participants but will be posted on HUD's website for availability to all of the public;

(2) Local data. As more fully addressed in the Assessment Tool, the term "local data" refers to metrics, statistics, and other quantified information, subject to a determination of statistical validity by HUD, relevant to the program participant's geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH using the Assessment Tool.

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

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

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment.

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

Disproportionate housing needs refers to a condition in which there are significant disparities in the proportion of members of a protected class experiencing a category of housing need when compared to the proportion of members of any other relevant groups or the total population experiencing that category of housing need in the applicable geographic area. For purposes of this definition, categories of housing need are based on such factors as cost burden, severe cost burden, overcrowding, and substandard housing conditions, as those terms are applied in the Assessment Tool.

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

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

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

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

Fair housing contributing factor (or contributing factor) means a factor that creates, contributes to, perpetuates, or increases the severity of one or more fair housing issues. Goals in an AFH are designed to overcome one or more contributing factors and related fair housing issues, as provided in § 5.154.

Fair housing issue means a condition in a program participant's geographic area of analysis that restricts fair housing choice or access to opportunity, and includes such conditions as ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law or regulations related to housing. Participation in "housing programs serving specified populations," as defined in this section, does not present a fair housing issue of segregation, provided that such programs are administered by program participants so that the programs comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.

Fair housing enforcement and fair housing outreach capacity means the ability of a jurisdiction, and organizations located in the jurisdiction, to accept complaints of violations of

fair housing laws, investigate such complaints, obtain remedies, engage in fair housing testing, and educate community members about fair housing laws and rights. This definition covers any State or local agency that enforces a law substantially equivalent to the Fair Housing Act (see 24 CFR part 115) and any organization participating in the Fair Housing Initiative Programs (see 24 CFR part 125).

Geographic area means a jurisdiction, region, State, Core-Based Statistical Area (CBSA), or another applicable area (e.g., census tract, neighborhood, Zip code, block group, housing development, or portion thereof) relevant to the analysis required to complete the assessment of fair housing, as specified in the Assessment Tool.

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

(1) Serve specific identified populations; and

(2) Comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.

Insular area has the same meaning as provided in § 570.405.

Integration means a condition, within the program participant's geographic area of

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

Joint participants refers to two or more program participants conducting and submitting a single AFH (a joint AFH), in accordance with § 5.156 and 24 CFR 903.15(a)(1) and (2), as applicable.

Local knowledge. As more fully addressed in the Assessment Tool, local knowledge means information to be provided by the program participant that relates to the participant's geographic areas of analysis and that is relevant to the program participant's AFH, is known or becomes known to the program participant, and is necessary for the completion of the AFH using the Assessment Tool.

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

Program participants means any entities specified in § 5.154(b).

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

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

Qualified public housing agency (Qualified PHA). Refers to a PHA:

(1) For which the sum of:

(i) The number of public housing dwelling units administered by the PHA; and

(ii) The number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the PHA is 550 or fewer; and

(2) That is not designated under section 6(j)(2) of the United States Housing Act of 1937 as a troubled PHA, and does not have a failing score under the Section 8 Management Assessment Program (SEMAP) during the prior 12 months.

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

Regionally collaborating participants refers to joint participants, at least two of which are consolidated plan program participants. A PHA may participate in a regional assessment in accordance with PHA Plan participation requirements under 24 CFR 903.15(a)(1). Regionally collaborating participants conduct and submit a single AFH (regional AFH) in accordance with § 5.156.

Segregation means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of

a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). (See 28 CFR part 35, appendix B, addressing 25 CFR 35.130.) Participation in "housing programs serving specified populations" as defined in this section does not present a fair housing issue of segregation, provided that such programs are administered to comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs): the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing: section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.

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

§ 5.154 Assessment of Fair Housing (AFH).

(a) General. To develop a successful affirmatively furthering fair housing strategy, it is central to assess the elements and factors that cause, increase, contribute to, maintain, or perpetuate segregation, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, and disproportionate housing needs. For HUD program participants already required to develop plans for effective uses of HUD funds consistent with the statutory

requirements and goals governing such funds, an AFH will be integrated into such plans.

(b) Requirement to submit an AFH. In furtherance of the statutory obligation to affirmatively further fair housing, an AFH must be developed following the AFH consultation, content, and submission requirements described in §§ 5.150 through 5.180, and submitted in a manner and form prescribed by HUD by the following entities:

(1) Jurisdictions and Insular Areas that are required to submit consolidated plans for the following programs:

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

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

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

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

(2) Public housing agencies (PHAs) receiving assistance under sections 8 or 9 of the United States Housing Act of 1937 (42 U.S.C. 1437f or 42 U.S.C.1437g).

(c) Fair housing data. Program participants will use HUD-provided data, as defined within the definition of "data" in § 5.152, and supplement the HUD-provided data, as needed, with local data and local knowledge, as guided by the Assessment Tool.

(d) Content. Using the Assessment Tool prescribed by HUD, each program participant shall conduct an AFH for the purpose of examining its programs, jurisdiction, and region, and identifying goals to affirmatively further fair housing and to inform fair housing strategies in the consolidated plan, annual action plan, the PHA Plan and any other plan incorporated therein, and community plans including, but not limited to, education, transportation, or environmental

related plans. The AFH's analysis, goals, and priorities will address integration and segregation; racially or ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs based on race, color, religion, sex, familial status, national origin, and disability. The AFH will assess the jurisdiction's fair housing enforcement and fair housing outreach capacity. At a minimum, the AFH will include the following elements:

(1) Summary of fair housing issues and capacity. The AFH must include a summary of fair housing issues in the jurisdiction, including any findings, lawsuits, enforcement actions, settlements, or judgments related to fair housing or other civil rights laws, an assessment of compliance with existing fair housing laws and regulations, and an assessment of the jurisdiction's fair housing enforcement and fair housing outreach capacity.

(2) Analysis of data. Using HUD-provided data, local data, local knowledge, including information gained through community participation, and the Assessment Tool, the program participant will undertake the analysis required by this section. This analysis will address the following to the extent the data or local knowledge are informative of the following:

(i) Identification of integration and segregation patterns and trends based on race, color, religion, sex, familial status, national origin, and disability within the jurisdiction and region;

(ii) Identification of racially or ethnically concentrated areas of poverty within the jurisdiction and region;

(iii) Identification of significant disparities in access to opportunity for any protected class within the jurisdiction and region; and

(iv) Identification of disproportionate housing needs for any protected class within the jurisdiction and region.

(3) Assessment of fair housing issues. Using the Assessment Tool provided by HUD, the

AFH will identify the contributing factors for segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs as identified under paragraph (d)(2) of this section.

(4) Identification of fair housing priorities and goals. Consistent with the identification of fair housing issues, and the analysis and assessment conducted under paragraphs (d)(1) through (3) of this section, the AFH must:

(i) Identify and discuss the fair housing issues arising from the assessment; and

(ii) Identify significant contributing factors, prioritize such factors, and justify the prioritization of the contributing factors that will be addressed in the program participant's fair housing goals. In prioritizing contributing factors, program participants shall give highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance; and

(iii) Set goals for overcoming the effects of contributing factors as prioritized in accordance with paragraph (d)(4)(ii) of this section. For each goal, a program participant must identify one or more contributing factors that the goal is designed to address, describe how the goal relates to overcoming the identified contributing factor(s) and related fair housing issue(s), and identify the metrics and milestones for determining what fair housing results will be achieved. For instance, where segregation in a development or geographic area is determined to be a fair housing issue, with at least one significant contributing factor, HUD would expect the AFH to include one or more goals to reduce the segregation.

(5) Strategies and actions. To implement goals and priorities in an AFH, strategies and actions shall be included in program participants' consolidated plans, Annual Action Plans, and PHA Plans (including any plans incorporated therein), and need not be reflected in their AFH.

Strategies and actions must affirmatively further fair housing and may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, including HUD-assisted housing.

(6) Summary of community participation. The AFH must include a concise summary of the community participation process, public comments, and efforts made to broaden community participation in the development of the AFH; a summary of the comments, views, and recommendations, received in writing, or orally at public hearings, during the community participation process; and a summary of any comments, views, and recommendations not accepted by the program participant and the reasons for nonacceptance.

(7) Review of progress achieved since submission of prior AFH. For each AFH submitted after the first AFH submission, the program participant will provide a summary of progress achieved in meeting the goals and associated metrics and milestones of the prior AFH, and identify any barriers that impeded or prevented achievement of goals.

§ 5.156 Joint and Regional AFHs.

(a) General. For the purposes of sharing resources and addressing fair housing issues from a broader perspective, program participants are encouraged to collaborate to conduct and submit a single AFH, either a joint AFH or regional AFH (as defined in § 5.152), for the purpose of evaluating fair housing issues and contributing factors.

(1) Collaborating program participants, whether joint participants or regionally collaborating participants, need not be located in contiguous jurisdictions and may cross State

boundaries, provided that the collaborating program participants are located within the same Core Based Statistical Area (CBSA), as defined by the United States Office of Management and Budget (OMB) at the time of submission of the joint or regional AFH.

(2) Program participants, whether contiguous or noncontiguous, that are either not located within the same CBSA or that are not located within the same State and seek to collaborate on an AFH, must submit a written request to HUD for approval of the collaboration, stating why the collaboration is appropriate. The collaboration may proceed upon approval by HUD.

(3) Collaborating program participants must designate, through express written consent, one participant as the lead entity to oversee the submission of the joint or regional AFH on behalf of all collaborating program participants. When collaborating to submit a joint or regional AFH, program participants may divide work as they choose, but all program participants are accountable for the analysis and any joint goals and priorities, and each collaborating program participant must sign the AFH submitted to HUD. Collaborating program participants are also accountable for their individual analysis, goals, and priorities to be included in the collaborative AFH.

(4) Program participants that intend to prepare either a joint or regional AFH shall promptly notify HUD of such intention and provide HUD with a copy of their written agreement.

(b) Coordinating program years and submission deadlines. (1) To the extent practicable, all collaborating program participants must be on the same program year and fiscal year (as applicable) before submission of the joint AFH or regional AFH. (See § 5.160 and 24 CFR 91.10 and 903.5.) The applicable procedures for changing consolidated plan program participant

program year start dates, if necessary, are described in 24 CFR 91.10. The applicable procedures for changing PHA fiscal year beginning dates, if necessary, are described in 24 CFR part 903.

(2) If alignment of a program year or fiscal year is not practicable, the submission deadline for a joint AFH or regional AFH must be based on the designated lead entity's program year start date or fiscal year beginning date (as applicable), as provided in § 5.160(c). Within 12 months after the date of AFH acceptance, each collaborating program participant that has a program year start date, or fiscal year beginning date, earlier than the designated lead entity must make appropriate revisions to its full consolidated plan (as described in § 91.15(b)(2) of this chapter), or PHA Plan and any plan incorporated therein, to incorporate strategies and proposed actions consistent with the fair housing goals, issues, and other elements identified in the joint AFH or regional AFH.

(c) Procedures for withdrawal from a joint or regional collaboration. A program participant that, for any reason, decides to withdraw from a previously arranged collaborative AFH must promptly notify HUD of the withdrawal. HUD will work with the withdrawing program participant, as well as the remaining collaborative participants, to determine whether a new submission date is needed for the withdrawing participant or the remaining participants. If a new submission date is needed for the withdrawing participant or the remaining participants, HUD will establish a submission date that is as close as feasible to the originally intended submission date and is no later than the original joint or regional submission date unless good cause for an extension is shown.

(d) Community participation. Collaborating program participants must have a plan for community participation that complies with the requirements of §§ 5.150 through 5.180. The community participation process must include residents, and other interested members of the

public, in the jurisdictions of each collaborating program participant, and not just those of the lead entity. In addition, the community participation process must be conducted in a manner sufficient for each consolidated plan program participant collaborating in a joint AFH or regional AFH to certify that it is following its applicable citizen participation plan, and for each PHA, collaborating in a joint AFH or regional AFH, to satisfy the notice and comment requirements in 24 CFR part 903. To the extent that public notice and comment periods provided in §§ 5.150 through 5.180 or in the consolidated plan or PHA plan regulations differ, the longer period shall apply. A material change that requires any collaborating program participant to revise its AFH pursuant to § 5.164(a)(1) will trigger a requirement to revise the joint or regional AFH.

(e) Content of the joint or regional AFH. A joint or regional AFH must include the elements required under § 5.154(d). A joint or regional AFH does not relieve each collaborating program participant from its obligation to analyze and address local and regional fair housing issues and contributing factors that affect housing choice, and to set priorities and goals for its geographic area to overcome the effects of contributing factors and related fair housing issues.

§ 5.158 Community participation, consultation, and coordination.

(a) General. To ensure that the AFH is informed by meaningful community participation, program participants must give the public reasonable opportunities for involvement in the development of the AFH and in the incorporation of the AFH into the consolidated plan, PHA Plan, and other required planning documents. To ensure that the AFH, the consolidated plan, and the PHA Plan and any plan incorporated therein are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. Such communications may be met, as appropriate, by publishing a summary

of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the program participant's official government website, and as well at libraries, government offices, and public places. Program participants shall ensure that all aspects of community participation are conducted in accordance with fair housing and civil rights laws, including title VI of the Civil Rights Act of 1964 and the regulations at 24 CFR part 1; section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable. At a minimum, whether a program participant is preparing an AFH individually or in combination with other program participants, AFH community participation must include the following for consolidated plan program participants and PHAs (as applicable):

(1) Consolidated plan program participants. The consolidated plan program participant must follow the policies and procedures described in its applicable citizen participation plan, adopted pursuant to 24 CFR part 91 (see 24 CFR 91.105, 91.115, and 91.401), in the process of developing the AFH, obtaining community feedback, and addressing complaints. The jurisdiction must consult with the agencies and organizations identified in consultation requirements at 24 CFR part 91 (see 24 CFR 91.100, 91.110, and 91.235).

(2) PHAs. PHAs must follow the policies and procedures described in 24 CFR 903.13, 903.15, 903.17, and 903.19 in the process of developing the AFH, obtaining Resident Advisory Board and community feedback, and addressing complaints.

(b) Coordination. (1) As described in 903.15, a PHA may fulfill its responsibility to conduct an AFH by:

(i) Participating with a consolidated plan program participant, including State jurisdictions; or

(ii) Participating with one or more PHAs in the planning, and preparation of the AFH; or

(iii) Preparing its own AFH.

(2) When working with other program participants, PHAs are encouraged to enter into Memorandums of Understanding (MOUs) to clearly define the functions, level of member participation, method of dispute resolution, and decisionmaking process of the program participants, in the creation of the AFH.

§ 5.160 Submission requirements.

(a) First AFH--(1) Submission deadline for program participants. (i) For each program participant listed in this paragraph (a)(1)(i), the first AFH shall be submitted no later than 270 calendar days prior to the start of:

(A) For consolidated plan participants not covered in paragraph (a)(1)(i)(B) or (C) of this section, the program year that begins on or after January 1, 2017 for which a new consolidated plan is due, as provided in 24 CFR 91.15(b)(2); and

(B) For consolidated plan participants whose fiscal year (FY) 2015 CDBG grant is $500,000 or less**,** the program year that begins on or after January 1, 2018 for which a new consolidated plan is due, as provided in 24 CFR 91.15(b)(2); and

(C) For consolidated plan participants that are Insular Areas or States, the program that begins on or after January 1, 2018 for which a new consolidated is due, as provided in 24 CFR 91.15(b)(2); and

(D) For PHAs, except for qualified PHAs, the PHA's fiscal year that begins on or after January 1, 2018 for which a new 5-year plan is due, as provided in 24 CFR 903.5; and

(E) For qualified PHAs, the PHA's fiscal year that begins on or after January 1, 2019

for which a new 5-year plan is due, as provided in 24 CFR 903.5; and

(F) For joint or regional program participants, the date provided under this paragraph (a)(1) or under paragraph (a)(2) of this section, dependent upon the program participant that is selected to be the lead entity, as provided in § 5.156(b)(2).

(ii) If the time frame specified in this paragraph (a)(1) would result in a first AFH submission date that is less than 9 months after the date of publication of the Assessment Tool that is applicable to the program participant or lead entity, the participant(s)' submission deadline will be extended as specified in that Assessment Tool publication to a date that will not be less than 9 months from the date of publication of the Assessment Tool.

(2) Exceptions to the first submission deadline for recently completed Regional Analysis of Impediments (RAI). An entitlement jurisdiction subject to the submission deadline in paragraph (a)(1) of this section is not required to submit an AFH by the deadline specified in such paragraph if the entitlement jurisdiction has completed a HUD-approved RAI in accordance with a grant awarded under HUD's FY 2010 or 2011 Sustainable Communities Competition and submitted the RAI within 30 months prior to the date when the program participant's AFH is due as provided under this section.

(3) Compliance with existing requirements until first AFH submission. Except as provided in paragraph (a)(4) of this section, until such time as program participants are required to submit an AFH, the program participant shall continue to conduct an analysis of impediments, as required of the program participant by one or more of the HUD programs listed in § 5.154, in accordance with requirements in effect prior to **[Insert date 30 days after date of publication in the Federal Register]**.

(4) New program participants. For a new program participant that has not submitted a

consolidated plan or PHA plan as of [**Insert date 30 days after date of publication in the Federal Register**], HUD will provide the new program participant with a deadline for submission of its first AFH and the strategies and actions to implement an accepted AFH, which shall be incorporated into the program participant's consolidated plan or PHA plan, as applicable, within 18 months of the start date of its first program year or fiscal year, as applicable.

(b) Second and subsequent AFHs. After the first AFH, for all program participants, subsequent AFHs are due 195 calendar days before the start of the first year of the next 3 to 5-year cycle (as applicable), as described in paragraph (a)(1) of this section; that is, the subsequent AFH is to precede the next strategic plan under 24 CFR 91.15(b)(2) or 5-year plan under 24 CFR 903.5.

(c) Collaborative AFHs. All collaborative program participants, whether joint participants or regionally collaborating participants, will select a lead entity and submit the AFH according to that entity's schedule.

(d) Frequency. All program participants shall submit an AFH no less frequently than once every 5 years, or at such time agreed upon in writing by HUD and the program participant, in order to coordinate the AFH submission with time frames used for consolidated plans, participation in a regional AFH, cooperation agreements, PHA Plans, or other plans. (See 24 CFR 91.15(b)(2) and 903.15.)

(e) Certification. Each program participant, including program participants submitting a joint or regional AFH, must certify that it will take meaningful actions to further the goals identified in its AFH conducted in accordance with the requirements in §§ 5.150 through 5.180 and 24 CFR 91.225(a)(1), 91.325(a)(1), 91.425(a)(1), 570.487(b)(1), 570.601, 903.7(o), and

903.15(d), as applicable. The certification will be required at the time a program participant submits its first AFH and for each AFH thereafter. If a PHA Plan, consolidated plan, Action Plan, or other submission requiring a civil rights-related certification is due prior to the time of submission of the AFH, the participant will complete a certification, in a form provided by HUD, that it will affirmatively further fair housing, or complete such other certification that HUD may require in accordance with applicable program regulations in effect before **[Insert date 30 days after date of publication in the Federal Register]**.

§ 5.162 Review of AFH.

(a) Review and acceptance of AFH--(1) General. HUD's review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting, as set forth in § 5.154(d). The AFH will be deemed accepted after 60 calendar days after the date that HUD receives the AFH, unless on or before that date, HUD has provided notification that HUD does not accept the AFH. In its notification, HUD will inform the program participant in writing of the reasons why HUD has not accepted the AFH and the actions that the program participant may take to resolve the nonacceptance.

(2) Meaning of "acceptance". HUD's acceptance of an AFH means only that, for purposes of administering HUD program funding, HUD has determined that the program participant has provided an AFH that meets the required elements, as set forth in § 5.154(d). Acceptance does not mean that the program participant has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Fair Housing Act; or has complied with other civil rights laws and regulations.

(b) Nonacceptance of an AFH. (1) HUD will not accept an AFH if HUD finds that the AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete. In connection with a regional or joint AFH, HUD's determination to not accept the AFH with respect to one program participant does not necessarily affect the acceptance of the AFH with respect to another program participant.

(i) The following are examples of an AFH that is inconsistent with fair housing and civil rights requirements:

(A) HUD determines that the analysis of fair housing issues, fair housing contributing factors, goals, or priorities contained in the AFH would result in policies or practices that would operate to discriminate in violation of the Fair Housing Act or other civil rights laws;

(B) The AFH does not identify policies or practices as fair housing contributing factors, even though they result in the exclusion of a protected class from areas of opportunity.

(ii) The following are examples of an AFH that is substantially incomplete:

(A) The AFH was developed without the required community participation or the required consultation;

(B) The AFH fails to satisfy a required element in §§ 5.150 through 5.180. Failure to satisfy a required element includes an assessment in which priorities or goals are materially inconsistent with the data or other evidence available to the program participant or in which priorities or goals are not designed to overcome the effects of contributing factors and related fair housing issues.

(2) HUD will provide written notification to the program participant, including each program participant involved in a collaborative AFH (joint or regional AFH), of HUD's nonacceptance of the AFH and the written notification will specify the reasons why the AFH was

not accepted and will provide guidance on how the AFH should be revised in order to be accepted.

(c) Revisions and resubmission. HUD will provide a program participant, including each program participant involved in a collaborative AFH, with a time period to revise and resubmit the AFH, which shall be no less than 45 calendar days after the date on which HUD provides written notification that it does not accept the AFH. The revised AFH will be deemed accepted after 30 calendar days of the date by which HUD receives the revised AFH, unless on or before that date HUD has provided notification that HUD does not accept the revised AFH.

(d) Accepted AFH as requirement for consolidated plan and PHA Plan approval. If a program participant does not have an accepted AFH, HUD will disapprove a consolidated plan (see 24 CFR 91.500) or a PHA Plan (see 24 CFR 903.23) except where delayed submission is otherwise permitted under § 5.156 or § 5.160.

(1) If a consolidated plan program participant fails to submit an AFH as required by § 5.160, HUD may establish an alternative date for the jurisdiction to submit its consolidated plan, but in no event past the August 16 deadline provided in 24 CFR 91.15. Failure to submit a consolidated plan by August 16 of the Federal fiscal year for which funds are appropriated will automatically result in the loss of the CDBG funds to which the jurisdiction would otherwise be entitled.

(2) If a PHA fails to submit the AFH in accordance with § 5.160, the PHA must have an accepted AFH no later than 75 calendar days before the commencement of the PHA's fiscal year to avoid any potential impacts on funding.

§ 5.164 Revising an accepted AFH.

(a) General--(1) Minimum criteria for revising the AFH. An AFH previously accepted by HUD must be revised and submitted to HUD for review under the following circumstances:

(i) A material change occurs. A material change is a change in circumstances in the jurisdiction of a program participant that affects the information on which the AFH is based to the extent that the analysis, the fair housing contributing factors, or the priorities and goals of the AFH no longer reflect actual circumstances. Examples include Presidentially declared disasters, under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), in the program participant's area that are of such a nature as to significantly impact the steps a program participant may need to take to affirmatively further fair housing; significant demographic changes; new significant contributing factors in the participant's jurisdiction; and civil rights findings, determinations, settlements (including Voluntary Compliance Agreements), or court orders; or

(ii) Upon HUD's written notification specifying a material change that requires the revision.

(2) Criteria for revising the AFH. The criteria that will be used in determining when revisions to the AFH are appropriate must be specified in the citizen participation plan adopted under the consolidated plan pursuant to 24 CFR part 91, and the public participation procedures and significant amendment process required under 24 CFR part 903. Such criteria must include, at a minimum, the circumstances described in paragraph (a)(1) of this section.

(3) Revised AFH. A revision pursuant to paragraph (a)(1) of this section consists of preparing and submitting amended analyses, assessments, priorities, and goals that take into account the material change, including any new fair housing issues and contributing factors that may arise as a result of the material change. A revision may not necessarily require the

submission of an entirely new AFH. The revision need only focus on the material change and appropriate adjustments to the analyses, assessments, priorities, or goals.

(b) Timeframe for revision. (1) Where a revision is required under paragraph (a)(1)(i) of this section, such revision shall be submitted within 12 months of the onset of the material change, or at such later date as HUD may provide. Where the material change is the result of a Presidentially declared disaster, such time shall be automatically extended to the date that is 2 years after the date upon which the disaster declaration is made, and HUD may extend such deadline, upon request, for good cause shown.

(2)(i) Where a revision is required under paragraph (a)(1)(ii) of this section, HUD will specify a date by which the program participant must submit the revision of the AFH to HUD, taking into account the material change, the program participant's capacity, and the need for a valid AFH to guide planning activities. HUD may extend the due date upon written request by the program participant that describes the reasons the program participant is unable to make the deadline.

(ii) On or before 30 calendar days following the date of HUD's written notification under paragraph (a)(1)(ii) of this section, the program participant may advise HUD in writing of its belief that a revision to the AFH is not required. The program participant must state with specificity the reasons for its belief that a revision is not required. HUD will respond on or before 30 calendar days following the date of the receipt of the program participant's correspondence and will advise the program participant in writing whether HUD agrees or disagrees with the program participant. If HUD disagrees, the program participant must proceed with the revision. HUD may establish a new due date that is later than the date specified in its original notification.

(c) Community participation. Revisions to an AFH, as described in this section, are subject to community participation. The jurisdiction must follow the notice and comment process applicable to consolidated plan substantial amendments under the jurisdiction's citizen participation plan adopted pursuant to 24 CFR part 91 (see 24 CFR 91.105, 91.115, and 91.401). A consortium must follow the participation process applicable to consolidated plan substantial amendments under the consortium's citizen participation plan adopted pursuant to 24 CFR 91.401. Insular areas submitting an abbreviated consolidated plan shall follow the citizen participation requirements of 24 CFR 570.441. The PHA must follow the notice and comment process applicable to significant amendments or modifications pursuant to 24 CFR 903.13, 903.15, 903.17, and 903.21.

(d) Submission to HUD of the revised AFH. Upon completion, any revision to the AFH must be made public and submitted to HUD at the time of the revision.

(e) PHAs. Upon any revision to the AFH pursuant to §§ 5.150 through 5.180, PHAs must revise their PHA Plan within 12 months, consistent with the AFH revision, and pursuant to 24 CFR 903.15(c).

§ 5.166 AFFH certification.

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

(b) Procedure for challenging the validity of an AFFH certification. (1) For consolidated plan program participants, HUD's challenge to the validity of an AFFH certification will be based on procedures and standards specified in 24 CFR part 91.

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

§ 5.168 Recordkeeping.

(a) General. Each program participant must establish and maintain sufficient records to enable HUD to determine whether the program participant has met the requirements of this subpart. A PHA not preparing its own AFH in accordance with 24 CFR 903.15(a)(3) must maintain a copy of the applicable AFH and records reflecting actions to affirmatively further fair housing as described in 24 CFR 903.7(o). All program participants shall make these records available for HUD inspection. At a minimum, the following records are needed for each consolidated plan program participant and each PHA that prepares its own AFH:

(1) Information and records relating to the program participant's AFH and any significant revisions to the AFH, including, but not limited to, statistical data, studies, and other diagnostic tools used by the jurisdiction; and any policies, procedures, or other documents relating to the analysis or preparation of the AFH;

(2) Records demonstrating compliance with the consultation and community participation requirements of §§ 5.150 through 5.180 and applicable program regulations, including the names of organizations involved in the development of the AFH, summaries or transcripts of public meetings or hearings, written public comments, public notices and other correspondence, distribution lists, surveys, or interviews (as applicable);

(3) Records demonstrating the actions the program participant has taken to affirmatively further fair housing, including activities carried out in furtherance of the assessment; the program participant's AFFH goals and strategies set forth in its AFH, consolidated plan, or PHA Plan, and any plan incorporated therein; and the actions the program participant has carried out to promote or support the goals identified in accordance with § 5.154 during the preceding 5 years;

(4) Where courts or an agency of the United States Government or of a State government has found that the program participant has violated any applicable nondiscrimination and equal opportunity requirements set forth in § 5.105(a) or any applicable civil rights-related program requirement, documentation related to the underlying judicial or administrative finding and affirmative measures that the program participant has taken in response.

(5) Documentation relating to the program participant's efforts to ensure that housing and community development activities (including those assisted under programs administered by HUD) are in compliance with applicable nondiscrimination and equal opportunity requirements set forth in § 5.105(a) and applicable civil rights related program requirements;

(6) Records demonstrating that consortium members, units of general local government receiving allocations from a State, or units of general local government participating in an urban county have conducted their own or contributed to the jurisdiction's assessment (as applicable) and documents demonstrating their actions to affirmatively further fair housing; and

(7) Any other evidence relied upon by the program participant to support its affirmatively furthering fair housing certification.

(b) Retention period. All records must be retained for such period as may be specified in the applicable program regulations.

§§ 5.167-5.180 [Reserved]

PART 91—CONSOLIDATED SUBMISSION FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

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

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

5. In § 91.5, the introductory text is revised to read as follows:

§ 91.5 Definitions.

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

* * * * *

6. In § 91.100, paragraphs (a)(1) and (5) and (c) are revised and paragraph (e) is added to read as follows:

§ 91.100 Consultation; local governments.

(a) General. (1) When preparing the AFH and the consolidated plan, the jurisdiction shall consult with other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws.

*** * * * ***

(5) The jurisdiction also should consult with adjacent units of general local government and local and regional government agencies, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and

solutions that go beyond a single jurisdiction.

* * * * *

(c) Public housing agencies (PHAs). (1) The jurisdiction shall consult with local PHAs operating in the jurisdiction regarding consideration of public housing needs, planned programs and activities, the AFH, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing in the consolidated plan. (See also 24 CFR 5.158 for coordination when preparing an AFH jointly with a PHA.) This consultation will help provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the local government's description of its strategy for affirmatively furthering fair housing and the manner in which it will address the needs of public housing and, where necessary, the manner in which it will provide financial or other assistance to a troubled PHA to improve the PHA's operations and remove the designation of troubled, as well as obtaining PHA input on addressing fair housing issues in the Public Housing and Housing Choice Voucher programs.

(2) This consultation will also help ensure that activities with regard to affirmatively furthering fair housing, local drug elimination, neighborhood improvement programs, and resident programs and services, those funded under a PHA's program and those funded under a program covered by the consolidated plan, are fully coordinated to achieve comprehensive community development goals and affirmatively further fair housing. If a PHA is required to implement remedies under a Voluntary Compliance Agreement, the local jurisdiction should work with or consult with the PHA, as appropriate, to identify actions the jurisdiction may take, if any, to assist the PHA in implementing the required remedies. A local jurisdiction may use CDBG funds for eligible activities or other funds to implement remedies required under a

Voluntary Compliance Agreement.

* * * * *

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

(2) This consultation must occur with any organizations that have relevant knowledge or data to inform the AFH and that are sufficiently independent and representative to provide meaningful feedback to a jurisdiction on the AFH, the consolidated plan, and their implementation.

(3) Consultation must occur at various points in the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations described in this paragraph (e) in the development of both the AFH and the consolidated plan. Consultation on the consolidated plan shall specifically seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan.

7. In § 91.105, paragraphs (a)(1) and (a)(2)(i) through (iii) are revised, paragraph (a)(4) is added, and paragraphs (b), (c), (e)(1), (f), (g), (h), (i), (j) and (l) are revised to read as follow:

§ 91.105 Citizen participation plan; local governments.

(a) Applicability and adoption of the citizen participation plan. (1) The jurisdiction is required to adopt a citizen participation plan that sets forth the jurisdiction's policies and procedures for citizen participation. (Where a jurisdiction, before **[Insert date 30 days after date of publication in the Federal Register],** adopted a citizen participation plan it, will need to amend the citizen participation plan to comply with provisions of this section.)

(2) Encouragement of citizen participation. (i) The citizen participation plan must provide for and encourage citizens to participate in the development of the AFH, any revisions to the AFH, the consolidated plan, any substantial amendment to the consolidated plan, and the performance report. These requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those persons living in areas designated by the jurisdiction as a revitalization area or in a slum and blighted area and in areas where CDBG funds are proposed to be used, and by residents of predominantly low- and moderate-income neighborhoods, as defined by the jurisdiction. A jurisdiction must take appropriate actions to encourage the participation of all its citizens, including minorities and non-English speaking persons, as provided in paragraph (a)(4) of this section, as well as persons with disabilities.

(ii) The jurisdiction shall encourage the participation of local and regional institutions, Continuums of Care, and other organizations (including businesses, developers, nonprofit organizations, philanthropic organizations, and community-based and faith-based organizations) in the process of developing and implementing the AFH and the consolidated plan.

(iii) The jurisdiction shall encourage, in conjunction with consultation with public housing agencies, the participation of residents of public and assisted housing developments (including any resident advisory boards, resident councils, and resident management corporations) in the process of developing and implementing the AFH and the consolidated plan,

along with other low-income residents of targeted revitalization areas in which the developments are located. The jurisdictions shall make an effort to provide information to the PHA about the AFH, AFFH strategy, and consolidated plan activities related to its developments and surrounding communities so that the PHA can make this information available at the annual public hearing(s) required for the PHA Plan.

* * * * *

(4) The citizen participation plan shall describe the jurisdiction's procedures for assessing its language needs and identify any need for translation of notices and other vital documents. At a minimum, the citizen participation plan shall require that the jurisdiction take reasonable steps to provide language assistance to ensure meaningful access to participation by non-English-speaking residents of the community.

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

(1)(i) The citizen participation plan must require that at or as soon as feasible after the start of the public participation process the jurisdiction will make the HUD-provided data and any other supplemental information the jurisdiction plans to incorporate into its AFH available to its residents, public agencies, and other interested parties. The jurisdiction may make the HUD-provided data available to the public by cross-referencing to the data on HUD's website.

(ii) The citizen participation plan must require that, before the jurisdiction adopts a consolidated plan, the jurisdiction will make available to residents, public agencies, and other interested parties information that includes the amount of assistance the jurisdiction expects to receive (including grant funds and program income) and the range of activities that may be

undertaken, including the estimated amount that will benefit persons of low- and moderate-income. The citizen participation plan also must set forth the jurisdiction's plans to minimize displacement of persons and to assist any persons displaced, specifying the types and levels of assistance the jurisdiction will make available (or require others to make available) to persons displaced, even if the jurisdiction expects no displacement to occur.

(iii) The citizen participation plan must state when and how the jurisdiction will make this information available.

(2) The citizen participation plan must require the jurisdiction to publish the proposed AFH and the proposed consolidated plan in a manner that affords its residents, public agencies, and other interested parties a reasonable opportunity to examine its content and to submit comments. The citizen participation plan must set forth how the jurisdiction will publish the proposed AFH and the proposed consolidated plan and give reasonable opportunity to examine each document's content. The requirement for publishing may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the jurisdiction's official government website, and as well at libraries, government offices, and public places. The summary must describe the content and purpose of the AFH or the consolidated plan (as applicable), and must include a list of the locations where copies of the entire proposed document may be examined. In addition, the jurisdiction must provide a reasonable number of free copies of the plan or the AFH (as applicable) to residents and groups that request it.

(3) The citizen participation plan must provide for at least one public hearing during the development of the AFH or the consolidated plan (as applicable). See paragraph (e) of this section for public hearing requirements, generally.

(4) The citizen participation plan must provide a period, not less than 30 calendar days, to receive comments from residents of the community on the consolidated plan or the AFH (as applicable).

(5) The citizen participation plan shall require the jurisdiction to consider any comments or views of residents of the community received in writing, or orally at the public hearings, in preparing the final AFH or the final consolidated plan (as applicable). A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the final AFH or the final consolidated plan (as applicable).

(c) Consolidated plan amendments and AFH revisions. (1)(i) Criteria for amendment to consolidated plan. The citizen participation plan must specify the criteria the jurisdiction will use for determining what changes in the jurisdiction's planned or actual activities constitute a substantial amendment to the consolidated plan. (See § 91.505.) The citizen participation plan must include, among the criteria for a substantial amendment, changes in the use of CDBG funds from one eligible activity to another.

(ii) Criteria for revision to the AFH. The jurisdiction must specify the criteria the jurisdiction will use for determining when revisions to the AFH will be required. (At a minimum, the specified criteria must include the situations described in 24 CFR 5.164.)

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

amendment or any revision to the AFH before the consolidated plan substantial amendment is implemented or the revised AFH is submitted to HUD for review.

(3) The citizen participation plan shall require the jurisdiction to consider any comments or views of residents of the community received in writing, or orally at public hearings, if any, in preparing the substantial amendment of the consolidated plan or significant revision to the AFH (as applicable). A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the substantial amendment of the consolidated plan or revision to the AFH (as applicable).

* * * * *

(e) Public hearings. (1)(i) Consolidated plan. The citizen participation plan must provide for at least two public hearings per year to obtain residents' views and to respond to proposals and questions, to be conducted at a minimum of two different stages of the program year. Together, the hearings must address housing and community development needs, development of proposed activities, proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH, and a review of program performance.

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

(iii) Assessment of Fair Housing. To obtain the views of the community on AFH-related data and affirmatively furthering fair housing in the jurisdiction's housing and community

development programs, the citizen participation plan must provide that at least one public hearing is held before the proposed AFH is published for comment.

* * * * *

(f) Meetings. The citizen participation plan must provide residents of the community with reasonable and timely access to local meetings, consistent with accessibility and reasonable accommodation requirements, in accordance with section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable.

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

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

(i) Technical assistance. The citizen participation plan must provide for technical assistance to groups representative of persons of low- and moderate-income that request such assistance in commenting on the AFH and in developing proposals for funding assistance under any of the programs covered by the consolidated plan, with the level and type of assistance determined by the jurisdiction. The assistance need not include the provision of funds to the groups.

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

* * * * *

(l) Jurisdiction responsibility. The requirements for citizen participation do not restrict the responsibility or authority of the jurisdiction for the development and execution of its consolidated plan or AFH.

8. In § 91.110, paragraph (a) is revised to read as follows:

§ 91.110 Consultation; States.

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

(1) With respect to public housing or Housing Choice Voucher programs, the State shall consult with any housing agency administering public housing or the section 8 program on a Statewide basis as well as all PHAs that certify consistency with the State's consolidated plan.

State consultation with these entities may consider public housing needs, planned programs and activities, the AFH, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing. This consultation helps provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the State's description of its strategy for affirmatively furthering fair housing, and the manner in which the State will address the needs of public housing and, where applicable, the manner in which the State may provide financial or other assistance to a troubled PHA to improve its operations and remove such designation, as well as in obtaining PHA input on addressing fair housing issues in public housing and the Housing Choice Voucher programs. This consultation also helps ensure that activities with regard to affirmatively furthering fair housing, local drug elimination, neighborhood improvement programs, and resident programs and services, funded under a PHA's program and those funded under a program covered by the consolidated plan, are fully coordinated to achieve comprehensive community development goals and affirmatively further fair housing. If a PHA is required to implement remedies under a Voluntary Compliance Agreement, the State should consult with the PHA and identify actions the State may take, if any, to assist the PHA in implementing the required remedies.

(2) The State shall consult with State-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent such entities operate within the State. This consultation will help provide a better basis for the State's AFH, its certification to affirmatively further fair

housing, and other portions of the consolidated plan concerning affirmatively furthering fair housing. This consultation should occur with organizations that have the capacity to engage with data informing the AFH and be sufficiently independent and representative to provide meaningful feedback on the AFH, the consolidated plan, and their implementation. Consultation must occur at various points in the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations described in this paragraph (a)(2) in the development of both the AFH and the consolidated plan. Consultation on the consolidated plan shall specifically seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan.

* * * * *

9. In § 91.115, paragraphs (a)(1) and (2) are revised, paragraph (a)(4) is added, and paragraphs (b), (c), (f), (g), and (h) are revised to read as follows:

§ 91.115 Citizen participation plan; States.

(a) * * *

(1) When citizen participation plan must be amended. The State is required to adopt a citizen participation plan that sets forth the State's policies and procedures for citizen participation. (Where a State, before **[Insert date 30 days after date of publication in the Federal Register]**, adopted a citizen participation plan, it will need to amend the citizen participation plan to comply with provisions of this section.)

(2) Encouragement of citizen participation. (i) The citizen participation plan must provide for and encourage citizens to participate in the development of the AFH, any revision to the AFH, the consolidated plan, any substantial amendments to the consolidated plan, and the

performance report. These requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used and by residents of predominantly low- and moderate-income neighborhoods. A State must take appropriate actions to encourage the participation of all its residents, including minorities and non-English speaking persons, as provided in paragraph (a)(4) of this section, as well as persons with disabilities.

(ii) The State shall encourage the participation of Statewide and regional institutions, Continuums of Care, and other organizations (including businesses, developers, nonprofit organizations, philanthropic organizations, and community-based and faith-based organizations) that are involved with or affected by the programs or activities covered by the consolidated plan in the process of developing and implementing the AFH and the consolidated plan.

(iii) The State should also explore alternative public involvement techniques that encourage a shared vision of change for the community and the review of program performance; e.g., use of focus groups and use of the Internet.

* * * * *

(4) Language assistance for those with limited English proficiency. The citizen participation plan shall describe the State's procedures for assessing its language needs and identify any need for translation of notices and other vital documents. At a minimum, the citizen participation plan shall require the State to make reasonable efforts to provide language assistance to ensure meaningful access to participation by non-English speaking persons.

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

(1)(i) The citizen participation plan must require that at or as soon as feasible after the start of the public participation process the State will make HUD-provided data and any other supplemental information the State intends to incorporate into its AFH available to the public, public agencies, and other interested parties. The State may make the HUD-provided data available to the public by cross-referencing to the data on HUD's website.

(ii) The citizen participation plan must require that, before the State adopts an AFH or consolidated plan, the State will make available to its residents, public agencies, and other interested parties information that includes the amount of assistance the State expects to receive and the range of activities that may be undertaken, including the estimated amount that will benefit persons of low- and moderate-income and the plans to minimize displacement of persons and to assist any persons displaced. The citizen participation plan must state when and how the State will make this information available.

(2) The citizen participation plan must require the State to publish the proposed AFH and the proposed consolidated plan in a manner that affords residents, units of general local governments, public agencies, and other interested parties a reasonable opportunity to examine the document's content and to submit comments. The citizen participation plan must set forth how the State will make publicly available the proposed AFH and the proposed consolidated plan and give reasonable opportunity to examine each document's content. To ensure that the AFH, the consolidated plan, and the PHA plan are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. Such communications may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the grantee's official government website, and as well at

libraries, government offices, and public places. The summary must describe the content and purpose of the AFH or the consolidated plan (as applicable), and must include a list of the locations where copies of the entire proposed document(s) may be examined. In addition, the State must provide a reasonable number of free copies of the plan or the AFH (as applicable) to its residents and groups that request a copy of the plan or the AFH.

(3) The citizen participation plan must provide for at least one public hearing on housing and community development needs and proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH, before the proposed consolidated plan is published for comment. To obtain the public's views on AFH-related data and affirmatively furthering fair housing in the State's housing and community development programs, the citizen participation plan must provide that at least one public hearing is held before the proposed AFH is published for comment.

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

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

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

speaking residents can be reasonably expected to participate.

(4) The citizen participation plan must provide a period, of not less than 30 calendar days, to receive comments from residents and units of general local government on the consolidated plan or the AFH (as applicable).

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

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

(ii) Criteria for revision to the AFH. The State must specify the criteria it will use for determining when revision to the AFH will be appropriate. (At a minimum, the specified criteria must include the situations described in 24 CFR 5.164.)

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

substantial amendment is implemented or the revised AFH is submitted to HUD.

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

* * * * *

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

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

(h) Complaints. The citizen participation plan shall describe the State's appropriate and practicable procedures to handle complaints from its residents related to the consolidated plan, consolidated plan amendments, the AFH, any revisions to the AFH, and the performance report. At a minimum, the citizen participation plan shall require that the State must provide a timely, substantive written response to every written resident complaint, within an established period of

time (within 15 working days, where practicable, if the State is a CDBG grant recipient).

* * * * *

10. In § 91.205, paragraph (b)(2) is revised to read as follows:

§ 91.205 Housing and homeless needs assessment.

* * * * *

(b) * * *

(2) Until the jurisdiction has submitted an AFH, which includes an assessment of disproportionate housing needs in accordance with 24 CFR 5.154(d)(2)(iv), the following assessment shall continue to be included in the consolidated plan. For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole. Once the jurisdiction has submitted an AFH, however, this assessment need not be included in the consolidated plan.

* * * * *

11. In § 91.215, paragraph (a)(5) is added to read as follows:

§ 91.215 Strategic plan.

(a) * * *

(5)(i) Describe how the priorities and specific objectives of the jurisdiction under paragraph (a)(4) of this section will affirmatively further fair housing by setting forth strategies

and actions consistent with the goals and other elements identified in an AFH conducted in accordance with 24 CFR 5.150 through 5.180.

(ii) For AFH goals not addressed by these priorities and objectives, identify any additional objectives and priorities for affirmatively furthering fair housing.

* * * * *

12. In § 91.220, paragraph (k) is revised to read as follows:

§ 91.220 Action plan.

*** * * * ***

(k)(1) Affirmatively furthering fair housing. Actions it plans to take during the next year that address fair housing goals identified in the AFH.

(2) Other actions. Actions it plans to take during the next year to address obstacles to meeting underserved needs, foster and maintain affordable housing, evaluate and reduce lead-based paint hazards, reduce the number of poverty-level families, develop institutional structure, and enhance coordination between public and private housing and social service agencies (see § 91.215(a), (b), (i), (j), (k), and (l)).

*** * * * ***

13. In § 91.225, paragraph (a)(1) is revised to read as follows:

§ 91.225 Certifications.

(a) * * *

(1) Affirmatively furthering fair housing. Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the

requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

* * * * *

14. Section 91.230 is revised to read as follows:

§ 91.230 Monitoring.

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

15. In § 91.235, paragraphs (c)(1) and (4) are revised to read as follows:

§ 91.235 Special case; abbreviated consolidated plan.

* * * * *

(c) What is an abbreviated plan? — (1) Assessment of needs, resources, and planned activities. An abbreviated plan must contain sufficient information about needs, resources, and planned activities to address the needs to cover the type and amount of assistance anticipated to be funded by HUD. The plan must describe how the jurisdiction will affirmatively further fair housing by addressing issues identified in an AFH conducted in accordance with 24 CFR 5.150 through 5.180.

* * * * *

(4) Submissions, certifications, amendments, and performance reports. An Insular Area

grantee that submits an abbreviated consolidated plan under this section must comply with the submission, certification, amendment, and performance report requirements of 24 CFR 570.440. This includes certification that the grantee will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

* * * * *

16. In § 91.305, paragraph (b)(2) is revised to read as follows:

§ 91.305 Housing and homeless needs assessment.

* * * * *

(b) * * *

(2) Until the jurisdiction has submitted an AFH, which includes an assessment of disproportionate housing needs in accordance with 24 CFR 5.154(d)(2)(iv), the following assessment shall continue to be included in the consolidated plan. For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole. Once the jurisdiction has submitted an AFH, however, this assessment need not be included in the consolidated plan.

* * * * *

17. In § 91.315, paragraph (a)(5) is added to read as follows:

§ 91.315 Strategic plan.

(a) * * *

(5)(i) Describe how the priorities and specific objectives of the State under § 91.315(a)(4) will affirmatively further fair housing by setting forth strategies and actions consistent with the goals and other elements identified in an AFH conducted in accordance with 24 CFR 5.150 through 5.180.

(ii) For AFH goals not addressed by these priorities and objectives, identify any additional objectives and priorities for affirmatively furthering fair housing.

* * * * *

18. In § 91.320, paragraph (j) is revised to read as follows:

§ 91.320 Action plan.

*** * * * ***

(j)(1) Affirmatively furthering fair housing. Actions it plans to take during the next year that address fair housing goals identified in the AFH.

(2) Other actions. Actions it plans to take during the next year to implement its strategic plan and address obstacles to meeting underserved needs, foster and maintain affordable housing (including allocation plans and policies governing the use of Low-Income Housing Credits under 26 U.S.C.42, which are more commonly referred to as Low-Income Housing Tax Credits), evaluate and reduce lead-based paint hazards, reduce the number of poverty-level families, develop institutional structure, enhance coordination between public and private housing and

social service agencies, address the needs of public housing (including providing financial or other assistance to troubled PHAs), and encourage public housing residents to become more involved in management and participate in homeownership.

* * * * *

19. In § 91.325, paragraph (a)(1) is revised to read as follows:

§ 91.325 Certifications.

(a) General—(1) Affirmatively furthering fair housing. Each State is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

* * * * *

20. Section 91.415 is revised to read as follows:

§ 91.415 Strategic plan.

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

plan will address the needs identified (in accordance with § 91.405), setting forth strategies and actions consistent with the goals and other elements identified in an AFH conducted in accordance with 24 CFR 5.150 through 5.180, describing the reasons for the consortium's allocation priorities, and identifying any obstacles there are to addressing underserved needs.

21. In § 91.420, paragraph (b) is revised to read as follows:

§ 91.420 Action plan.

* * * * *

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

*** * * * ***

22. In § 91.425, paragraph (a)(1)(i) is revised to read as follows:

§ 91.425 Certifications.

(a) Consortium certifications--(1) General--(i) Affirmatively furthering fair housing. Each consortium must certify that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

* * * * *

23. In § 91.505, add paragraph (d) to read as follows:

§ 91.505 Amendments to the consolidated plan.

* * * * *

(d) The jurisdiction must ensure that amendments to the plan are consistent with its certification to affirmatively further fair housing and the analysis and strategies of the AFH.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

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

Authority: 42 U.S.C. 3535(d) and 12701-12839.

25. Revise 92.104 to read as follows:

§ 92.104 Submission of a consolidated plan and Assessment of Fair Housing.

A jurisdiction that has not submitted a consolidated plan to HUD must submit to HUD, not later than 90 calendar days after providing notification under § 92.103, a consolidated plan in accordance with 24 CFR part 91 and an Assessment of Fair Housing (AFH) in accordance with 24 CFR 5.150 through 5.180.

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

§ 92.508 Recordkeeping.

(a) * * *

(7) * * *

(i) * * *

(C) Documentation of the actions the participating jurisdiction has taken to affirmatively further fair housing, including documentation related to the participating jurisdiction's

Assessment of Fair Housing as described in 24 CFR 5.168.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

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

Authority: 42 U.S.C. 3535(d) and 5300-5320.

28. In § 570.3, revise the introductory text to read as follows:

§ 570.3 Definitions.

The terms Affirmatively Furthering Fair Housing, Assessment of Fair Housing or AFH, HUD, and Secretary are defined in 24 CFR part 5. All of the following definitions in this section that rely on data from the United States Bureau of the Census shall rely upon the data available from the latest decennial census or the American Community Survey.

*** * * * ***

29. In § 570.205, paragraph (a)(4)(vii) is revised to read as follows:

§ 570.205 Eligible planning, urban environmental design and policy-planning-management-capacity building activities.

(a) * * *

(4) * * *

(vii) Assessment of Fair Housing.

* * * * *

30. In § 570.441, paragraphs (b) introductory text, (b)(1) introductory text, (b)(2), (b)(3), (b)(4), (c), (d), and (e) are revised to read as follows:

§ 570.441 Citizen participation—insular areas.

* * * * *

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

(1) Giving citizens timely notice of local meetings and reasonable and timely access to local meetings consistent with accessibility and reasonable accommodation requirements in accordance with section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8, and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable, as well as information and records relating to the grantee's proposed and actual use of CDBG funds including, but not limited to:

* * * * *

(2) Providing technical assistance to groups that are representative of persons of low- and moderate-income that request assistance in commenting on the AFH and developing proposals. The level and type of assistance to be provided is at the discretion of the jurisdiction. The assistance need not include the provision of funds to the groups;

(3) Holding a minimum of two public hearings for the purpose of obtaining residents' views and formulating or responding to proposals and questions. Each public hearing must be conducted at a different stage of the CDBG program year. Together, the hearings must address affirmatively furthering fair housing, community development and housing needs, development of proposed activities, proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH, and a review of program performance. There must be reasonable

notice of the hearings, and the hearings must be held at times and accessible locations convenient to potential or actual beneficiaries, with reasonable accommodations, including materials in accessible formats, for persons with disabilities. The jurisdiction must specify in its citizen participation plan how it will meet the requirement for hearings at times and accessible locations convenient to potential or actual beneficiaries;

(4) Assessing its language needs, identifying any need for translation of notices and other vital documents and, in the case of public hearings, meeting the needs of non-English speaking residents where a significant number of non-English speaking residents can reasonably be expected to participate. At a minimum, the citizen participation plan shall require the jurisdiction to make reasonable efforts to provide language assistance to ensure meaningful access to participation by non-English speaking persons;

* * * * *

(c) Publication of proposed AFH and proposed statement. (1) The insular area jurisdiction shall publish a proposed AFH and a proposed statement consisting of the proposed community development activities and community development objectives (as applicable) in order to afford affected residents an opportunity to:

(i) Examine the document's contents to determine the degree to which they may be affected;

(ii) Submit comments on the proposed document; and

(iii) Submit comments on the performance of the jurisdiction.

(2) The requirement for publishing in paragraph (c)(1) of this section may be met by publishing a summary of the proposed document in one or more newspapers of general circulation and by making copies of the proposed document available on the Internet, on the

grantee's official government website, and as well at libraries, government offices, and public places. The summary must describe the contents and purpose of the proposed document and must include a list of the locations where copies of the entire proposed document may be examined.

(d) Preparation of the AFH and final statement. An insular area jurisdiction must prepare an AFH and a final statement. In the preparation of the AFH and final statement, the jurisdiction shall consider comments and views received relating to the proposed document and may, if appropriate, modify the final document. The final AFH and final statement shall be made available to the public. The final statement shall include the community development objectives, projected use of funds, and the community development activities.

(e) Program amendments. To assure citizen participation on program amendments to final statements and any revision to the AFH, the insular area grantee shall:

(1) Furnish its residents with information concerning the amendment to the consolidated plan or any revision to the AFH (as applicable);

(2) Hold one or more public hearings to obtain the views of residents on the proposed amendment to the consolidated plan or revision to the AFH;

(3) Develop and publish the proposed amendment to the consolidated plan or any revision to the AFH in such a manner as to afford affected residents an opportunity to examine the contents, and to submit comments on the proposed amendment to the consolidated plan or revision to the AFH, as applicable;

(4) Consider any comments and views expressed by residents on the proposed amendment to the consolidated plan or revision to the AFH, and, if the grantee finds it appropriate, make modifications accordingly; and

(5) Make the final amendment to the community development program or revision to the AFH available to the public before its submission to HUD.

* * * * *

31. In § 570.486, paragraphs (a)(2), (4), and (5) are revised to read as follows:

§ 570.486 Local government requirements.

(a) * * *

(2) Ensure that residents will be given reasonable and timely access to local meetings, consistent with accessibility and reasonable accommodation requirements in accordance with section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8, and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable, as well as information and records relating to the unit of local government's proposed and actual use of CDBG funds;

* * * * *

(4) Provide technical assistance to groups that are representative of persons of low- and moderate-income that request assistance in developing proposals (including proposed strategies and actions to affirmatively further fair housing) in accordance with the procedures developed by the State. Such assistance need not include providing funds to such groups;

(5) Provide for a minimum of two public hearings, each at a different stage of the program, for the purpose of obtaining residents' views and responding to proposals and questions. Together the hearings must cover community development and housing needs (including affirmatively furthering fair housing), development of proposed activities, and a review of program performance. The public hearings to cover community development and

housing needs must be held before submission of an application to the State. There must be reasonable notice of the hearings and they must be held at times and accessible locations convenient to potential or actual beneficiaries, with accommodations for persons with disabilities. Public hearings shall be conducted in a manner to meet the needs of non-English speaking residents where a significant number of non-English speaking residents can reasonably be expected to participate;

* * * * *

32. In § 570.487, paragraph (b) is revised to read as follows:

§ 570.487 Other applicable laws and related program requirements.

* * * * *

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

(1) Taking meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 CFR5.150 through 5.180;

(2) Taking no action that is materially inconsistent with its obligation to affirmatively further fair housing; and

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

* * * * *

33. In § 570.490, paragraphs (a)(1) and (b) are revised to read as follows:

§ 570.490 Recordkeeping requirements.

(a) State records. (1) The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG funds under § 570.493. The content of records maintained by the State shall be as jointly agreed upon by HUD and the States and sufficient to enable HUD to make the determinations described at § 570.493. For fair housing and equal opportunity purposes, and as applicable, such records shall include documentation related to the State's AFH, as described in 24 CFR part 5, subpart A (§ 5.168). The records shall also permit audit of the States in accordance with 24 CFR part 85.

* * * * *

(b) Unit of general local government's record. The State shall establish recordkeeping requirements for units of general local government receiving CDBG funds that are sufficient to facilitate reviews and audits of such units of general local government under §§ 570.492 and 570.493. For fair housing and equal opportunity purposes, and as applicable, such records shall include documentation related to the State's AFH as described in 24 CFR part 5, subpart A (§ 5.168).

* * * * *

34. In § 570.506, paragraph (g)(1) is revised to read as follows:

§ 570.506 Records to be maintained.

* * * * *

(g) * * *

(1) Documentation related to the recipient's AFH, as described in 24 CFR part 5, subpart A (§ 5.168).

* * * * *

35. In § 570.601, paragraph (a)(2) is revised to read as follows:

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

(a) * * *

(2) Public Law 90–284, which is the Fair Housing Act (42 U.S.C. 3601–3620). In accordance with the Fair Housing Act, the Secretary requires that grantees administer all programs and activities related to housing and urban development in a manner to affirmatively further the policies of the Fair Housing Act. Furthermore, in accordance with section 104(b)(2) of the Act, for each community receiving a grant under subpart D of this part, the certification that the grantee will affirmatively further fair housing shall specifically require the grantee to take meaningful actions to further the goals identified in the grantee's AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180 and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

* * * * *

36. In § 570.904, paragraph (c) is revised to read as follows:

§ 570.904 Equal opportunity and fair housing review criteria.

* * * * *

(c) Review for fair housing. (1) General. See the requirements in the Fair Housing Act (42 U.S.C. 3601–20), as well as § 570.601(a).

(2) Affirmatively furthering fair housing. HUD will review a recipient's performance to determine if it has administered all programs and activities related to housing and urban development in accordance with § 570.601(a)(2), which sets forth the grantee's responsibility to affirmatively further fair housing.

* * * * *

PART 574— HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

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

Authority: 42 U.S.C. 3535(d) and 12901-12912.

38. Section 574.530 is revised to read as follows:

§ 574.530 Recordkeeping.

Each grantee must ensure that records are maintained for a 4-year period to document compliance with the provisions of this part. Grantees must maintain the following:

(a) Current and accurate data on the race and ethnicity of program participants.

(b) Documentation related to the formula grantee's Assessment of Fair Housing, as described in 24 CFR 5.168.

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

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

Authority: 42 U.S.C. 11371 et seq., 42 U.S.C. 3535(d).

40. In § 576.500, revise paragraph (s)(1) to read as follows:

§ 576.500 Recordkeeping and reporting requirements.

* * * * *

(s) * * *

(1) Records demonstrating compliance with the nondiscrimination and equal opportunity requirements under §576.407(a) and the affirmative outreach requirements in § 576.407(b), including:

(i) Data concerning race, ethnicity, disability status, sex, and family characteristics of persons and households who are applicants for, or program participants in, any program or activity funded in whole or in part with ESG funds; and

(ii) Documentation required under 24 CFR 5.168 in regard to the recipient's Assessment of Fair Housing and the certification that the recipient will affirmatively further fair housing.

* * * * *

PART 903—PUBLIC HOUSING AGENCY PLANS

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

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

42. The heading of subpart A is revised to read as follows:

Subpart A—Deconcentration of Poverty

43. The heading of subpart B is revised to read as follows:

Subpart B—PHA Plans and Fair Housing Requirements

44. Section 903.1 is revised to read as follows:

§ 903.1 What is the purpose of this subpart?

The purpose of this subpart is to specify the process which a Public Housing Agency, as part of its annual planning process and development of an admissions policy, must follow in order to develop and apply a policy that provides for deconcentration of poverty and income

mixing in certain public housing developments.

45. Section 903.2 is amended by:

a. Revising the section heading;

b. Removing paragraph (d);

c. Redesignating paragraph (e) as paragraph (d); and

d. Revising newly redesignated paragraph (d).

The revisions read as follows:

§ 903.2 With respect to admissions, what must a PHA do to deconcentrate poverty in its developments?

* * * * *

(d) Relationship between poverty deconcentration and fair housing. The requirements for poverty deconcentration in paragraph (c) of this section and for fair housing in 24 CFR 903.15(d) arise under separate statutory authorities.

46. In § 903.7, paragraphs (a) and (o) are revised to read as follows:

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

* * * * *

(a) A statement of housing needs. (1) This statement must address the housing needs of the low-income and very low-income families who reside in the jurisdiction served by the PHA, and other families who are on the public housing and Section 8 tenant-based assistance waiting lists, including:

(i) Families with incomes below 30 percent of area median (extremely low-income

families);

(ii) Elderly families;

(iii) Until the PHA has submitted an Assessment of Fair Housing (AFH), which includes an assessment of disproportionate housing needs in accordance with 24 CFR 5.154(d)(2)(iv), households with individuals with disabilities and households of various races and ethnic groups residing in the jurisdiction or on the waiting list. Once the PHA has submitted an AFH, however, such households need not be addressed in this statement.

(2) A PHA must make reasonable efforts to identify the housing needs of each of the groups listed in paragraph (a)(1) of this section based on information provided by the applicable consolidated plan, information provided by HUD, and other generally available data.

(i) The identification of housing needs must address issues of affordability, supply, quality, accessibility, size of units, and location.

(ii) The statement of housing needs also must describe the ways in which the PHA intends, to the maximum extent practicable, to address those needs and the PHA's reasons for choosing its strategy.

* * * * *

(o) Civil rights certification. (1) The PHA must certify that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), the Fair Housing Act (42 U.S.C. 3601–19), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and other applicable Federal civil right laws, and that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, that it will take no action that

is materially inconsistent with its obligation to affirmatively further fair housing, and that it will address fair housing issues and contributing factors in its programs, in accordance with paragraph (o)(3) of this section.

(2) The certification is applicable to both the 5-Year Plan and the Annual Plan, including any plan incorporated therein.

(3) A PHA shall be considered in compliance with the certification requirement to affirmatively further fair housing if the PHA fulfills the requirements of §§ 903.7(o)(1) and 903.15(d) and:

(i) Examines its programs or proposed programs;

(ii) Identifies any fair housing issues and contributing factors within those programs, in accordance with 24 CFR 5.154;

(iii) Specifies actions and strategies designed to address contributing factors, related fair housing issues, and goals in the applicable Assessment of Fair Housing consistent with 24 CFR 5.154, in a reasonable manner in view of the resources available;

(iv) Works with jurisdictions to implement any of the jurisdiction's initiatives to affirmatively further fair housing that require the PHA's involvement;

(v) Operates programs in a manner consistent with any applicable consolidated plan under 24 CFR part 91, and with any order or agreement, to comply with the authorities specified in paragraph (o)(1) of this section;

(vi) Complies with any contribution or consultation requirement with respect to any applicable AFH, in accordance with 24 CFR 5.150 through 5.180;

(vii) Maintains records reflecting these analyses, actions, and the results of these actions; and

(viii) Takes steps acceptable to HUD to remedy known fair housing or civil rights violations.

* * * * *

47. Section 903.15 is revised to read as follows:

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

(a) The preparation of an Assessment of Fair Housing (AFH) is required once every 5 years, in accordance with 24 CFR 5.150 through 5.180. PHAs have three options in meeting their AFH requirements. PHAs must notify HUD of the option they choose. The options are:

(1) Option 1: Assessment of Fair Housing with Units of General Local Government or State Governmental Agencies. (i) A PHA may work with a unit of general local government or State governmental agency in the preparation of the AFH.

(A) A PHA must choose the unit of general local government or State governmental agency in which the PHA is located, unless the PHA's service area is within two or more jurisdictions.

(B) If the PHA serves residents of two or more jurisdictions, the PHA may choose the jurisdiction that most closely aligns to its planning activities under this part and 24 CFR part 905, unless the PHA has preexisting obligations prescribed in a binding agreement with HUD or the courts, such as a Recovery Agreement, Voluntary Compliance Agreement, or Consent Decree.

(C) If a PHA has a preexisting obligation prescribed in a binding agreement with HUD or the courts, the PHA must work with the general unit of local government named in the Agreement or Decree, when preparing the AFH.

(ii) A PHA working with a unit of general local government or State governmental agency in the preparation of the AFH will have fulfilled the requirements of AFH submission when the general unit of local government or State governmental agency submits an AFH.

(iii) If the unit of general local government or state governmental agency's AFH is accepted, all PHAs working with the unit of general local government or State governmental agency in the preparation of the AFH will be covered by the applicable goals contained in the AFH.

(iv) If a PHA joins with a unit of general local government or State governmental agency in the preparation of an AFH, the PHA must ensure that its PHA Plan is consistent with the general unit of local government's or State governmental agency's applicable consolidated plan and its AFH. (See also 24 CFR 5.158 for coordination when preparing an AFH jointly with a jurisdiction.)

(v) PHAs are encouraged to enter into Memorandums of Understanding (MOU) with units of general local government, State governmental agencies, and other PHAs to clearly define the functions, level of member participation, method of dispute resolution, and decisionmaking process of the program participants in the creation of the AFH.

(2) Option 2: Assessment of Fair Housing with Public Housing Agencies. (i) A PHA may jointly participate with one or more PHAs in the planning, participation, and preparation of the AFH consistent with the requirements of 24 CFR 5.150 through 5.180, and with the geographic scope and proposed actions scaled to the PHAs' operations and region, as provided in § 5.154.

(A) PHAs preparing a joint submission of an AFH are encouraged to prepare MOUs or other such cooperative agreements, which clearly define the functions, level of member participation, method of dispute resolution, and decisionmaking process for the jointly

participating PHAs. The MOU or cooperative agreement should also clearly indicate a lead agency that will submit on behalf of the joint participants.

(B) An accepted AFH submitted on behalf of jointly participating PHAs will fulfill the submission requirements for all entities.

(C) If jointly participating PHAs' AFH is accepted, all PHAs participating in the creation of the AFH will be covered by the applicable goals contained in the AFH.

(ii) If a PHA joins with other PHAs in the submission of an AFH, the PHA must ensure that its 5-year PHA Plan is consistent with the AFH and its obligation to affirmatively further fair housing.

(iii) A PHA that is jointly participating with other PHAs in the creation of an AFH must certify consistency with the consolidated plan of the unit of general local government or State governmental agency in which the PHA is located, unless the PHA's service area is within two or more jurisdictions. If a PHA's service area is within two or more jurisdictions then -

(A) The PHA may choose to certify consistency with the jurisdiction that most closely aligns to its planning activities under this part and 24 CFR part 905, unless the PHA has pre-existing obligations prescribed in a binding agreement with HUD or the courts, such as a Recovery Agreement, Voluntary Compliance Agreement, or Consent Decree.

(B) If a PHA has a preexisting obligation prescribed in a binding agreement with HUD or the courts, the PHA must certify consistency with the general unit of local government named in the Voluntary Compliance Agreement or Consent Decree, when preparing the AFH.

(iv) In the event that HUD accepts an AFH under this option, and such AFH conflicts with the accepted AFH conducted by the unit of general local government or State governmental agency, a PHA's certification of consistency with the consolidated plan shall be accepted as a

certification of consistency with the consolidated plan for all actions that do not directly conflict with the PHA's AFH that has been accepted by HUD.

(3) Option 3: Independent PHA Assessment of Fair Housing. (i) A PHA may conduct its own AFH with geographic scope and proposed actions scaled to the PHA's operations and region, in accordance with 24 CFR 5.154(d). An accepted AFH submitted by a PHA performing an independent AFH will fulfill the submission requirements for that PHA and the PHA shall be covered by the goals contained in the AFH.

(ii) A PHA that is performing its own AFH must certify consistency with the consolidated plan of the unit of general local government or State governmental agency in which the PHA is located, unless the PHA's service area is within two or more jurisdictions. If a PHA's service area is in two or more jurisdictions then:

(A) The PHA may choose to certify consistency with the jurisdiction that most closely aligns to its planning activities under this part and 24 CFR part 905, unless the PHA has pre-existing obligations prescribed in a binding agreement with HUD or the courts, such as a Recovery Agreement, Voluntary Compliance Agreement, or Consent Decree.

(B) If a PHA has a preexisting obligation prescribed in a binding agreement with HUD or the courts, the PHA must certify consistency with the general unit of local government named in the Voluntary Compliance Agreement or Consent Decree, when preparing the AFH.

(iii) In the event that HUD accepts an AFH under this option, and such AFH conflicts with the AFH conducted by the unit of general local government or State governmental agency, the PHA's certification of consistency with the consolidated plan shall be accepted as a certification of consistency with the consolidated plan for all actions that do not directly conflict with the PHA's AFH that has been accepted by HUD.

(b) PHAs may but are not required to request a change in their fiscal years to better coordinate their planning cycle with the planning performed under each of the options listed in paragraph (a) of this section.

(c) If a material change in circumstances occurs in the jurisdiction of a PHA that requires a revision to the AFH, as specified in 24 CFR 5.164, the PHA will have up to 12 months to incorporate any goals from the revised AFH into its 5-Year PHA Plan, in accordance with the provisions of 24 CFR 903.21.

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

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

(2) Affirmatively Furthering Fair Housing. A PHA's policies should be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability in conformity with any applicable Assessment of Fair Housing as defined at 24 CFR 5.150 through 5.180 and the PHA's assessment of its fair housing needs. Any affirmative steps

or incentives a PHA plans to take must be stated in the admission policy.

(i) HUD regulations provide that PHAs must take steps to affirmatively further fair housing. PHA policies should include affirmative steps to overcome the effects of discrimination and the effects of conditions that resulted in limiting participation of persons because of their race, national origin, disability, or other protected class.

(ii) Such affirmative steps may include, but are not limited to, marketing efforts, use of nondiscriminatory tenant selection and assignment policies that lead to desegregation, additional applicant consultation and information, provision of additional supportive services and amenities to a development (such as supportive services that enable an individual with a disability to transfer from an institutional setting into the community), and engagement in ongoing coordination with state and local disability agencies to provide additional community-based housing opportunities for individuals with disabilities and to connect such individuals with supportive services to enable an individual with a disability to transfer from an institutional setting into the community.

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

(A) Fails to meet the affirmatively furthering fair housing requirements at 24 CFR 5.150 through 5.180, including failure to take meaningful actions to further the goals identified in the AFH; or

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

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

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

48. In § 903.23, paragraph (f) is added to read as follows:

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

* * * * *

(f) Recordkeeping. PHAs must maintain a copy of the Assessment of Fair Housing as described in 24 CFR part 5, subpart A (§§ 5.150 through 5.180) and records reflecting actions to affirmatively further fair housing, as described in § 903.7(o).

Dated: _June 30, 2015.

_____
Julián Castro,
Secretary.

[FR Doc. 2015-17032 Filed: 7/15/2015 08:45 am; Publication Date: 7/16/2015]