

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

**24 CFR Parts 5, 200, 203, 236, 400, 570,
574, 882, 891, and 982**

[Docket No. FR 5359–F–02]

RIN 2501–AD49

**Equal Access to Housing in HUD
Programs Regardless of Sexual
Orientation or Gender Identity**

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: Through this final rule, HUD implements policy to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. This rule follows a January 24, 2011, proposed rule, which noted evidence suggesting that lesbian, gay, bisexual, and transgender (LGBT) individuals and families are being arbitrarily excluded from housing opportunities in the private sector. Such information was of special concern to HUD, which, as the Nation's housing agency, has the unique charge to promote the federal goal of providing decent housing and a suitable living environment for all. It is important not only that HUD ensure that its own programs do not involve discrimination against any individual or family otherwise eligible for HUD-assisted or -insured housing, but that its policies and programs serve as models for equal housing opportunity.

DATES: *Effective Date:* March 5, 2012.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

**I. Background—the January 24, 2011,
Proposed Rule**

HUD published a proposed rule on January 24, 2011 (76 FR 4194), which advised of evidence suggesting that LGBT individuals and families do not have equal access to housing. Such information concerned HUD because HUD is charged with promoting the federal goal of providing decent housing and a suitable living environment for

all.¹ In the January 24, 2011, proposed rule, HUD noted that many state and local governments share the concern over equal housing opportunity for LGBT individuals and families. Twenty states, the District of Columbia, and over 200 localities have enacted laws prohibiting discrimination in housing on the basis of sexual orientation or gender identity.²

As the Nation's housing agency, it is important not only that HUD ensure that its own programs do not involve arbitrary discrimination against any individual or family otherwise eligible for HUD-assisted or -insured housing, but that its policies and programs serve as models for equal housing opportunity. In July 2010, HUD issued guidance to assist LGBT individuals and families facing housing discrimination. (See http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination.) In addition to the guidance, HUD initiated this rulemaking in January 2011 in an effort to ensure that HUD's rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation, gender identity, or marital status.

HUD's January 24, 2011, rule proposed to amend 24 CFR 5.100 to include definitions of "sexual orientation" and "gender identity" among the definitions generally applicable to HUD programs. Under the proposed rule, 24 CFR 5.100 would define "sexual orientation" as "homosexuality, heterosexuality, or bisexuality," a definition that the Office of Personnel Management (OPM) uses in the context of the federal workforce in its publication "Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights." (See www.opm.gov/er/address.pdf at page 4.) The January 24, 2011, rule proposed to define "gender identity" as "actual or perceived gender-related characteristics," consistent with the definition of "gender identity" in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Public Law 111–84, Division E, Section 4707(c)(4) (18 U.S.C. 249(c)(4)).

To promote equal access to HUD's housing programs without regard to

sexual orientation or gender identity, in the January 2011 rule, HUD proposed to prohibit inquiries regarding sexual orientation or gender identity. As proposed, the prohibition precludes owners and operators of HUD-assisted housing or housing whose financing is insured by HUD from inquiring about the sexual orientation or gender identity of an applicant for, or occupant of, the dwelling, whether renter- or owner-occupied. In the January 2011 rule, HUD proposed to institute this policy in its rental assistance and homeownership programs, which include HUD's Federal Housing Administration (FHA) mortgage insurance programs, community development programs, and public and assisted housing programs.³ While the January 2011 rule proposed to prohibit inquiries regarding sexual orientation or gender identity, nothing in the rule proposed to prohibit any individual from voluntarily self-identifying his or her own sexual orientation or gender identity. Additionally, the January 2011 rule did not propose to prohibit otherwise lawful inquiries of an applicant or occupant's sex where the housing involves the sharing of sleeping areas or bathrooms. This prohibition of inquiries regarding sexual orientation or gender identity was proposed to be provided in a new paragraph (a)(2) to 24 CFR 5.105.

Additionally, the January 24, 2011, proposed rule clarified in the regulations governing HUD's housing programs that all otherwise eligible families, regardless of sexual orientation, gender identity, or marital status have the opportunity to participate in HUD programs. As noted in the January 2011 proposed rule, the majority of HUD's rental housing and homeownership programs already interpret the term "family" broadly. The proposed rule clarified that families, who are otherwise eligible for HUD programs, may not be excluded because one or more members of the family may be LGBT or perceived to be LGBT.

Finally, the rule proposed to revise 24 CFR 203.33(b), by adding sexual orientation and gender identity to the characteristics that an FHA lender may not take into consideration in determining the adequacy of a mortgagor's income. Marital status is already a prohibited consideration under the current version of 24 CFR 203.33(b).

³ Institution of this policy in HUD's Native American programs will be undertaken by separate rulemaking.

¹ This goal is rooted in section 2 of the Housing Act of 1949, 42 U.S.C. 1441.

² See, e.g., *Laws Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, Institute of Real Estate Management (IREM) Legislative Staff, July 2007, which is available at www.irem.org/pdfs/publicpolicy/Anti-discrimination.pdf; see also http://www.hrc.org/files/assets/resources/Housing_Laws_and_Policies.pdf.

II. Changes Made at the Final Rule Stage

In response to public comment and upon further consideration by HUD of the issues presented in this rulemaking, HUD makes the following changes at this final rule stage:

- New § 5.105(a)(2) is revised to make explicit that eligibility determinations for HUD-assisted or -insured housing must be made without regard to actual or perceived sexual orientation, gender identity, or marital status. Also, new § 5.105(a)(2) is revised by dividing this paragraph into two sections. Section 5.105(a)(2)(i) will affirmatively state that housing assisted or insured by HUD must be made available without regard to actual or perceived sexual orientation, gender identity, or marital status. New § 5.105(a)(2)(ii) includes the prohibition of inquiries regarding sexual orientation or gender identity for the purpose of determining eligibility or otherwise making housing available and further allows inquiries related to an applicant or occupant's sex for the limited purpose of determining placement in temporary, emergency shelters with shared bedrooms or bathrooms, or for determining the number of bedrooms to which a household may be entitled.

- The term "family" in § 5.403 is slightly reorganized in the opening clause to read as follows: "Family includes but is not limited to the following, regardless of actual or perceived sexual orientation, gender identity, or marital status * * *." This reorganization makes explicit that perceived, as well as actual, sexual orientation, gender identity, and marital status cannot be factors for determining eligibility for HUD-assisted housing or FHA-insured housing.

- The term "family" in 24 CFR 574.3 of the program regulations for the Housing Opportunities for Persons With AIDS (HOPWA) program is slightly revised to reinsert a clause in the definition of "family" in the codified HOPWA regulations that was inadvertently omitted at the proposed rule stage. As stated below in the discussion of public comments, the insertion of this clause serves to combine the original meaning of "family" as provided in the HOPWA regulations with the meaning given the term "family" in 24 CFR 5.403, as revised by this rule.

- The regulations for HUD's Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities programs are revised to provide a cross-reference to

"family" in 24 CFR 5.403, as revised by this rule.

There is one issue of significant comment for which HUD is not making a change at the final rule stage. This pertains to development and implementation of a national system that reports the sexual orientation and gender identity of beneficiaries of HUD housing programs, to allow HUD to better understand the extent to which HUD programs are serving LGBT persons. HUD is not making the requested change to the rule because HUD needs more time to consider the feasibility of such a system and the issues it raises; foremost among them being maintaining the privacy rights of the individual who would be the subject of such reporting. However, in response to comments highlighting the beneficial uses of data on LGBT individuals seeking assistance under HUD programs, and in deference to other government agencies that do collect such data, HUD is clarifying that the prohibition on inquiries is not intended to prohibit mechanisms that allow for voluntary and anonymous reporting of sexual orientation or gender identity solely for compliance with data collection requirements of state or local governments or other federal assistance programs.

With respect to permissible inquiries as to sex where the accommodations provided to an individual involve shared sleeping or bathing areas, HUD clarifies that the lawful inquiries as to sex would be permitted primarily for emergency shelters and like facilities. This temporary housing, unlike other HUD subsidized housing and unlike housing insured by the FHA, involves no application process to obtain housing, but rather involves immediate provision of temporary, short-term shelter for homeless individuals.

III. Public Comments Submitted on Proposed Rule and HUD's Responses

A. Overview of Public Comments

The public comment period for the proposed rule closed on March 25, 2011. At the close of the public comment period, approximately 376 public comments were received from a variety of commenters, including individuals, advocacy groups, legal aid offices, tenant and fair housing organizations, realtors and their representatives, law school clinics, public housing authorities, local government officials, and members of Congress. The overwhelming majority of comments were supportive of the rule. Some commenters, while supporting the rule, suggested modifications, and a

minority of the commenters opposed the rule.

Commenters supporting the rule stated that it was long overdue and noted that HUD, as the Nation's housing agency, should lead the efforts to prevent discrimination against LGBT persons in housing. The commenters supportive of the rule all pointed to the importance of equal housing opportunity for LGBT persons.

Commenters opposing the rule stated that of the many important topics that should be addressed in the housing area, this is not one of them. One commenter viewed the rule as excessive government regulation. Other commenters opined that the rule will cause owners of multifamily housing to decline to participate in the Housing Choice Voucher program. A minority of commenters opposing the rule expressed concern that HUD's proposal will create an unsuitable housing environment.

In proceeding with this final rule, HUD expresses its disagreement with the commenters opposing the rule. HUD believes that the concerns they have voiced will not be realized in practice.

B. Significant Public Comments and HUD's Responses

This section presents significant issues raised by commenters and HUD's responses to these comments.

Terminology Changes

Several commenters recommended some changes to the terms proposed to be included in 24 CFR part 5, including for "family," "gender identity," and "sexual orientation." Commenters also proposed adding definitions of "child," "marital status," and "sex."

Family. For the convenience of the reader and the discussion to follow, the term "family" proposed to be included in 24 CFR 5.403 is restated below:

Family includes, but is not limited to, regardless of marital status, actual or perceived sexual orientation, or gender identity, the following:

- (1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person, or any other single person; or
- (2) A group of persons residing together, and such group includes, but is not limited to:

- (a) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family);

- (b) An elderly family;
- (c) A near-elderly family;
- (d) A disabled family;
- (e) A displaced family; and

(f) The remaining member of a tenant family.

Comment: One commenter proposed expanding the definition of “family” to include any person or persons, regardless of their sex or relationship to one another, with the only restriction being to allow at least one, but no more than two, persons per bedroom.

Response: HUD believes the term “family,” as presented in 24 CFR 5.403, addresses the concern of the commenter. With respect to bedroom size, the existing occupancy requirements of HUD’s public and assisted housing programs already address the number of persons who may occupy one bedroom.

Comment: Other commenters suggested that it is important that the term “family” in HUD’s rule prevent from exclusion family members who may identify as LGBT individuals or who have LGBT relationships, or who may be perceived as such.

Response: HUD submits that the term “family,” as provided in 24 CFR 5.403, and as proposed to be slightly revised by this final rule, prevents such arbitrary exclusion.

Comment: Commenters suggested that the rule include in 24 CFR 982.201(c), a Public and Indian Housing program regulation permitting public housing agencies (PHAs) to determine who qualifies as a family, an explicit statement that PHAs do not have discretion to define family groupings in a way that excludes LGBT persons, and that a PHA’s discretion cannot conflict with 24 CFR 5.403. To accomplish this, a commenter recommended adding to 24 CFR 982.201(c) the phrase “regardless of marital status, sexual orientation, or gender identity.”

Response: HUD maintains that amendment of 24 CFR 982.201(c) is not required. The rule already proposes an amendment to 24 CFR 982.4 requiring that PHA determinations regarding family be consistent with 24 CFR 5.403. PHAs submit administrative plans to HUD. These administrative plans must include family definitions that are at least as inclusive as HUD’s definition. This requirement has generally proven an effective means of ensuring compliance with HUD eligibility requirements for beneficiaries of its public housing programs. If this approach is not effective following implementation of this rule, HUD will revisit the issue.

Comment: A commenter requested that HUD ensure that the term “family” as presented in 24 CFR 5.403 not have an adverse impact on Housing Opportunities for Persons With AIDS (HOPWA) recipients. The commenter

stated that HOPWA regulations are intended to ensure that AIDS patients can structure their living situations broadly, according to their health needs.

Response: At this final rule stage, HUD makes a slight change to the definition of the term “family” in 24 CFR 574.3, the definition section of the HOPWA program regulations, to reinsert in the definition of “family” the clause “who are determined to be important to their care or well-being.” This clause was inadvertently omitted in the proposed rule. Through insertion of this clause, the final rule combines the definition of family in the proposed 24 CFR 5.403 with the other elements of the original term “family” in 24 CFR 574.3.

Comment: Commenters stated that the definition for disabled households may be read to exclude same-sex couples. They suggested that HUD amend the definition of disabled households to add an additional cross-reference to the term “family” in 24 CFR 5.403 to capture “regardless of marital status, sexual orientation, or gender identity.”

Response: HUD’s regulations for the Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities programs, codified in 24 CFR part 891, include broad definitions of “elderly family” and “disabled household.” Nevertheless, similar to the approach that HUD took with the HOPWA definition of the term “family,” HUD is adding to the regulations in 24 CFR part 891 a cross-reference to the term “family” in 24 CFR 5.403. The cross-reference to “family” in 24 CFR 5.403 will supplement the meanings already provided to “family” in 24 CFR part 891.

Comment: Commenters suggested that the term “family” could be made more inclusive by moving the phrase “actual or perceived” to explicitly include marital status, and clarifying who qualifies as a “child,” as many LGBT parents lack the ability to create legal relationships with their children.

Response: In response to the commenters’ concern and as noted in Section II of this preamble, the final rule restates the term “family” to provide in relevant part, as follows: “Family includes but is not limited to the following, regardless of actual or perceived sexual orientation, gender identity, or marital status * * *.” However, with respect to the second request, who qualifies as a child has not arisen as an issue in determining eligibility for housing. Accordingly, HUD will not add a definition of “child” to the final rule.

Comment: A commenter asked whether a family can be one individual.

Response: Yes, in accordance with section 3(b)(3)(A) of the U.S. Housing Act of 1937, HUD’s longstanding definition of “family” has always included a single person.

Comment: A commenter stated that the term “family” as provided in 24 CFR 5.403 of the proposed rule fails to give a “definite meaning to family” and leaves the door open for program abuse by allowing any group that wants to live together to call itself a family. Another commenter stated that the proposed regulation, with its expansion of the term “family,” could potentially allow any combination of persons to qualify as a family without the requirement of a legally recognized relationship. Another commenter stated that the term “family” as proposed in the January 2011 rule will make it impossible for the PHA to determine the family composition, the family income, or who is on the lease, as families could change on a weekly basis. The commenter submitted that the proposed change will take away the security and stability of the family, as well as the PHA’s power to determine if a tenant is suitable or whether the tenant’s behavior would have an adverse effect on other residents.

Response: As discussed in this rulemaking, in both the proposed and final rules, “family” in HUD programs had broad meaning long before these regulatory amendments. By way of this rule, HUD is merely affirming that an eligible family may not be excluded because of actual or perceived sexual orientation, gender identity, or marital status. This rule’s clarification of the term “family” has no impact on other program eligibility requirements, such as income qualification, annual certification, or the requirement that all family members are named on the household lease. The rule in no way precludes a PHA from consistently applying its otherwise lawful policies to a family consisting of LGBT members, just as it would a family with no LGBT members.

Gender Identity. For the convenience of the reader and the discussion to follow, the term “gender identity” in proposed 24 CFR 5.403 is restated below:

Gender identity means actual or perceived gender-related characteristics.

Comment: One commenter stated that the term “gender-related characteristics” is ambiguous and that this ambiguity could result in discriminatory application of the rule. The commenter called for a more precise definition for “gender identity,” but did not offer suggested language.

Another commenter was concerned that it would be very difficult to predict how the term “gender identity,” as defined in the statute, would actually be applied. Another commenter expressed similar concern that the rule does not address how “actual or perceived gender-related characteristics” would be interpreted in a given case, and recommended incorporation of an express reasonableness standard. The commenter stated that a reasonableness standard “will require claimants to meet a strenuous standard for relief, without placing them in the dubious position of having to produce proof that is most readily available to potential defendants.”

A commenter suggested replacing the term “gender identity” with the more comprehensive “gender identity or expression.” Another commenter also stated that the definition of “gender identity” should include gender-related expression, to better protect transgender individuals from discrimination.

Another commenter stated that “without more, ‘actual or perceived gender-related characteristics’ could be interpreted to be limited to those characteristics traditionally associated with the individual’s sex at birth.” The commenter further stated, “To pre-empt any suggestion that HUD condones this view,” HUD should amend the language to read: “Gender identity means actual or perceived gender related characteristics, whether or not those characteristics are stereotypically associated with the person’s designated sex at birth.” This commenter stated that the definition mirrors language currently adopted by a number of states and municipalities. Another commenter endorsed the definition suggested by the preceding commenter.

Response: HUD appreciates the suggested revisions to the definition of “gender identity” offered by the commenters, and will consider these suggested revisions further. However, HUD declines to make changes to this term at this final rule stage. The number of suggested revisions to the definition highlights the differing views among the commenters regarding the meaning of this term. Given this, HUD believes that any changes to the definition should be the subject of further public comment before HUD submits the term as the established definition under which HUD programs will operate. The definition of “gender identity” that is being established by this rule is based on the definition of “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. 249(c)(4). This federal statute was enacted in 2009 to protect LGBT

individuals from targeted violence. Passage of the law resulted from the ongoing efforts of individuals personally impacted by hate crime violence, together with nearly 300 civil rights and religious organizations, education groups, and civic associations committed to gaining legal protections for members of the LGBT community. In addition, the bill received support from many major law enforcement organizations, including the International Association of Chiefs of Police, the National District Attorneys Association, the National Sheriffs Association, the Police Executive Research Forum, and 31 state Attorneys General. Congress considered the issue over multiple sessions through public hearings, reports, and floor debates. The purpose of HUD’s rule, as with the Hate Crimes Prevention Act, is to provide greater protection for LGBT persons. Accordingly, HUD believes it appropriate to use the same definition of “gender identity” as applies in the Hate Crimes Prevention Act. HUD seeks to experience how this term works in its programs before determining what, if any, changes are needed for its effective application in the housing context. Commenters should note, however, that since the definition is intended to cover actual or perceived gender-related characteristics of all persons, including transgender persons, HUD will interpret it to include those gender-related characteristics not stereotypically associated with a person’s designated sex at birth.

Sexual Orientation. For the convenience of the reader and the discussion to follow, the term “sexual orientation” in proposed 24 CFR 5.403 is restated below:

Sexual orientation means homosexuality, heterosexuality, or bisexuality.

Comment: A commenter claimed that defining sexual orientation as “homosexuality, heterosexuality, or bisexuality” alone excludes many people. Another commenter stated that HUD should “broaden the definition of “sexual orientation” to “homosexuality, heterosexuality, bisexuality, or *sexuality as defined by the individual*” [emphasis added by commenter].

Other commenters stated that HUD could add the word “including” prior to the list in the proposed definition of “sexual orientation” to clarify that the list is not exhaustive. The commenters stated that, as written, the definition “excludes transgender individuals who self-identify as multi-gendered or between genders.” Still other commenters stated that the fluidity of the term sexual orientation must be

considered in light of transgender individuals. One of the commenters stated that the term sexual orientation should specifically include transgender individuals, due to uncertainty about whether general “sexual orientation” language would protect such individuals and in light of the historical treatment of such individuals.

Another commenter stated that the rule should broaden protections for “sexual orientation” to include persons who self-identify as heterosexuals but who have histories of same-sex relationships. Such histories could be an issue in small communities, in particular. The commenter states that protection for persons who identify as bisexuals would not be sufficient to cover this situation.

Response: As with commenters’ suggested revisions to the definition of “gender identity,” HUD appreciates the suggested revisions to the definition of “sexual orientation” offered by commenters, but for the same reasons as provided in the preceding response, HUD declines to make changes at this final rule stage. The definition of “sexual orientation,” which HUD provided in the proposed rule, is based in federal policy—the Office of Personnel Management (OPM) “Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights.” (See <http://www.opm.gov/er/address.pdf> at page 4.) The purpose of the OPM publication is to implement the Federal Government’s commitment to equal employment opportunity for LGBT individuals in the federal civil service. The OPM publication serves a goal analogous to the one served by HUD’s proposed rule, and, as with the definition of “gender identity,” HUD seeks to experience how this term will work in practice before making changes to a definition currently established in federal policy.

HUD notes that its rule covers actual or perceived sexual orientation, as well as gender identity. As such, the rule covers most of the situations presented by the commenters, such as identifying as transgender; being perceived as transgender, multi-gendered, or between genders; or having a history of same-sex relationships. No one definition in the rule need cover every situation.

Marital Status.

Comment: One commenter recommended adding a definition of “marital status” that would define this term as “the state of being unmarried, married, or separated, as defined by applicable state law. The term ‘unmarried’ includes persons who are single, divorced, or widowed.”

Response: The term “marital status” is not currently defined in HUD regulations and HUD does not find that the focus of this rule calls for a definition of “marital status.”

Sex.

Comment: One commenter stated that to foreclose the possibility of using the allowed inquiry into sex in 24 CFR 5.105(a)(2) against transgender individuals, the rule should either: (a) Define “sex” broadly as “the state of being or becoming male or female or transsexual;” or (b) substitute the more inclusive term “gender” for “sex,” and define “gender” as “sex, including a person’s gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”

Response: HUD declines to define “sex” or to substitute “gender identity” for “sex” in HUD programs. HUD recognizes the difficulty that transgender persons have faced in finding adequate emergency shelter. HUD does not, however, believe that it is necessary to define “sex” as the commenter suggests. The rule makes clear that housing must be available without regard to actual or perceived gender identity and prohibits inquiries concerning such. Inquiries as to sex are permitted only when determining eligibility for a temporary, emergency shelter that is limited to one sex because it has shared sleeping areas and/or bathrooms, or to determine the number of bedrooms to which a household may be entitled. Such inquiries are not permitted in any other homeless shelter or housing. In light of the narrow breadth of the exception and the regulation’s overall purpose, HUD anticipates that transgender individuals will have greater access to shelters and other housing and will monitor its programs so as to ascertain whether additional guidance may be necessary.

Rule Should More Directly Prohibit Discrimination

Several commenters requested that HUD more directly prohibit discrimination. One commenter stated that “a different section of the proposed regulation completely prohibits a mortgagee from taking into account the sexual orientation or gender identity of an individual in determining whether to provide a mortgage to that person. Amending the proposed regulation to completely ban housing discrimination towards individuals based on their sexual orientation or gender identity * * * would (1) be more consistent with the complete prohibition on using sexual orientation or gender identity in

determining an individual’s adequacy for a mortgage and would (2) provide greater protection to LGBT individuals from housing discrimination.”

Other commenters agreed, stating that the rule could provide stronger protection by completely prohibiting “discrimination based on sexual orientation or gender identity toward occupants of or applicants for HUD-assisted housing (or housing with financing insured by HUD),” rather than by prohibiting certain inquiries. The commenters stated that there are ways other than direct inquiry that LGBT individuals could be identified or discriminated against.

Still other commenters expressed concern that people who are gender-nonconforming may be perceived as gay or lesbian without any inquiry into their sexual orientation and that most discrimination against LGBT persons occurs not because a person answered an inquiry about sexual orientation or gender identity, but because of assumptions about a person’s gender identity or sexual orientation. Those commenters proposed adding language that clearly prevents discrimination on the basis of real or perceived sexual orientation or gender identity.

One commenter suggested that proposed 24 CFR 5.105(a) be revised to cite 18 U.S.C. 249, the Hate Crimes Prevention Act, “for the inference that Congress intends to discourage animus against others based on their sexual orientation, and therefore HUD will similarly disallow animus against others based on their sexual orientation.” Another commenter also referenced the Hate Crimes Prevention Act, stating that HUD’s rule falls short of the goals of that Act. The commenter stated that a rule prohibiting inquiries will have little effect on those who discriminate based on their unverified perceptions.

Response: HUD believes that the revision made to § 5.105(a)(2), as discussed in Section II of this preamble, addresses the commenters’ concern.

Interpret the Fair Housing Act To Cover Discrimination Based on Sexual Orientation or Gender Identity

One commenter suggested that HUD interpret “discriminatory practice” in the Fair Housing Act to include discrimination against persons on the basis of sexual orientation or gender identity.

Response: In order to ensure equal access for all eligible families to HUD programs, this rule requires that eligibility determinations for HUD-assisted or -insured housing be made without regard to sexual orientation, gender identity, or marital status. These

additional program requirements do not, however, create additional protected classes in existing civil rights laws such as the federal Fair Housing Act. The Fair Housing Act prohibits discrimination based on race, color, national origin, religion, sex, disability, and familial status. Sexual orientation and gender identity are not identified as protected classes in the Fair Housing Act. As discussed in the following section, however, the Fair Housing Act’s prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.

Interpret Sex Discrimination Under the Fair Housing Act To Reach Discrimination and Harassment of LGBT Persons

A commenter stated that proposed 24 CFR 5.403, prohibiting inquiries of “actual or perceived sexual orientation,” could be revised to prohibit inquiries of “actual or perceived sex.” The commenter stated that sex is already a protected class under the Civil Rights Act of 1964 and could be used to reach discrimination against LGBT persons.

Response: HUD declines to revise the proposed rule to prohibit inquiries of sex, but notes that certain complaints from LGBT persons would be covered by the Fair Housing Act. If an LGBT person experiences any of the forms of discrimination enumerated in the Fair Housing Act, such as race or sex discrimination, that person can invoke the protections of the Fair Housing Act to remedy that discrimination. Discrimination based on sex under the Fair Housing Act includes discrimination because of nonconformity with gender stereotypes. For example, if a PHA denies a voucher to a person because the person does not conform to gender stereotypes, that person may file a Fair Housing Act complaint with HUD alleging sex discrimination.

HUD may also have jurisdiction to process a complaint filed under the Fair Housing Act if an LGBT person obtains housing but then experiences discrimination in the form of sexual harassment. Sexual harassment is illegal under the Fair Housing Act if the conduct is motivated by sex and is either so severe or pervasive that it creates a hostile environment or the provision of housing or its benefits is conditioned on the receipt of sexual favors (for example, as a *quid pro quo*). Harassment may be motivated by sex if, for example, it is due to the landlord’s view that the tenant’s appearance or

mannerisms fail to conform with stereotypical expectations of how a man or woman should look or act. Housing owners or operators may be liable for their own actions or the actions of their employees or other residents.

If HUD determines that it does not have jurisdiction to investigate a complaint from an LGBT person, the person may still be protected under state and local laws that include sexual orientation or gender identity as protected classes.

Expand the Rule's Protection To Cover Discrimination Beyond Refusal To Rent

A commenter recommended expanding the proposed rule to prohibit harassment and disparate treatment on the basis of sexual orientation or gender identity. The commenter explained that in order for the proposed rule to maximize its effectiveness, owners and operators of HUD-assisted housing or housing whose financing is insured by HUD should be precluded from negative decisionmaking based on these protected categories. HUD should be clear about its power to enforce nondiscrimination and the remedies available to individuals who have been discriminated against.

Another commenter suggested that the prohibition on inquiries be strengthened so that no information about a person's sexual orientation or gender identity can be used to deny a tenancy, harass a tenant, evict a tenant, or terminate a voucher.

Yet other commenters recognized the intent behind prohibiting inquiries regarding sexual orientation or gender identity, but submitted that the prohibition will not adequately protect LGBT persons from harassment in housing, as much housing discrimination occurs when a housing provider infers a person's sexual orientation or gender identity based on stereotypes, appearances, mannerisms, or information from a third party. The commenters urged HUD to adopt a final rule that prohibits discrimination based on sexual orientation and gender identity in all HUD-assisted and HUD-insured housing.

Response: HUD believes the revision made to § 5.105(a)(2), as discussed in Section II of this preamble, addresses the commenters' concern. In order to ensure equal access for all eligible families to HUD programs, § 5.105(a)(2) requires that eligibility determinations for HUD-assisted or -insured housing be made without regard to sexual orientation, gender identity, or marital status.

Prohibition on Inquiries

Several commenters suggested changes to the prohibition on inquiries in proposed 24 CFR 5.105(a)(2). The proposed rule provided as follows:

No owner or administrator of HUD-assisted or HUD-insured housing, approved lender in an FHA mortgage insurance program, nor any (or any other) recipient or subrecipient of HUD funds may inquire about the sexual orientation, or gender identity of an applicant for, or occupant of, a HUD-assisted dwelling or a dwelling whose financing is insured by HUD, whether renter- or owner-occupied. This prohibition on inquiries regarding sexual orientation or gender identity does not prohibit any individual from voluntarily self-identifying the individual's sexual orientation or gender identity.

Comment: A commenter stated that the prohibition on inquiries may discourage open dialogue when determining appropriate placement of families applying for HUD programs. Inquiries regarding sexual orientation or gender identity may be appropriate where the safety of the individual or family being placed is of concern. There also may be other nondiscriminatory reasons for a person responsible for program placement to inquire about an individual's sexual orientation or gender identity. This commenter states that "the language [should] be changed to simply include 'actual and perceived sexual orientation and gender identity' in the section for nondiscrimination; or that the prohibition on inquiries [should be] limited to discriminatory purposes."

Response: Revised § 5.105(a)(2) addresses the commenters' nondiscrimination concerns. In addition, the prohibition on inquiries regarding sexual orientation or gender identity does not prevent individuals from volunteering to identify their sexual orientation or gender identity. They may choose to do so to address any safety concerns or for other placement-related issues, for example. Also, the commenter's concern is one that prompted HUD to include in the proposed rule its language on the permissibility of lawful inquiries as to sex, which is discussed below. However, as noted in the discussion of Section II of this preamble, and addressed in revised § 5.105(a)(2), the inquiries permissible in determining program eligibility are contemplated generally only where temporary, emergency shelter is provided to homeless individuals that involves the sharing of sleeping areas or bathrooms, or for a determination of the number of bedrooms to which a household may be entitled.

Lawful Inquiries of Sex

Several commenters requested clarification of the rule's lawful inquiry provision or expressed concern that the provision would allow for discrimination. The lawful inquiry provision provided by the proposed rule stated as follows:

[The] prohibition on inquiries regarding sexual orientation or gender identity does not prohibit lawful inquiries of an applicant or occupant's sex where the housing provided or to be provided to the individual involves the sharing of sleeping areas or bathrooms.

Comment: A commenter stated that the lawful inquiry exception for the sharing of sleeping areas or bathrooms may exacerbate extant stereotypes about gays and lesbians living in close quarters with heterosexuals. The commenter stated that numerous scenarios come to mind where landlords abuse this exception to refuse to rent to homosexuals, purportedly because heterosexuals feel uncomfortable "sharing bathrooms or living space" with homosexuals. The only legitimate purpose of such an exception, the commenter stated, would be in single-sex housing situations. But even there, the commenter stated, the inquiry is "entirely irrelevant and inappropriate" as to transgender status, because the person would have already acquired a new gender.

A commenter stated that the assumption that one person's sexual orientation might disturb the rights of another person in a setting where bathrooms and bedrooms would be shared reinforces stereotypes and biases, rather than countering them. Another commenter made a similar comment, stating that the proposal continues to promote negative stereotypes and violence against LGBT persons. A commenter speculated that while such language was placed in the proposal with the intention of ensuring that other tenants remain comfortable and safe, there are several issues with that goal, the first of which is whether "leaving so much up to the discretion of the landlord will lead to greater potential risk of danger for these tenants."

Another commenter stated that this provision creates numerous problems in application. The commenter states that asking someone who identifies with the so-called "opposite" gender to identify their sex implies that their identification is not "real" or "genuine," and that reinforces the very problems the regulation seeks to resolve. This commenter stated that as with sexual orientation, it is difficult to imagine how one's gender identity, even in a shared situation, would be a problem for

any other person, as few programs require individuals to share bedrooms with strangers.

Another commenter also expressed concern about the practical effect of allowing inquiries into the applicant's or occupant's sexual orientation or gender identity. The commenter stated that it is not clear from the proposed rule whether this language provides an exhaustive or merely illustrative list of scenarios under which it is appropriate to inquire about an individual's gender. The commenter claimed that if the language is merely illustrative, a housing provider will likely be authorized to make broad inquiries into an applicant's gender identity when any shared living space is anticipated. A commenter stated that this "lawful inquiry" into sex could be used to indirectly reach gender identity, for instance in the case of a transgender individual, and this allowed inquiry could be used to accomplish the kind of discrimination the rule is meant to prevent. Another commenter expressed concern about the impact unrestricted inquiries would have on low-income transgender people who cannot afford to access legal gender change petitions.

Response: The allowance of lawful inquiries of sex for housing that provides shared bathrooms or sleeping arrangements is not a license to exclude LGBT persons from HUD-assisted housing. HUD programs must be open and available to persons regardless of sexual orientation or gender identity. The allowance of the limited inquiry of sex provided in the proposed rule is intended to apply primarily in emergency shelters for homeless persons, to ensure privacy if the shelter consists of shared sleeping or bathing areas. HUD addressed the harassment issue earlier in this preamble.

Comment: A commenter noted that HUD had not proposed a definition of what is meant by the term "housing provided * * * to the individual (that) involves the sharing of sleeping areas or bathrooms." The commenter stated that "[t]here was presumably no intention to permit inquiry of any person applying to any development that had bathrooms in common space. Additionally, by not providing that the "sharing" reference applies only to persons who are not part of the same household," it would open the door to inquiries of all applicants for all housing that permits households of more than one individual.

Response: HUD believes that revised § 5.105(a)(2), in this final rule, expressly provides that LGBT status cannot be a basis for denying participation in a program funded or insured by HUD. Moreover, the inquiry permitted by the

rule is not unrestricted. As provided in this final rule, HUD believes it is appropriate to make inquiries as to sex in temporary, emergency shelters that have shared bedrooms or bathrooms. This housing, unlike other HUD subsidized housing and housing insured by FHA, necessitates immediate provision of temporary shelter for homeless individuals.

Comment: Another commenter expressed concern that the proposed prohibition on inquiries concerning gender identity may adversely affect the assignment of households to appropriately sized housing. The commenter explained that many local programs determine housing size in part based on the gender of household members, because household members of different genders other than spouses are not required to share a bedroom. According to the commenter, sponsors may assign households to housing that is too small or too large based on members' genders, consuming unnecessary housing assistance resources. A commenter suggested that HUD clarify the existing exception or add another exception to the blanket prohibition against inquiries to permit the assignment of households to properly sized housing.

Response: With the clarification provided in this final rule that HUD intended to allow lawful inquiries to a limited sector of HUD-assisted programs, HUD does not believe the commenter's concerns will be realized.

Comment: A commenter expressed concern about the lawful inquiries provision in the rule because the commenter believed the provision would allow housing providers to inquire about someone's human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS) status, and explained that gay men are often discriminated against when they are considered to have HIV/AIDS.

Response: Nothing in the lawful inquiries provision of this rule and no provision in HUD's existing regulations for its housing programs allows a housing provider to inquire about someone's HIV status, except where providing HIV/AIDS-related housing assistance and supportive services (e.g. activities under the HOPWA program (24 CFR part 574)), and subject to confidentiality requirements. Moreover, the federal Fair Housing Act, which HUD enforces and administers, prohibits discrimination against someone who has or is regarded as having a disability, including HIV/AIDS. (See 42 U.S.C. 3602(h)(3) and 3604(f)(1).)

Comment: Several commenters expressed concern that inquiries as to a person's "sex" in situations involving shared sleeping areas and bathrooms is not sufficiently clear to guard against discrimination based on gender identity and asked HUD to provide further guidance. One commenter stated that this exception for lawful inquiries "leaves landlords with significant discretion to deny housing on illegitimate grounds." This same commenter stated that HUD "should add language to more clearly confine this exception to its legitimate ends." Another commenter requested that HUD clarify what type of inquiries are acceptable and in what specific circumstances, so as not to allow this exception to become a pretext for discrimination based on gender identity.

Several commenters stated that the allowed inquiry into sex provided could be used to identify and target transgender individuals, in particular, because the term "sex" used in the rule is vague and because the "lawful inquiries" exception is too broadly defined, leaving landlords "significant discretion to deny housing on illegitimate grounds." Some of these commenters thought the exception should be more narrowly defined.

One commenter stated that the proposed rule does not provide sufficient guidance to clarify for housing providers the limits of permissible inquiry into the applicant's sex, thus placing housing administrators in the position of arbiter of the transgender individual's sex for the purpose of their housing applications, and exposing transgender persons to harm and discrimination because of varying interpretations. Another commenter similarly stated that "the exception for inquiries about sex for determining eligibility for single sex-dormitories or housing with single-sex shared-bathrooms might create opportunities for discrimination against transgender persons." The commenter asked HUD "to establish strict limitations on when these questions are appropriate."

A commenter stated that opponents of the rule will likely focus on the "niche issue of the placement of transgender individuals (or those that are pretending to be transgender) in single sex facilities." The commenter stated that HUD, in the interest of addressing these critics and for clarity overall, "should fully analyze this question instead of merely stating that the rule is 'not intended to prohibit otherwise lawful inquiries'" of sex, which is vague. The commenter asked, as an example, "[c]an a battered women's shelter still receive funding from HUD if it denies shelter to

a man, who perceives himself to be a woman? What would be the adjudicatory process in such an event? Is this event a realistic scenario? HUD should further analyze issues such as these both to undercut critics' arguments that the proposed rule would be unworkable and to better guide its local program coordinators in proper practices. The overarching goal of this proposed rule change is too important for it to be scrapped because of this rare and currently murky legal scenario."

Another commenter stated that a transgender person's actual sex may be at odds with his or her appearance, and questioned the meaning of this provision for such a person. A commenter asked if transgender persons may be excluded from shared housing or gay men excluded from sharing housing with other men. If so, would other accommodations be made for excluded groups? Other commenters urged HUD to clarify the rule to state that a housing provider may only inquire about individuals' gender identity for the purpose of placing them in gender-specific accommodations, but cannot inquire about a person's birth sex, anatomy, or medical history.

Response: In Section II of this preamble, HUD has already addressed several of the concerns raised by the commenters. HUD is committed to further review of this issue and, as necessary, will issue guidance that, through examples, elaborates on how the prohibition of inquiries on sexual orientation and gender identity, and the allowance for lawful inquiries as to sex, will work in practice.

Comment: Several commenters suggested that HUD-funded programs should accept an individual's gender identity, as opposed to "sex" in determining housing placement in sex-segregated housing programs. One commenter stated that lawful inquiries of a consumer's "sex" where housing involves the sharing of sleeping areas and bathrooms leave transgender individuals, who may need the most protection, particularly vulnerable to discrimination. Another commenter stated that even inquiries of individuals who have obtained legal gender change documents would lead to harassment and discrimination. For this reason, the commenter suggested that inquiries about sex for sex-specific housing should be made in reference to an individual's gender identity.

Another commenter stated that if applicants are not allowed to report their gender identity rather than their sex as legally defined by their state government, the considerable differences among states as to how

persons may change their sex would lead to a considerable lack of uniformity across HUD programs. The commenter further stated that transgender persons may be arbitrarily excluded from HUD programs if they are forced to report their sex as defined by their state government, instead of being permitted to report a gender identity that more accurately describes them. Several commenters expressing similar concerns recommended that the rule be revised so that a person is required only to disclose the gender they identify as regardless of sex assigned at birth and not be asked to provide proof of that identity.

Other commenters stated that the rule should allow for voluntary self-reporting where sex designations are required. In such cases, the commenter stated that "HUD could allow applicants to list the sex designation they would like to have rather than their biological or as yet medically un-reassigned sex." The commenter stated that this would help to avoid the problem of using allowed inquiries regarding sex to get to issues of gender identity. Another commenter stated that it is important to ensure that persons are able to self-select their sex in order to protect the access of transgender persons to housing facilities. Another commenter, after querying how the "lawful inquiries" regarding sex will apply to transgender individuals, stated that "in these instances, self-identification is probably the best way to go; however, this may be an area best left with some discretion."

Response: HUD recognizes the serious problem of housing instability among transgender persons. The housing discrimination, harassment, and homelessness that transgender persons face are part of what precipitated HUD's rulemaking in this area. These issues also contributed to HUD's recent recognition that housing discrimination because of nonconformity with gender stereotypes may constitute sex discrimination under the Fair Housing Act. HUD is aware of the significant challenges that transgender persons face when attempting to access shelters. By way of this rule, however, HUD is not mandating a national policy related to appropriate placement of transgender persons in shelters limited to one sex. HUD needs additional time to review this issue and determine whether setting national policy is appropriate.

Comment: A commenter expressed concern about being required to identify the sex of tenants on the Form HUD-50059, given that the applicant/tenant is not asked to self-identify sex but rather the information is assigned by a third party based on observation. Form HUD-

50059 is used to determine the number of bedrooms a family may need, based on the age and sex of the children. The commenter submitted that requiring information on sex to be reported on Form 50059 conflicts with the proposed rule prohibiting inquiries about sex, and suggested that individuals should self-identify their gender and sex.

Response: HUD will further examine this form, to determine whether a change is needed. The form is subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which requires notice and comment when changes are made. Accordingly, any changes made to this form will provide the public the opportunity to comment, and such comment will not only be helpful in addressing the specific issues raised about this form, but may inform HUD on changes that may be needed to other forms.

Collect Data To Protect LGBT Community

Several commenters suggested that HUD establish a confidential data collection system to identify LGBT beneficiaries of HUD housing programs to ensure that their housing needs are met and that they are protected from discrimination.

Comment: Several commenters proposed that HUD provide a mechanism by which applicants and tenants of HUD-assisted housing or HUD-insured housing can voluntarily report their sexual orientation and gender identity. Such data would be collected for informational purposes only, and in a manner to protect the confidentiality of the responder.

Commenters identified varying need for such data. One commenter explained that data on the sexual orientation and gender identity of HUD program participants is crucial to demonstrate the need for affirmative outreach, assess its effect, and attract resources to address problems in this area. Other commenters stated that the data would be of substantial value for the development of appropriate programs and policies. One commenter specified that information on program participants' sexual orientation and gender identity can be useful to determine whether appropriate servicers are being delivered and to assess whether progress is being made in meeting the housing needs of LGBT youth and adults. Other commenters stated that data should be collected only to assess whether the rule is achieving its goals.

Commenters provided specific suggestions for safeguarding confidentiality. One commenter

proposed that inquiries should not be permitted until after admission decisions have been made, and another stated that only staff involved in the collection and analysis of the data should have access to it. Other commenters urged HUD to continue to work with fair housing organizations and the housing community to collect demographic information on the LGBT community in a way that cannot be used to discriminate, by including appropriate restrictions on the acquisition, retention, and use of the information to protect the privacy of those whose data is being collected. Several commenters discussed the effect of the proposed prohibition on inquiries on data collection. One commenter stated there are a myriad of potential mechanisms for achieving the dual goals of protection against discrimination while gathering sufficient data to monitor LGBT housing discrimination. The commenter proposed a voluntary reporting system that would allow persons who wish to self-identify to bypass housing providers and PHAs and submit demographic information directly to HUD. The commenter suggested that language be added to existing forms that would direct all applicants and occupants of HUD-assisted housing wishing to provide such information to a Web site and mailing address for HUD's Office of Fair Housing and Equal Opportunity. The commenter stated that this could enable the person to submit the information anonymously, while providing HUD with sufficient demographic information to monitor discrimination.

Another commenter also viewed voluntary disclosure as the appropriate balancing of the right to privacy "against the rule's purpose in ensuring equal access to housing." But according to the commenter, "[w]hile the rule proposal notes that the inquiry prohibition does nothing to limit voluntary disclosure, it also does nothing to channel such disclosures in a way that promotes the rule's underlying goal."

One commenter recommended that HUD conform its data collection systems related to the sex of household members to the proposed prohibition of inquiries concerning gender identity. Another commenter stated that the prohibition on inquiries regarding gender identity could result in the inadvertent housing of dangerous individuals because, in the commenter's view, gender identity is an important component of the applicant information collected to gather accurate criminal background information. The commenter supported the establishment

of a database containing gender identity information of applicants.

Response: For the reasons discussed in Section II of the preamble, HUD declines to include in this regulation a national reporting system of sexual orientation and gender identity. HUD understands the concerns of the commenters, but believes that further consideration must be given to this proposal. This final rule is not intended to prohibit mechanisms that allow for voluntary and anonymous reporting of sexual orientation or gender identity for compliance with data collection requirements of state and local governments or other federal assistance programs, but only after determining the individual's or family's eligibility for HUD assistance.

Comment: Commenters urged HUD to look for ways to collect and maintain data to help identify and combat LGBT housing discrimination, while protecting and preserving privacy and safety, and preventing further discrimination or retaliation so that additional policy efforts can be further developed. The commenters stated that because discrimination against LGBT individuals is substantially underreported, the final rule should contain language requiring covered housing providers and grantees to provide accessible information about these protections, as well as necessary information on how people can submit complaints when they believe their rights have been violated.

One commenter urged HUD to work with the LGBT community and fair housing organizations to collect demographic data on sexual orientation and gender identity to better enable the LGBT community to advocate for increased funding for geographic and programmatic areas where LGBT persons remain vulnerable. Another commenter stated that because sexual orientation and gender identity are still not identified in the Fair Housing Act as prohibited bases for discrimination, data must be collected to reflect the number of LGBT individuals and families seeking access to HUD programs and services to help advocate for necessary policy changes and to identify areas where LGBT persons remain particularly vulnerable to discrimination.

Response: HUD appreciates all the proposals submitted by the commenters. As discussed in Section II of the preamble, HUD declines to add a data collection mechanism to the rule. HUD notes, however, that it has existing mechanisms for collecting and reporting on discrimination claims filed with its Office of Fair Housing and Equal

Opportunity. (See http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination.)

Enforcement Procedures

Comment: Several commenters noted that the proposed rule was not explicit as to how HUD plans to enforce the rule. One commenter stated that there must be a mechanism by which claims of discrimination in HUD programs can be voiced by the LGBT community. Another commenter echoed that concern, stating that if sexual orientation or gender identity discrimination does occur, it must be clear to the landlords and future tenants that these matters will be addressed in a fair and timely manner.

A commenter suggested that HUD include in the final rule a clear procedure for submitting complaints, holding hearings, and making determinations of violations of HUD program rules. Another commenter suggested including an appeals process. One commenter suggested that HUD create a centralized complaint system through which persons can submit information about discrimination under the rule. That commenter proposed that HUD establish a telephone number for complaints based on violations of the proposed rule, and that HUD designate a coordinator to direct complaints to the appropriate persons in the program offices. The commenter proposed that HUD create a complaint intake form similar to the existing Form HUD-903 that persons use to file complaints under the Fair Housing Act. The commenter stated that creating a centralized intake system would have the benefit of facilitating the filing of reports of discrimination, as well as providing more information about the occurrence of discrimination in HUD programs. The commenter stated that "[p]ractical mechanisms for enforcement will allow LGBT families and advocates to fully utilize these changes to access housing."

One commenter questioned whether HUD anticipates an expansion of its Investigations Division to support the proposed rule, and if so, what if any training the existing staff would undergo to adequately prepare for this type of investigation. Another commenter simply suggested that HUD consider expanding its investigative units to respond to the likely increase in complaints.

A commenter inquired whether the regulations create a new right for aggrieved parties. The commenter explained that while an aggrieved party can file a complaint alleging discrimination on grounds expressly

forbidden in the Fair Housing Act, the proposed rule does not seem to give victims of discrimination based on sexual orientation or gender identity the same right. The commenter requested clarification regarding what method of enforcement HUD will implement if it does not explicitly extend this right to victims of discrimination based on sexual orientation or gender identity. The commenter concluded that without zealous and informed enforcement, these regulations will provide only lip service to the broader goals of promoting access to HUD programs for all eligible families.

Response: As noted in response to an earlier comment, this rule creates additional program requirements to ensure equal access to HUD programs for all eligible families. Therefore, a violation of the program requirements established by this rule will be handled in the same manner that violations of other program requirements are handled. Each HUD program has in place mechanisms for addressing violations of program requirements. If a participant in HUD-assisted or HUD-insured housing programs believes that the housing provider is not complying with program requirements, the individual may complain to the appropriate HUD office that administers the program (e.g., the Office of Public and Indian Housing, the Office of Community Planning and Development). In addition, as also noted in the earlier response to a comment, certain complaints would be covered by the Fair Housing Act. A claim of discrimination based on nonconformity with gender stereotypes may be investigated and enforced under the Fair Housing Act as sex discrimination. HUD recently published guidance on this. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination. Such claims would be filed through HUD's Office of Fair Housing and Equal Opportunity at the Web site noted earlier in this preamble: http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination or 1-(800) 669-9777. Many states and localities have laws prohibiting discrimination based on one's LGBT status. HUD's guidance, referenced above, contains a list of such states. As noted below, HUD will develop training materials to educate recipients of HUD funding of their rights and responsibilities under this rule.

Remedies

Other commenters recommended that HUD clearly explain its authority to

provide remedies under the rule, whether it is to sanction, suspend, debar, or seek civil penalties against those individuals or entities who deny individuals and families safe, clean, affordable housing because of their gender identity or sexual orientation. The commenters believe that "setting the rules in stone" would deter housing providers from violating the terms of the rule.

Response: Whenever a participant in a HUD program fails or refuses to comply with regulatory requirements, such failure or refusal shall constitute a violation of the requirements under the program in which the participant is operating and the participant will be subject to all sanctions and penalties for violation of program requirements, as provided for under the applicable program, including the withholding of HUD assistance. In addition, as is discussed in the prior response, HUD may pursue an enforcement action when the Fair Housing Act is implicated. A housing provider who is found to have violated the Fair Housing Act may be liable for actual damages, injunctive and other equitable relief, civil penalties, and attorney's fees.

Education, Outreach, and Guidance

A commenter stated that HUD should add education requirements. The commenter stated that within 9 months after this regulation goes into effect, entities that participate in HUD programs should educate their relevant staff on the rule. An Internet-based training program could be efficiently used. This requirement could be waived in rural areas that currently lack Internet access, or an alternative means of satisfying the requirement could be created, such as participation via telephone. This commenter also stated that within 9 months, HUD should require participating entities to begin providing individuals with updated information regarding their rights to be free from discrimination. This commenter stated that given limited resources, HUD should focus its efforts on areas with large LGBT populations and in jurisdictions that do not currently possess anti-discrimination statutes that cover sexual orientation or gender identity.

Another commenter stated that whether this policy has its desired effect will greatly depend on outside factors. The anti-discrimination policies in place should be brought to the attention of applicants for HUD housing through HUD application forms, interviews, and Web site pages. HUD employees should be instructed as to the reasons for these policies and should be sanctioned for

any behavior or comment that discriminates against individuals covered under HUD's policies. Employees who are sensitive to LGBT issues should be enlisted to provide information to assist LGBT individuals and their families in making decisions as to the most comfortable and safe housing. Another of the commenters stated that in order to ensure compliance with the proposed rule, it will be necessary to educate the affected agencies and programs on the meaning of "actual or perceived gender-related characteristics," a definition cited in the rule and drawn from the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.

Another commenter recommended that HUD develop comprehensive outreach goals and advertise in the LGBT media. The commenter recommended that forms HUD-935.2(a) or (b) be amended for this purpose to include categories for gender identity and sexual orientation as target groups, and that such forms be available for all HUD-assisted programs. The commenter also suggested that PHAs affirmatively market to underrepresented populations as they are required to affirmatively market housing under the Fair Housing Act. Other commenters recommended that HUD-assisted housing providers be required to affirmatively market to the LGBT population through community centers and other outreach groups. One of these commenters stated that HUD program staff, PHAs, subsidized housing providers, and housing-related service providers will need education on the final rule to ensure that they are in compliance.

A commenter recommended that HUD conduct a public relations campaign that explains the new regulation and welcomes LGBT families. The commenter suggested that owners and operators of HUD-assisted housing and FHA-insured housing be aware of the proposed rule and its impact on their day-to-day dealings with tenants and mortgagors, while also suggesting that HUD create literature, posters, and other materials directed at LGBT families. The commenter stated that these advertisements should advise LGBT families that HUD wants to ensure their equal access to its core rental assistance and homeownership programs, while the media campaign should convey that HUD is committed to taking actions necessary to ensure that LGBT families are not excluded on the basis of their sexual orientation, gender identity, or other criteria irrelevant to the purpose of HUD.

Another commenter stated that if LGBT individuals do not know about

the proposed regulation, it will be much less effective. If enforcement of the proposed regulation largely depends on litigation by those who have been discriminated against, then those individuals must know that the discrimination that they faced was actually illegal. HUD should work with prominent LGBT organizations, as well as with nonprofits that deal with fair housing and with state and local governments to disseminate these proposed rules in a simple and easy-to-understand way.

A commenter specifically inquired about whether HUD's Fair Housing Enforcement Office would provide training on the implementation of the rule. Another commenter states that, in particular, HUD should: (1) Publicize the new regulation, (2) develop know-your-rights materials for LGBT individuals to promote the reporting of violations, and (3) provide mandatory trainings to owners and operators of HUD-assisted housing programs to encourage compliance.

Another commenter recommended that HUD issue clear guidelines that will ensure that LGBT tenants of single-sex housing will not be singled out for harassment or disparate treatment on the basis of their sexual orientation or gender identity. The commenter suggested that HUD owners and operators be given instructions on how to provide reasonable accommodations for LGBT families, including, where possible, mechanisms that provide privacy in public showers. The commenter stated that HUD staff, as well as HUD owners and operators, should be trained on the importance of safe housing for persons who self-identify as transgender.

Response: Without question, HUD plans to engage in education and outreach about this rule, and will consider many of the proposals offered by the commenters on how such education and outreach may be conducted.

Rule Should Wait for Completion of Study

Comment: A commenter expressed concern that HUD's proposed rule was published before HUD completed its study on housing discrimination based on sexual orientation and gender identity. The commenter suggested that HUD complete its study and consider the study's evidence in revising and finalizing the proposed rule rather than developing the regulation and conducting the study simultaneously.

Response: The study to which the commenter refers concerns the private sector and not HUD's programs.

Accordingly, HUD does not find it necessary to wait for the completion of the study. It is HUD's desire to proactively address the possibility of discrimination against LGBT individuals and families in HUD's housing programs.

Rule Did Not Properly Address Federalism Concerns

Comment: A commenter stated that this rule fails to properly address federalism concerns because protecting LGBT persons from discrimination is a matter of state law, and while some states have chosen to enact such protections, other states have declined to do so. Another commenter stated that HUD is overstepping its authority by defining family in the proposed regulation. The commenter thought this could be construed as an infringement on states' rights because the Federal Government has primarily left it to the states to make determinations regarding the definition of family. Another commenter stated that HUD is violating Executive Order 13132 on federalism by regulating marriage and housing. According to the commenter, these are states' rights issues, as regulation of marriage and housing occur at a state level, notwithstanding that the Federal Government provides funding for housing.

Response: HUD's rule is not in violation of the executive order on federalism, Executive Order 13132, nor is it regulating marriage. HUD's rule only pertains to HUD's housing programs. There is no requirement for any multifamily housing owner to participate in HUD's programs or for any lender to become an FHA-approved lender. However, if these individuals or entities choose to participate, then they must abide by the program requirements established by HUD.

Rule Exceeds HUD's Legal Authority

Comment: A few commenters stated that this rule exceeds HUD's legal authority. The commenters stated that making "sexual orientation" and "gender identity" protected classifications for purposes of federal housing programs has no support in any act of Congress, and that forbidding such discrimination undermines the Defense of Marriage Act. The commenters stated that HUD should not create new protected classifications where there is no statutory policy undergirding it.

Response: The rule creates additional program requirements to ensure equal access of all eligible families to HUD programs, which is well within the scope of HUD's authority. HUD's

mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. This includes LGBT persons, who have faced difficulty in seeking housing. Excluding any eligible person from HUD-funded or HUD-insured housing because of that person's sexual orientation or gender identity contravenes HUD's responsibility under the Department of Housing and Urban Development Act to work to address "the needs and interests of the Nation's communities and of the people who live and work in them." (See 42 U.S.C. 3531.) Congress has repeatedly charged the Department with serving the existing housing needs of all Americans, including in section 2 of the Housing Act of 1949, 42 U.S.C. 1441 ("The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require * * * the realization as soon as feasible the goal of a decent home and a suitable living environment for every American family * * *"); section 2 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701t ("The Congress affirms the national goal, as set forth in section 2 of the Housing Act of 1949, of 'a decent home and a suitable living environment for every American family'"); sections 101 and 102 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 12701-702 ("The Congress affirms the national goal that every American family be able to afford a decent home in a suitable environment. * * * The objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions able * * * to ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness * * * [and] to improve housing opportunities for all residents of the United States"); and section 2(b) of the Housing and Community Development Act of 1974, 42 U.S.C. 5301 note ("The purpose of this Act, therefore, is—(1) to reaffirm the principle that decent and affordable shelter is a basic necessity, and the general welfare of the Nation and the health and living standards of its people require the addition of new housing units to remedy a serious shortage of housing for all Americans.")

Congress has given HUD broad authority to fulfill this mission and implement its responsibilities through rulemaking. Section 7(d) of the Department of Housing and Urban Development Act specifically states that

the Secretary “may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.”

HUD does not agree that the Defense of Marriage Act, which relates to the definition of marriage, overrides the Department’s responsibility to ensure that its programs are carried out free from discrimination. This rule does not define or otherwise regulate marriage. Rather, it seeks to make housing available to LGBT persons who might otherwise be denied access to HUD-funded or assisted housing.

Rule Creates Conflict With Religious Freedom

Comment: A commenter stated that the rule may force faith-based and other organizations, as a condition of participating in HUD programs and in contravention of their religious beliefs, to support shared housing arrangements between persons who are not joined in what the commenter referred to as “the legal union of one man and woman.” Another commenter explained that, while not insisting that any person should be denied housing, faith-based and other organizations should retain the freedom to make housing placements in a manner consistent with their religious beliefs. The commenter further stated that the rule, by infringing on religious freedom, may have the ultimate effect of driving away faith-based organizations with a long and successful track record in meeting housing needs. The commenter concluded that given their large role in serving unmet housing needs, it is imperative that such faith-based organizations not be required to compromise or violate their religious beliefs as a condition of participating in HUD-assisted housing programs and receiving government funds to carry out needed services.

Other commenters stated that protecting sexual orientation and gender identity without provisions for protecting rights of conscience and belief results in governmental discrimination favoring one version of morality and belief over another. The commenters stated that there are many individuals and faith-based organizations who have already been penalized for adherence to religious beliefs that will not permit them to support same-sex relationships.

Response: Faith-based organizations have long been involved in HUD programs and provide valuable services to low-income populations served by HUD. It is HUD’s hope that faith-based organizations will continue to actively participate in HUD programs. However, the exclusion of an individual or family

from HUD housing for no reason other than that the individual is LGBT or the family has one or more LGBT members is inconsistent with HUD’s mission to ensure decent housing and a suitable living environment for all. Accordingly, it is incumbent on HUD to ensure that the regulations governing its housing programs make clear that such arbitrary exclusion will not be tolerated.

IV. Findings and Certifications

Regulatory 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 the Office of Management and Budget (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. A determination was made that this rule is a “significant regulatory action,” as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial

number of small entities. This rule does not impose any new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of the rule is to ensure open access to HUD’s core programs, regardless of sexual orientation or gender identity. In this rule, HUD affirms the broad meaning of “family” that is already provided for in HUD programs by statute. The only clarification that HUD makes is that a family is a family as currently provided in statute and regulation, regardless of marital status, sexual orientation, or gender identity. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

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

Executive Order 13132, Federalism

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

Unfunded Mandates Reform Act

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

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development,

Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping.

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 236

Grant programs—housing and community development, Low- and moderate-income housing, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 574

Community facilities, Grant programs—health programs, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 891

Aged, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs—housing and community development, Grant programs—Indians, Indians, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated above, HUD amends 24 CFR parts 5, 200, 203, 236, 291, 570, 574, and 982, as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

- 2. The heading of subpart A is revised to read as follows:

Subpart A—Generally Applicable Definitions and Requirements; Waivers

* * * * *

- 3. In § 5.100, definitions for “family,” “gender identity,” and “sexual orientation” are added to read as follows:

§ 5.100 Definitions.

* * * * *

Family has the meaning provided this term in § 5.403, and applies to all HUD programs unless otherwise provided in the regulations for a specific HUD program.

* * * * *

Gender identity means actual or perceived gender-related characteristics.

* * * * *

Sexual orientation means homosexuality, heterosexuality, or bisexuality.

* * * * *

- 4. In § 5.105, revise the introductory text, redesignate paragraph (a) as paragraph (a)(1), and add paragraph (a)(2) to read as follows:

§ 5.105 Other Federal Requirements.

The requirements set forth in this section apply to all HUD programs, except as may be otherwise noted in the respective program regulations in title 24 of the CFR, or unless inconsistent with statutes authorizing certain HUD programs:

(a) * * *

(2) *Equal access to HUD-assisted or insured housing.* (i) *Eligibility for HUD-assisted or insured housing.* A determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.

(ii) *Prohibition of inquiries on sexual orientation or gender identity.* No owner or administrator of HUD-assisted or

HUD-insured housing, approved lender in an FHA mortgage insurance program, nor any (or any other) recipient or subrecipient of HUD funds may inquire about the sexual orientation or gender identity of an applicant for, or occupant of, HUD-assisted housing or housing whose financing is insured by HUD, whether renter- or owner-occupied, for the purpose of determining eligibility for the housing or otherwise making such housing available. This prohibition on inquiries regarding sexual orientation or gender identity does not prohibit any individual from voluntarily self-identifying sexual orientation or gender identity. This prohibition on inquiries does not prohibit lawful inquiries of an applicant or occupant’s sex where the housing provided or to be provided to the individual is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms, or inquiries made for the purpose of determining the number of bedrooms to which a household may be entitled.

* * * * *

Subpart D—Definitions for Section 8 and Public Housing Assistance Under the United States Housing Act of 1937

- 5. In § 5.403, the definitions of “disabled family”, “elderly family”, “family”, and “near elderly family” are revised to read as follows:

§ 5.403 Definitions.

* * * * *

Disabled family means a family whose head (including co-head), spouse, or sole member is a person with a disability. It may include two or more persons with disabilities living together, or one or more persons with disabilities living with one or more live-in aides.

* * * * *

Elderly family means a family whose head (including co-head), spouse, or sole member is a person who is at least 62 years of age. It may include two or more persons who are at least 62 years of age living together, or one or more persons who are at least 62 years of age living with one or more live-in aides.

Family includes, but is not limited to, the following, regardless of actual or perceived sexual orientation, gender identity, or marital status:

(1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person, or any other single person; or

(2) A group of persons residing together, and such group includes, but is not limited to:

(i) A family with or without children (a child who is temporarily away from the home because of placement in foster

care is considered a member of the family);

- (ii) An elderly family;
- (iii) A near-elderly family;
- (iv) A disabled family;
- (v) A displaced family; and
- (vi) The remaining member of a tenant family.

* * * * *

Near-elderly family means a family whose head (including co-head), spouse, or sole member is a person who is at least 50 years of age but below the age of 62; or two or more persons, who are at least 50 years of age but below the age of 62, living together; or one or more persons who are at least 50 years of age but below the age of 62, living with one or more live-in aides.

* * * * *

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 6. The authority citation for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

■ 7. In § 200.3, paragraph (a) is revised to read as follows:

§ 200.3 Definitions.

(a) The definitions “department”, “elderly person”, “family”, “HUD”, and “Secretary”, as used in this subpart A, shall have the meanings given these terms in 24 CFR part 5.

* * * * *

■ 8. Section 200.300 is revised to read as follows:

§ 200.300 Nondiscrimination and fair housing policy.

Federal Housing Administration programs shall be administered in accordance with:

(a) The nondiscrimination and fair housing requirements set forth in 24 CFR part 5, including the prohibition on inquiries regarding sexual orientation or gender identity set forth in 24 CFR 5.105(a)(2); and

(b) The affirmative fair housing marketing requirements in 24 CFR part 200, subpart M and 24 CFR part 108.

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 9. The authority citation for 24 CFR part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715z–16, and 1715u; 42 U.S.C. 3535(d).

■ 10. In § 203.33, paragraph (b) is revised to read as follows:

§ 203.33 Relationship of income to mortgage payments.

* * * * *

(b) Determinations of adequacy of mortgagor income under this section shall be made in a uniform manner without regard to race, color, religion, sex, national origin, familial status, handicap, marital status, actual or perceived sexual orientation, gender identity, source of income of the mortgagor, or location of the property.

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION PAYMENT FOR RENTAL PROJECTS

■ 11. The authority citation for 24 CFR part 236 continues to read as follows:

Authority: 12 U.S.C. 1715b and 1715z–1; 42 U.S.C. 3535(d).

■ 12. Section 236.1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 236.1 Applicability, cross-reference, and savings clause.

(a) *Applicability.* * * * The definition of “family” in 24 CFR 200.3(a) applies to any refinancing of a mortgage insured under section 236, or to financing pursuant to section 236(j)(3) of the purchase, by a cooperative or nonprofit corporation or association of a project assisted under section 236.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 13. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d), and 5301–5320.

Subpart A—General Provisions

■ 14. In § 570.3, the definitions of “family” and “household” are revised to read as follows:

§ 570.3 Definitions.

* * * * *

Family refers to the definition of “family” in 24 CFR 5.403.

Household means all persons occupying a housing unit. The occupants may be a family, as defined in 24 CFR 5.403; two or more families living together; or any other group of related or unrelated persons who share living arrangements, regardless of actual or perceived, sexual orientation, gender identity, or marital status.

* * * * *

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 15. The authority citation for 24 CFR part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901–12912.

■ 16. In § 574.3, the definition of “family” is revised to read as follows:

§ 574.3 Definitions.

* * * * *

Family is defined in 24 CFR 5.403 and includes one or more eligible persons living with another person or persons, regardless of actual or perceived sexual orientation, gender identity, or marital status, who are determined to be important to the eligible person or person’s care or well-being, and the surviving member or members of any family described in this definition who were living in a unit assisted under the HOPWA program with the person with AIDS at the time of his or her death.

* * * * *

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 17. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

■ 18. In § 891.105, the definition of “family” is added to read as follows:

§ 891.105 Definitions.

* * * * *

Family is defined in 24 CFR 5.403.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 19. The authority citation for 24 CFR part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 20. In § 982.4, remove the colon at the end of paragraph (a) subject heading and add a period in its place, revise paragraph (a)(1), remove paragraph (a)(2), and redesignate paragraph (a)(3) as paragraph (a)(2); and revise the definition of “family” in paragraph (b) to read as follows:

§ 982.4 Definitions.

(a) *Definitions found elsewhere—(1) General definitions.* The following terms are defined in part 5, subpart A of this title: 1937 Act, covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, MSA, other person under the tenant’s control, public housing, Section 8, and violent criminal activity.

* * * * *

(b) * * *

Family. A person or group of persons, as determined by the PHA consistent

with 24 CFR 5.403, approved to reside in a unit with assistance under the program. See “family composition” at § 982.201(c).

* * * * *

■ 21. In § 982.201, paragraph (c) is revised to read as follows:

§ 982.201 Eligibility and targeting.

* * * * *

(c) *Family composition.* See definition of “family” in 24 CFR 5.403.

* * * * *

Dated: January 27, 2012.

Shaun Donovan,

Secretary.

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