

FDA believes that the special controls, in addition to the general controls, address these risks to health and provide reasonable assurance of the safety and effectiveness.

A magnetic surgical instrument system device is not safe for use except under the supervision of a practitioner licensed by law to direct the use of the device. As such, the device is a prescription device and must satisfy prescription labeling requirements (see 21 CFR 801.109, *Prescription devices*).

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the magnetic surgical instrument system they intend to market.

## II. Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## III. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801, regarding labeling have been approved under OMB control number 0910–0485.

### List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs, 21 CFR part 878 is amended as follows:

## PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for part 878 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 878.4815 to subpart E to read as follows:

### § 878.4815 Magnetic surgical instrument system.

(a) *Identification.* A magnetic surgical instrument system is a prescription device used in laparoscopic surgical procedures consisting of several components, such as surgical instruments, and a magnetic controller. The magnetic controller is provided separately from the surgical instrument and is used outside the patient. The external magnetic controller is magnetically coupled with the internal surgical instrument(s) at the surgical site to grasp, hold, retract, mobilize, or manipulate soft tissue and organs.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) In vivo performance data must demonstrate that the device performs as intended under anticipated conditions of use. Testing must demonstrate the ability of the device to grasp, hold, retract, mobilize, or manipulate soft tissue and organs.

(2) Non-clinical performance data must demonstrate that the system performs as intended under anticipated conditions of use. The following performance characteristics must be tested:

(i) Magnetic field strength testing characterization to identify the distances from the magnet that are safe for patients and users with ferromagnetic implants, devices, or objects.

(ii) Ability of the internal surgical instrument(s) to be coupled, de-coupled, and re-coupled with the external magnet over the external magnet use life.

(3) The patient-contacting components of the device must be demonstrated to be biocompatible.

(4) Performance data must demonstrate the sterility of the device components that are patient-contacting.

(5) Methods and instructions for reprocessing reusable components must be validated.

(6) Performance data must support shelf life by demonstrating continued sterility of the device or the sterile components and device functionality over the labeled shelf life.

(7) Training must be developed and validated by human factors testing and analysis to ensure users can follow the instructions for use to allow safe use of the device.

(8) Labeling must include:

(i) Magnetic field safe zones.

(ii) Instructions for proper device use.

(iii) A screening checklist to ensure that all patients and operating staff are screened from bringing ferromagnetic implants, devices, or objects near the external magnet.

(iv) Reprocessing instructions for any reusable components.

(v) Shelf life.

(vi) Use life.

Dated: September 15, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 5

[Docket No. FR 5863–F–02]

RIN 2506–AC40

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

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Final rule.

**SUMMARY:** Through this final rule, HUD ensures equal access for individuals in accordance with their gender identity in programs and shelter funded under programs administered by HUD's Office of Community Planning and Development (CPD). This rule builds upon HUD's February 2012 final rule entitled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" (2012 Equal Access Rule), which aimed to ensure that HUD's housing programs would be open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. The 2012 Equal Access Rule, however, did not address how transgender and gender non-conforming individuals should be accommodated in temporary, emergency shelters, and other buildings and facilities used for shelter, that have physical limitations or configurations that require and that are permitted to have shared sleeping quarters or shared bathing facilities. This final rule follows HUD's November 2015 proposed rule, which addressed

this issue and solicited public comment on measures to ensure that recipients and subrecipients of CPD funding—as well as owners, operators, and managers of shelters and other buildings and facilities and providers of services funded by CPD—grant equal access to such facilities and services to individuals in accordance with an individual's gender identity.

This rule amends HUD's definition of "gender identity" to more clearly reflect the difference between actual and perceived gender identity and eliminates the prohibition on inquiries related to sexual orientation or gender identity, so that service providers can ensure compliance with this rule. The removal of the prohibition on inquiries related to sexual orientation or gender identity does not alter the requirement to make housing assisted by HUD and housing insured by the Federal Housing Administration (FHA) available without regard to actual or perceived sexual orientation or gender identity. Lastly, without changing the scope of the requirement to provide equal access without regard to sexual orientation, this rule makes a technical amendment to the definition of "sexual orientation," which HUD adopted from the Office of Personnel Management's (OPM) definition of the term in 2012, to conform to OPM's current definition.

In order to ensure that individuals are aware of their rights to equal access, HUD is publishing elsewhere in this issue of the **Federal Register** for public comment, in accordance with the Paperwork Reduction Act of 1995, a document entitled "Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status" for owners or operators of CPD-funded shelters, housing, facilities, and other buildings to post on bulletin boards and in other public spaces where information is typically made available.

**DATES:** *Effective:* October 21, 2016.

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

**SUPPLEMENTARY INFORMATION:**

## I. Background

### A. HUD's Previous Efforts To Ensure Equal Access

On February 3, 2012, at 77 FR 5662, HUD issued its 2012 Equal Access Rule, which defined the terms "sexual orientation" and "gender identity," and required that HUD-assisted housing, including all housing funded by CPD, and housing insured by FHA be made available to individuals and families without regard to actual or perceived sexual orientation, gender identity, or marital status. The 2012 Equal Access Rule also generally prohibited inquiries into sexual orientation or gender identity for the purpose of determining eligibility for, or availability of, such housing. In the 2012 Equal Access Rule, HUD declined to adopt a national policy on the placement of transgender persons in temporary, emergency shelters with shared sleeping quarters or shared bathing facilities, deciding instead to conduct research and monitor its programs to determine whether additional guidance or national policy was needed to ensure equal access for transgender and gender nonconforming persons.<sup>1</sup> HUD also decided to conduct a similar review to determine whether additional guidance was needed with regard to the prohibition on inquiries.

As a result of its review, HUD determined that the 2012 Equal Access Rule did not adequately address the significant barriers faced by transgender and gender nonconforming persons when accessing temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities. Specifically, HUD found that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations. For instance, at a listening session on lesbian, gay, bisexual, and transgender (LGBT) issues conducted with the U.S. Interagency Council on Homelessness, homeless service providers reported that transgender persons are often discriminatorily excluded from shelters or face dangerous conditions in the shelters that correspond to their sex assigned at birth. Some commenters reported that, if given the choice between a shelter designated for assigned birth sex or sleeping on the

streets, many transgender shelter-seekers would choose the streets.

HUD also investigated individual cases where transgender persons were not provided equal access as required by the 2012 Equal Access Rule, or they faced unlawful discrimination under the Fair Housing Act. HUD also reviewed national research that revealed that lack of access to shelter for transgender and gender nonconforming persons, particularly those who were also homeless youths, was a pervasive problem and reviewed the efforts of other Federal agencies to provide equal access to transgender and gender nonconforming persons. HUD found that multiple agencies prohibit discrimination on the basis of sexual orientation and gender identity and also require that grant recipients treat transgender persons consistent with their gender identity. Specifically, HUD found guidance from other Federal agencies supporting the position that grant recipients could accommodate transgender individuals in accordance with their gender identity in Federal programs, including those program that funded single-sex facilities.

On February 20, 2015, CPD issued guidance, entitled "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities" (CPD-15-02), which applied to the following CPD programs: Housing Opportunities for Persons With AIDS (HOPWA), Emergency Solutions Grants (ESG), and Continuum of Care (CoC). This guidance clarified that HUD expected recipients and subrecipients under these programs to base placement decisions on the gender with which a person identifies—and not on another person's stereotype-based complaints—taking into consideration health and safety concerns and giving serious consideration to the transgender or gender nonconforming person's own personal health and safety concerns. The guidance also outlined best practices for providers.

### B. The November 2015 Proposed Rule

On November 20, 2015, at 80 FR 72642, following careful review of information about the treatment of transgender persons in temporary, emergency shelters, HUD proposed a second Equal Access rule, entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs" (CPD Equal Access). In this rulemaking, HUD proposed to add a new section to its regulations in 24 CFR part 5 that would require recipients and subrecipients of assistance under CPD programs—as well as owners, operators,

<sup>1</sup> Gender nonconforming persons are persons who do not follow other people's ideas or stereotypes about how they should look or act based on their sex assigned at birth.

and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by CPD programs—to provide equal access to programs, benefits, services, and accommodations in accordance with an individual's gender identity.

Specifically, the rule proposed to add to 24 CFR part 5 a new § 5.106, which would contain equal access provisions tailored to CPD programs. Section 5.106(a) proposed to identify the scope of its coverage as including recipients and subrecipients of assistance under the following CPD programs: HOME Investment Partnerships (HOME) (24 CFR part 92), Community Development Block Grant (CDBG) (24 CFR part 570), HOPWA (24 CFR part 574), ESG (24 CFR part 576), CoC (24 CFR part 578), as well as owners, operators, managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any of these programs.

Section 5.106(b) proposed to require CPD recipients, subrecipients, owners, operators, managers, and providers to establish or amend, as necessary, and administer program admissions, occupancy, and operating policies and procedures, including policies and procedures to protect individuals' privacy and security, so that equal access to programs, shelters, other buildings and facilities, benefits, services, and accommodations are provided to individuals in accordance with their gender identity. That section also proposed to require that such equal access be provided in a manner that affords equal access to the individual's family.

Section 5.106(c) proposed to require that the placement and accommodation of individuals in facilities that are permitted to be single-sex must be made in accordance with the individual's gender identity. The proposed rule provided that, under narrow circumstances, a written case-by-case determination could be made as to whether an alternative accommodation is necessary to ensure health and safety. The proposed rule contained a prohibition for such a determination to be based solely on a person's actual or perceived gender identity or on complaints of other shelter residents when those complaints are based on actual or perceived gender identity. It also proposed to prohibit the denial of appropriate placement based on a perceived threat to health or safety that can be mitigated some other, less burdensome way (e.g., by providing the transgender shelter seeker the option to use single occupant bathing facilities). Lastly, the rule proposed that, to avoid

unwarranted denials of placement in accordance with an individual's gender identity, decisions to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated.

Section 5.106(d) proposed to require that when a case-by-case determination based on health and safety is made under § 5.106(c), the entity providing the alternative accommodation must provide either (1) equivalent alternative accommodation, benefits, and services or (2) a referral to a comparable alternative program with availability that meets the needs of the individual.

Section 5.106(e) proposed to require recipients, subrecipients, or providers to keep records of compliance with paragraphs (b) and the case-by-case determinations under paragraph (c) of this section, including the facts, circumstances, and reasoning relied upon that lead to any alternative admission, accommodation, benefit, or service to an individual and the individual's family; the facts and circumstances regarding the opportunities to access alternative accommodations provided to an individual and the individual's family; and the outcomes regarding referral to an alternative program of an individual and the individual's family.

In addition, the rule proposed to amend the definition of "gender identity" at § 5.100 to separate the definitions of "actual" and "perceived" gender identity. In brief, the rule proposed to replace HUD's current definition, which mirrored the definition in the Matthew Shepard/James Byrd Hate Crimes Prevention Act of 2009 (Public Law 114–38, approved October 28, 2009) and instead adopt a definition that clarified the difference between actual and perceived gender identity.

Lastly, the proposed rule sought to remove the prohibition on inquiries provision at § 5.105(a)(2)(ii), which prohibited providers in most circumstances from asking individuals their sexual orientation or gender identity. HUD reasoned that the provision raised several legitimate questions about implementation, and its removal would allow temporary, emergency shelters or other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities to ask an individual's gender identity for nondiscriminatory purposes, such as to determine the appropriate placement for the individual or the number of

bedrooms to which a household is entitled.

### *C. Recent Developments in the Interpretation of Federal Law and Applicable Research*

After HUD issued the November 2015 proposed rule, the Center for American Progress released a new study specifically focusing on discrimination experienced by transgender individuals seeking access to shelters, the Department of Justice (DOJ) and the Department of Education issued guidance for educators on providing equal access for transgender students in schools, and the Department of Health and Human Services issued a final rule to ensure equal access to health programs and activities administered by that Department or established under title I of the Affordable Care Act.

On January 7, 2016, the Center for American Progress released the results of a discrimination telephone test, carried out across four States, that measured the degree to which transgender homeless women can access a shelter in accordance with their gender identity, as well as the types of discrimination and mistreatment they face in the process.<sup>2</sup> The study consisted of 100 phone calls to homeless shelters in four States, over 3 months, by testers who identified themselves as transgender women seeking access to both women's shelters and general shelters. The study found that only 30 percent of the shelters contacted by the testers were willing to house the transgender women with other women, 13 percent offered to house the transgender women in isolation or with men, 21 percent refused service altogether, and another 21 percent were unsure or unclear as to whether they could house transgender women with other women. The survey results also found that women's shelters were more likely to provide services consistent with an individual's gender identity than were mixed gender shelters. During interactions on the phone with shelter employees, testers experienced the following: they were often referred to using the wrong gender or shelter employees made other statements to discredit their gender identity, shelter employees made references to the testers' genitalia or to surgery as requirements for appropriate housing, and shelter employees stated

<sup>2</sup> Caitlin Rooney, et al., Center for American Progress and the Equal Rights Center *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, January 7, 2016, available at: <https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf>.

that other residents would be made uncomfortable or unsafe by the tester. Of the shelters called, 27 percent had received HUD funds at some point.

In May 2016, DOJ and the Department of Education released guidance summarizing the legal obligations of schools regarding transgender students.<sup>3</sup> The guidance specifically emphasizes that schools must “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.” In sex-segregated activities and facilities, transgender students “must be allowed to participate in such activities and access such facilities consistent with their gender identity.” The guidance also requires schools to provide a safe environment for all students, including transgender students, and requires that schools treat students consistent with their gender identity regardless of records or identification documents indicating a different sex.

Also in May 2016, the Department of Health and Human Services issued final regulations entitled “Nondiscrimination in Health Programs and Activities,” which implement section 1557 of the Affordable Care Act.<sup>4</sup> Section 1557 prohibits discrimination in health programs and activities on the basis of sex, and the rule provides that “a covered entity shall treat individuals consistent with their gender identity, except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual’s sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.”

## 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:

In § 5.100, the proposed definition of “perceived gender identity” is modified so that the definition states that “perceived gender identity” means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, sex

assigned at birth, or identification in documents. This change was made in response to public comments stating that transgender persons often face difficulty in being accommodated in accordance with their gender identity because it is difficult to obtain identity documents that accurately list their gender identity. The words “identified in documents” were added to the definition to make clear that the identification of gender or sex on an individual’s identity document may be different than a person’s actual gender identity. The definition of “gender identity” in the final rule, which is unchanged from the proposed rule, makes clear that “gender identity” means the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity. Reading these definitions together, “gender identity” is therefore determined regardless of the gender identified on an individual’s identity documents.

This rule also makes a technical amendment to the definition of “sexual orientation.” The 2012 Equal Access Rule defined “sexual orientation” as “homosexuality, heterosexuality, or bisexuality,” following a definition that OPM used in the context of the Federal workforce in its publication “Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights.” OPM’s publication was revised in June 2015, and HUD is amending its definition to conform to the new OPM definition, which is “sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex.” (See <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf>.) This change in definition does not change the coverage provided by the prior definition but is simply intended to use terminology that is up-to-date.

In § 5.105(a)(2), HUD adopts the proposal to eliminate the inquiries provision in § 5.105(a)(2)(ii). With the removal of § 5.105(a)(2)(ii), § 5.105(a)(2)(i) is redesignated as § 5.105(a)(2).

In § 5.106, HUD makes several changes. HUD has changed the heading of this section from “Providing access in accordance with the individual’s gender identity in community planning and development programs” to “Equal access in accordance with the individual’s gender identity in community planning and development

programs.” Although this is not a substantive change, the change appropriately emphasizes that the purpose of the rule is equal access in accordance with an individual’s gender identity in CPD programs generally. Equal access ensures that, when consideration of sex is prohibited or not relevant, individuals will not be discriminated against based on actual or perceived gender identity, and where legitimate consideration of sex or gender is appropriate, such as in a facility providing temporary, short term shelter that is not covered by the Fair Housing Act<sup>5</sup> and which is legally permitted to operate as a single-sex facility,<sup>6</sup> the individual’s own self-identified gender identity will govern.

Section 5.106(a) is revised at the final rule stage to clarify that § 5.106 applies to recipients and subrecipients of assistance from CPD, which include the specific programs identified at the proposed rule stage (HOME, CDBG, HOPWA, ESG, and CoC), as well as to the Housing Trust Fund program (with regulations at 24 CFR part 93) and the Rural Housing Stability Assistance Program (with regulations to be codified in 24 CFR part 579). As noted throughout the proposed rule, the rule was always intended to apply to recipients and subrecipients of CPD programs, as well as those who administer programs and services and provide temporary, emergency shelter funded by CPD programs, and HUD did not intend to exclude the new Housing Trust Fund and Rural Housing Stability

<sup>5</sup> The Fair Housing Act prohibits discrimination in the sale, rental, making unavailable, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, and national origin, and thus prohibits making housing unavailable to a person because of that person’s sex. 42 U.S.C. 3601 *et seq.* The Fair Housing Act contains no exemptions that permit covered housing to be sex-segregated. See 42 U.S.C. 3603(b) (limited exemptions from Fair Housing Act coverage for sales of certain single family homes and for rooms or units in certain owner-occupied dwellings), and § 3607 (exemptions from Fair Housing Act coverage for private clubs and religious organizations).

<sup>6</sup> Temporary, emergency shelters and other buildings and facilities that are not covered by the Fair Housing Act because they provide short-term, temporary accommodations may provide sex-segregated accommodations, which they sometimes do to protect the privacy and security of individuals when the buildings and facilities have physical limitations or configurations that require shared sleeping quarters or shared bathing facilities. For purposes of this rule, shared sleeping quarters or shared bathing facilities are those that are designed for simultaneous accommodation of multiple individuals in the same space. For example, a single-user bathing facility with a lock on the door is not designated for simultaneous occupancy by multiple individuals, so it is not a “shared bathing facility” for purposes of the Equal Access Rule or this rule.

<sup>3</sup> Dear Colleague Letter on Transgender Students May 13, 2016, <https://www.justice.gov/opa/file/850986/download>.

<sup>4</sup> See 81 FR 31375, <https://www.federalregister.gov/articles/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>.

Assistance programs from the list of CPD programs in this paragraph.

Section 5.106(b) addresses the admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers covered by this rule. Revised paragraph (b) adds that policies and procedures to protect health and safety, as well as privacy and security noted in the proposed rule, must be established, maintained, or amended, as necessary, and provides that all policies must be administered in a nondiscriminatory manner. HUD recognizes that in the temporary, emergency shelters covered by this rule, privacy, security, safety, and health concerns may arise as a result of the varied populations that reside in such facilities at any given time. The rule requires policies and procedures, if such policies and procedures have not already been updated, to reflect the obligation and to document the commitment of the provider to maintain a healthy and safe environment for all occupants and respect individual privacy without doing so in a way that is discriminatory or violates applicable Federal laws and regulations.

HUD also revises paragraph (b) to add a provision that the policies and procedures must ensure that individuals are not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity. This revision was made in response to public comment advising that transgender persons and gender nonconforming persons are often asked inappropriate, intrusive questions; asked to provide evidence about their physical anatomy; or asked for medical records relating to their gender identity or identification documents that record their gender identity. There are multiple reasons why this documentation is problematic and prohibited by this rule. Homeless persons encounter difficulties in maintaining their identification documents, and individuals whose gender identities differ from sex assigned at birth experience varying levels of difficulty in updating gender markers on identification documents. These barriers make it likely that an individual seeking homeless services and whose gender identity differs from their sex assigned at birth will possess identification documents that do not reflect that individual's gender identity, if they have identification documents at all. Further, gender identity is distinct from sex assigned at birth, is not associated with physical anatomy, and may not be indicated in medical

records. For these reasons, HUD agrees with public commenters that it is important that transgender or gender nonconforming persons can self-identify their gender identity orally and not be asked intrusive questions or asked to provide documentary, physical, or medical evidence to prove their gender identity.

Lastly, revised paragraph (b) also requires that such revisions ensure that amendments to CPD programs policies and procedures continue to include the existing requirement in § 5.105(a)(2) that individuals are provided equal access to housing in CPD programs without regard to actual or perceived gender identity. While this rule's focus is on programs, owners, operators, and managers of shelters, buildings, and other facilities and providers of CPD-funded services that were not covered under HUD's 2012 Equal Access Rule, housing under CPD programs has already been required to ensure equal access to individuals based on their gender identity. HUD adds this provision to clarify that, when amending CPD program policies and procedures, they should continue to reflect the existing 2012 Equal Access Rule requirement that housing be made available without regard to gender identity.

In § 5.106(c), which addresses placement and accommodation in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, HUD removes the proposed rule language that under narrow circumstances, a written case-by-case determination could be made on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. Public commenters expressed concern that the exception could be inappropriately used to avoid compliance with the equal access requirement, and that this "exception" also targeted transgender individuals as a cause of concern with respect to health and safety. HUD was persuaded by the public commenters that the "exception" provision had the opposite effect than that intended by HUD. HUD's intention in the inclusion of this language was to strive to ensure the health and safety of transgender individuals in temporary, emergency shelters and other buildings and facilities. It was not to indicate that the very presence of transgender individuals was a cause for health and safety concerns nor to indicate, by allowing alternative accommodation,

that HUD's only concern was the health and safety of transgender individuals and HUD was not concerned about any other occupants. HUD's regulations for the ESG program and the implementing guidance, make clear that temporary, emergency shelters, and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities have had, and continue to have, a responsibility to create a safe environment for all occupants, particularly those of special populations (see 24 CFR 576.400(e)(3)(iii) for more information).

This final rule thus revises paragraph (c) of § 5.106 to provide that placement and accommodation of individuals shall be made in accordance with an individual's gender identity, and it removes language that permits an exception to this rule where a provider makes a written case-by-case determination on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. There are various measures that HUD's providers may take to fulfill their duty to create a safe environment for all, including transgender and gender nonconforming individuals, and to ensure that HUD-funded projects are free from discrimination. As preemptive steps, providers are strongly encouraged to post a notice of rights under this rule and under HUD's 2012 Equal Access Rule on bulletin boards and in other public spaces where information is made available, to clearly establish expectations. In order to ensure that individuals are aware of their rights to equal access, HUD proposes to require owners and operators of CPD-funded shelters and facilities to post on bulletin boards and in other public spaces where information is typically made available a notice entitled "Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD's Community Planning and Development Programs," which HUD is publishing in today's **Federal Register** for public comment, in accordance with the Paperwork Reduction Act of 1995. In addition, HUD Technical Assistance materials provide a sample antidiscrimination policy that providers may consider adopting to further clarify expectations to persons as they enter the project.<sup>7</sup>

<sup>7</sup> See *Equal Access for Transgender People: Supporting Inclusive Housing and Shelters* <https://www.hudexchange.info/resources/documents/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf>.

Even with antidiscrimination policies clearly articulated, occupants may express concerns or engage in other behavior toward transgender or gender nonconforming persons. If some occupants initially present concerns about transgender or gender nonconforming occupants to project staff and managers, staff should treat those concerns as opportunities to educate and refocus the occupants. HUD recognizes that, even then, conflicts may persist and complaints may escalate to verbal or physical harassment. In these situations, providers should have policies and procedures in place to support residents and staff in addressing and resolving conflicts that escalate to harassment. These policies should include specific behaviors that violate standards of respectful behavior, escalate corrective actions if an individual repeats the same violation of standards after educational opportunities are offered, and focus corrective actions on aggressors who violate project rules, not on the person targeted by the harassment. If an occupant continues to harass a transgender individual, the provider should consider requiring that the harassing occupant stay away from the transgender individual, making changes in sleeping arrangements without limiting the freedom of the transgender individual, or pursuing other interventions. When appropriate, providers may consider expelling harassing residents, or any staff or volunteer members who perpetuate discrimination. In no instance, however, should any steps taken to address harassment or discrimination involve expulsion of harassed occupants.

Revised paragraph (c) provides for post-admission accommodations, where after an individual has been admitted to a temporary, emergency shelter, or other building or facility with shared sleeping quarters or shared bathing facilities, the provider must take non-discriminatory steps that may be necessary and appropriate to address privacy concerns raised by all residents or occupants, and, as needed, update its admissions, occupancy, and operating policies and procedures. These provisions apply to all individuals, regardless of gender identity. If an individual requests certain accommodations because of privacy concerns, staff may offer those accommodations to that individual but may not require that the individual use the accommodations. For example, if available, staff may offer that occupant a room, floor, or bed that is close to staff workstations or access to rooms, floors, or beds set aside for residents with

increased vulnerability. At the request of an individual, providers may also offer use of a single-occupant bathroom or provide certain times during the day that a shared bathroom can be scheduled by any client with a request to use a private bathing facility. If feasible, providers can ensure that toilet and shower stalls have locking doors or, at a minimum, curtains to allow for modesty and privacy. For shower use, providers may consider implementing a schedule for all clients if communal showers are the only available type of shower. HUD stresses that all such accommodations should be offered only to fulfill the request of individuals seeking accommodations for themselves, should be available to clients based on a variety of factors that can increase one's vulnerability, and should not be restricted for use only by transgender or gender nonconforming residents. In no case may a provider's policies isolate or segregate transgender or gender nonconforming occupants.

This final rule removes from § 5.105(d) in the proposed rule the language relating to referrals, HUD has removed the provision from the proposed rule that permitted housing providers to make a written case-by-case determination that a transgender individual should receive an alternative accommodation for health and safety reasons. This does not preclude the possibility that any occupant may request a referral to an alternate project for health and safety reasons, and in such cases staff may provide a referral or offer clients a hotel or motel voucher.<sup>8</sup>

This final rule redesignates the recordkeeping requirements from § 5.106(e) to 5.106(d) and states that providers must document and maintain, for a period of 5 years, records of compliance with the requirements of this rule regarding establishing or amending policies and procedures. This rule also removes the more specific requirements related to case-by-case determinations and referrals.

To strengthen enforcement mechanisms for this rule, HUD is publishing in today's **Federal Register** a notice for public comment, in accordance with the Paperwork Reduction Act of 1995, entitled "Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD's Community Planning and Development Programs." HUD proposes to require owners and

<sup>8</sup> In the ESG program, a hotel or motel voucher may be offered only if there are no other accessible or appropriate emergency shelter beds available for that night.

operators of CPD-funded shelters and facilities to post this notice on bulletin boards and in other public spaces where information is typically made available.

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

#### A. Overview of Public Comments

The public comment period for the November 20, 2015, proposed rule closed on January 19, 2016. As of the close of the comment period, HUD received approximately 184 public comments, in addition to a number of mass mailings, from a variety of commenters, including housing authorities, direct legal services providers, community development agencies, homeless shelters, healthcare providers, social workers, clergy, counselors, nonprofit social service providers, and LGBT advocacy organizations. 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 opposing the rule stated that it failed to balance the needs of all shelter occupants and lacks flexibility. All comments can be viewed at <http://www.regulations.gov>.

#### 1. Commenters Supporting the Rule

Many commenters supporting the rule suggested no changes and offered a variety of reasons why they supported the rule and why HUD should conclude the rulemaking as expeditiously as possible. Commenters stated that transgender persons, like all persons, need access to safe shelter and housing and that transgender persons are some of the most vulnerable members of society. Commenters stated that transgender individuals are disproportionately represented in the homeless population because of the frequent discrimination they face at home, in school, and on the job. Some cited a survey showing that one in five transgender or gender nonconforming individuals experienced homelessness at some point in their lives because of their transgender status. Commenters stated that transgender individuals were at greater overall risk of violence, murder, and homelessness-related death than people who are not transgender and may also experience mental and physical health problems because of the abuse they face.

Commenters stated that the rule would promote civil rights and expanded housing opportunity by addressing the effects of stigma on equal access to housing for transgender and

gender nonconforming persons. Commenters supporting the rule frequently stated that the rule would eliminate major barriers to access to safe, temporary, emergency shelter and other facilities and programs for transgender and gender nonconforming persons, particularly vulnerable subgroups within the population that need access to such accommodations. Some commenters stated that the rule will yield other positive societal outcomes. Many commenters provided extensive data to support the rule, including a January 2016 study conducted by the Center for American Progress that found, among other things, that only 30 percent of shelters studied were willing to accommodate transgender women in accordance with their gender identity. The commenters stated that LGBT providers were twice as likely to be willing to provide a shelter-seeker with accommodations in accordance with the individual's gender identity; that women's shelters were more likely than mixed-gender shelters to provide a shelter-seeker with accommodations in accordance with the individual's gender identity; and that many shelters did not correctly classify shelter-seekers in accordance with the individual's gender identity or stated that transgender or gender nonconforming individuals would have to submit to invasive medical examinations or inquiries, or demonstrate that they had undergone surgery, as a prerequisite to obtaining shelter.<sup>9</sup>

Other commenters supporting HUD's rule stated that the rule is needed because the willingness to house transgender people in accordance with their gender identity currently varies, depending on State laws and shelter type, and HUD's rule would provide some consistency. Commenters stated that because 32 States lack explicit gender identity protections in housing, HUD's rule will help ensure equal access to shelters nationwide for transgender and gender nonconforming individuals. Commenters said that even in jurisdictions with express protections for transgender individuals, discriminatory practices still persist. Commenters stated that HUD's rule is in step with recent Federal case law holding that discrimination on the basis of sexual orientation and gender identity constitutes unlawful discrimination on the "basis of sex," in

violation of Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972.

## 2. Comments Opposing the Rule

Commenters opposing the rule provided many reasons for their opposition but the primary reason concerned the safety of nontransgender individuals in a shelter. Commenters stated that the rule should not open female, single-sex spaces to individuals who were born male, citing their fear that individuals could deliberately misrepresent their gender identities and compromise the privacy or safety of vulnerable women and children. Commenters stated that there is a risk of causing female survivors of male-perpetrated domestic or sexual violence, who are disproportionately represented in the homeless population and shelters, to feel unsafe. Commenters said the rule does not respect legitimate safety and privacy concerns of biological women, and that the rule treats women's fear of being assaulted in a shelter as unreasonable "bigotry." Commenters stated that the rule should require providers to create segregated facilities for transgender individuals, rather than placing individuals into male or female facilities that correspond to the individual's gender identity. Commenters stated that transgender men are also vulnerable to assault in shelters. Several commenters opposing the rule cited to articles recounting the stories of individuals who had been raped in shelters. A commenter stated that it is untrue that transgender women can be safe only in a women's shelter. Commenters stated that the rule must balance the various needs, perspectives, personal histories, and expectations of privacy of both transgender individuals and other shelter seekers. Commenters stated that the rule should provide equal consideration to the health and safety concerns of transgender and nontransgender individuals and guidelines on what constitutes threats to health and safety for transgender and nontransgender individuals.

## 3. Responses to Comments in Support and Opposition

HUD appreciates all of the comments offered in response to HUD's proposed rule. Comments supporting the rule as well as comments opposing the rule gave HUD much to consider in the development of this final rule. While HUD is proceeding with this rulemaking, HUD is making the changes highlighted in Section II of this preamble.

## B. Significant Public Comments and HUD's Responses

This section presents significant issues raised by commenters and HUD's responses to these comments. The issues presented in this section highlight changes requested by commenters, and questions about or requests for clarifications about certain provisions of the rule.

*Comment:* Commenters stated that the rule exceeds HUD's current statutory mandate because Congress has not given HUD the authority to prohibit discrimination based on gender identity. Commenters stated that the rule's definitions of "gender identity" and "perceived gender identity" are overbroad and exceed HUD's authority by creating a new protected class and that HUD failed to specify the basis for this prohibition of discrimination.

*HUD Response:* The rule creates additional program requirements to ensure equal access for transgender and gender nonconforming persons, in accordance with their gender identity, in shelters, buildings, facilities, and programs funded in whole or in part by CPD. The creation of such program requirements 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 mission encompasses providing shelter for transgender and gender nonconforming persons, who have faced significant difficulty in obtaining access to shelters, and buildings and facilities that provide shelter. Excluding any eligible person from HUD-funded temporary, emergency shelters, buildings, facilities, housing, or programs because of that person's gender identity or nonconformance with gender stereotypes would contravene 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 HUD with serving the existing housing needs of all Americans.<sup>10</sup>

Congress has not only given HUD this broad mission but also given HUD broad authority to fulfill this mission and implement its responsibilities through rulemaking. Section 7(d) of the Department of Housing and Urban

<sup>9</sup>Center for American Progress, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (Jan. 7, 2016), available at <https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf>.

<sup>10</sup>See section 2 of the Housing Act of 1949 (42 U.S.C. 1441); section 2 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701t), sections 101 and 102 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12701-702), and section 2(b) of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 note).

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.” Moreover, as discussed in the preamble to HUD’s 2012 Equal Access Rule and as discussed in greater detail in response to the following comment, HUD is charged with administering and enforcing the Fair Housing Act, which prohibits discrimination on the basis of protected characteristics, including sex. Discrimination because of gender identity is covered within the Fair Housing Act’s prohibition of sex discrimination. In 2010, HUD issued a memorandum recognizing that sex discrimination includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion with regard to gender identity claims, “clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”<sup>11</sup> Following the EEOC’s decision, the U.S. Attorney General also concluded that:

the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination “because of . . . sex” includes discrimination because an employee’s gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.<sup>12</sup>

HUD reaffirms its view that discrimination based on gender identity is sex discrimination.

*Comment:* HUD received comments on sex discrimination under the Fair Housing Act and the proposed requirement that individuals be provided accommodations in accordance with their gender identity. A commenter stated that, while it is

<sup>11</sup> *Macy v. Dept. of Justice*, No. 0120120821, 2012 EEO PUB LEXIS 1181, \*13 (EEOC Apr. 20, 2012); see also *Lusardi v. Dept. of the Army*, No. 0120133395, 2015 EEO PUB LEXIS 896, \*17 (EEOC Apr. 1, 2015).

<sup>12</sup> Attorney General Memorandum, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), posted at <http://www.justice.gov/file/188671/download>. Similarly, the Office of Personnel Management revised its nondiscrimination regulations to make clear that sex discrimination under Title VII includes discrimination based on gender identity. See, e.g., 5 CFR 300.102–300.103; see also OFCCP Directive 2014–02, Gender Identity and Sex Discrimination (Aug. 19, 2014) (stating that discrimination based on gender identity or transgender status is discrimination based on sex), posted at [http://www.dol.gov/ofccp/regs/compliance/directives/Directive\\_2014-02\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/directives/Directive_2014-02_508c.pdf).

helpful that HUD already considers the Fair Housing Act’s provision against discrimination on the basis of sex to cover nonconforming gender expression, it would be helpful to make that protection explicit in the new rule.

*HUD Response:* HUD does not believe it is necessary to modify the proposed regulatory text as the commenter recommends. In § 5.100 of the proposed rule, HUD included a definition of “perceived gender identity” in order to differentiate between actual gender identity and perceived gender identity for purposes of this rule and the 2012 Equal Access Rule. Under that definition, perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth. In the final rule, the definition is amended to read as follows: Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth or identified in documents. Because the definition of perceived gender identity included in the proposed rule and adopted by this rule includes gender expression, § 5.105(a)(2) of the rule addresses the commenter’s concern that HUD-assisted or -insured housing shall be made available without regard to an individual’s gender expression. HUD does not believe any revision to the text of § 5.105(a)(2) is necessary to address this concern. Any suggested amendment to Fair Housing Act regulations is outside the scope of this rulemaking.

*Comment:* Some commenters stated that the rule should create similar equal access to housing policies for transgender or gender nonconforming persons in all emergency shelters and facilities. Another commenter stated that the Fair Housing Act does not prohibit discrimination based on gender identity in shelters. A commenter stated that the lack of a law prohibiting discrimination against transgender persons in shelters has not stopped rescue missions and other shelter providers from meeting the diverse needs of transgender persons in crisis.

*HUD Response:* While HUD appreciates that commenters want to have this rule apply to all emergency shelters, the scope of this rulemaking is limited to shelters, other buildings and facilities, and programs funded in whole or in part by CPD. CPD is the HUD office that funds various types of shelters. While HUD believes that all emergency

shelters, including those temporary, emergency shelters that are not subject to the requirements of the Fair Housing Act and that HUD does not fund, should provide equal access in accordance with an individual’s gender identity, imposing those requirements on all emergency shelters is outside the scope of this rulemaking.

With respect to the commenter’s statement about the Fair Housing Act, HUD seeks to clarify that, contrary to the commenter’s stated view, the Fair Housing Act’s prohibition of discrimination because of sex *does* include the prohibition of discrimination based on gender identity or nonconformance with gender stereotypes, which includes discrimination against an individual having a gender identity that does not conform to an individual’s sex assigned at birth. While HUD disagrees with the commenter’s broad statement that there is no law prohibiting discrimination based on gender identity in shelters, HUD agrees that it is beneficial for all shelters, including rescue missions, to continue to provide accommodation and services to transgender persons.

*Comment:* A commenter sought clarity regarding the application of the Fair Housing Act to shelters. The commenter asserted that the Fair Housing Act does not apply to homeless shelters because, in the commenter’s view, they are not “dwellings” covered under the Fair Housing Act. The commenter stated that the term “dwelling” is not well-defined in case law, that emergency shelters are not dwellings under the Act; and that the prohibitions of section 3604 of the Fair Housing Act do not apply to “free” shelters and similar facilities because, in the commenter’s view, such prohibitions only apply to housing that is for sale or rental. The commenter stated that, if HUD adopted a statement that the Fair Housing Act does not apply to homeless shelters, such adoption would “strengthen fair housing and mitigate confusion and misinterpretation among providers, fair-housing agencies, and shelter guests.”

*HUD Response:* The commenter misunderstands HUD’s statement about emergency shelters and the coverage of the Fair Housing Act. Contrary to the commenter’s assertion, HUD does not categorically exclude temporary, emergency shelters providing short-term housing accommodations from coverage under the Fair Housing Act. In fact, HUD’s established policy and regulations explicitly identify homeless shelters and other short-term or transient housing as “dwellings” subject



to the Act.<sup>13</sup> The Act defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families” and includes vacant land.<sup>14</sup> Thus, shelters generally are covered within the definition of dwelling, and many courts have held shelters and other short-term accommodations to be dwellings covered by the Fair Housing Act.<sup>15</sup> However, some shelters may not qualify as a “dwelling” under the Fair Housing Act, and, therefore, HUD has endorsed the following multiple factor analysis for determining whether a shelter is a covered dwelling for purposes of the Fair Housing Act: (1) Length of stay; (2) whether the rental rate for the unit will be calculated based on a daily, weekly, monthly, or yearly basis; (3) whether the terms and length of occupancy will be established through a lease or other written agreement; (4) what amenities will be included inside the unit, including kitchen facilities; (5) how the purpose of the property will be marketed to the public; (6) whether the resident possesses the right to return to the property; and (7) whether the resident has anywhere else to which to return.<sup>16</sup>

Determining whether a particular emergency shelter is a covered dwelling for purposes of the Fair Housing Act

<sup>13</sup> See, e.g., Final Report of HUD Review of Model Building Codes, 65 FR 15740, 15746, 15747 (March 23, 2000) (“HUD specified as dwellings covered by the Act . . . such short-term housing as . . . homeless shelters.”). See also, e.g., 24 CFR 100.201 (the definition of “dwelling units” includes, e.g., sleeping accommodations in shelters intended for occupancy as a residence for homeless persons); Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, 56 FR 9472, 9500 (March 6, 1991) (same); Implementation of the Fair Housing Amendments Act, 54 FR 3232, 3245 (January 23, 1989) (same).

<sup>14</sup> 42 U.S.C. 3602(b).

<sup>15</sup> See, e.g., *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008) (halfway houses for recovering addicts); *Lakeside Resort Enter. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 158–60 (3rd Cir. 2006) (treatment facility); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996) (homeless shelter); *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996) (nursing home); *U.S. v. Columbus Country Club*, 915 F.2d 877, 881 (3rd Cir. 1990) (summer bungalows); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 135 (D. Conn. 2001) (halfway houses for substance abuse treatment); *Lauer Farms, Inc. v. Waushara County Board of Adjustment*, 986 F. Supp. 544, 557, 559 (E.D. Wis. 1997) (migrant farmworker housing); *Louisiana Acorn Fair Hous. v. Quarter House*, 952 F. Supp. 352, 359–60 (E.D. La. 1997) (time-share unit); *Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (homeless shelter); *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (residence for terminally ill); *U.S. v. Hughes Mem'l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (home for needy children).

<sup>16</sup> See 65 FR at 15746.

requires application of the multiple factors to its operation. No single factor is determinative. For instance, the absence of a rental fee or lease does not disqualify an accommodation from coverage under the Fair Housing Act.<sup>17</sup> Further, contrary to the commenter’s view, section 3604 of the Fair Housing Act does not only apply to discriminatory conduct that involves a sale or rental. The Fair Housing Act has no such limitation. In addition to prohibitions against refusals “to sell or rent after making of a bona fide offer” and “to refuse to negotiate for the sale or rental,” section 3604(a) also prohibits “otherwise mak[ing] unavailable or deny[ing]” a dwelling to any person protected under the Fair Housing Act.<sup>18</sup> HUD and courts have long made clear that a variety of conduct that does not involve sale or rental can make housing otherwise unavailable.<sup>19</sup> Similarly, section 3604(b) is not limited to conduct involving a sale or rental, as it also prohibits discrimination in the “provision of services or facilities in connection” with a dwelling.<sup>20</sup> HUD strongly disagrees that adopting a broad statement that the Fair Housing Act does not apply to homeless shelters would strengthen fair housing. HUD also emphasizes that this rule covers CPD-funded shelters and other buildings and facilities regardless of whether the facility qualifies as a dwelling under the Fair Housing Act.

*Comment:* Some commenters stated that the proposed rule is inconsistent with the Fair Housing Act, which forbids sex discrimination as to covered dwellings but not as to free, temporary, emergency shelters or other buildings or facilities, and which, therefore, evinces the intent of Congress to permit single-sex housing in the latter case. Commenters expressed concern that the decision by Congress to allow single-sex facilities that do not qualify as dwellings would be unenforceable if this rule is implemented as proposed; for example, if a women’s shelter were required to admit a biological man based merely upon his assertion that he

<sup>17</sup> See, e.g., *Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (homeless shelter did not charge rent).

<sup>18</sup> 42 U.S.C. 3604(a).

<sup>19</sup> See, e.g., *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010) (discriminatory pricing and denial of homeowners insurance violates 804(a) and (b)); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357–58 (6th Cir. 1995) (same); *Keith v. Volpe*, 858 F.2d 467, 482–484 (9th Cir. 1988) (municipal’s refusal to permit low-income housing violates 804(a)). See also, e.g., 24 CFR 100.70(d)(4) (refusing to provide municipal services or property or hazard insurance because of protected class).

<sup>20</sup> 42 U.S.C. 3604(b); see, e.g., 24 CFR 100.65(b)(2) (failing or delaying maintenance because of protected class).

“identifies as” a woman, or if a men’s shelter were required to admit a biological woman based merely upon her assertion that she “identifies as” a man.

*HUD Response:* As previously stated, the rule is not inconsistent with the Fair Housing Act. While the Fair Housing Act includes nondiscrimination requirements applicable to dwellings covered by the Act, it does not prohibit HUD from establishing additional program requirements through rulemaking. Temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require shared sleeping quarters or bathing facilities and that do not qualify as dwellings under the Fair Housing Act may operate single-sex shelters unless doing so would violate some other Federal, State, or local law. Under this rule, such shelters or other buildings and facilities funded by programs administered by CPD<sup>21</sup> must determine placement in such single-sex facilities in accordance with each applicant’s or occupant’s gender identity, regardless of sex assigned at birth or other factors. As noted in response to a prior comment, HUD’s establishment of programmatic requirements for temporary, emergency shelters and other buildings and facilities funded through HUD programs is well within HUD’s statutory authority and an important part of HUD’s mission in ensuring access to housing for all Americans. Contrary to the public comment that suggests what Congress’s intent was in creating single-sex facilities, HUD does not opine on Congress’s intent behind permitting single-sex facilities, but does make clear in this rule that, for purposes of determining placement in a single-sex facility, placement should be made consistent with an individual’s gender identity. This rule does not attempt to interpret or define sex.

*Comment:* One commenter expressed concern that Congress would see no need to enact the Equality Act, a bill that would expressly forbid discrimination in housing on the basis of sexual orientation and gender identity, once HUD issued a rule prohibiting such discrimination.

*HUD Response:* While HUD appreciates the commenter’s desire to see Congress enact new legislation expanding antidiscrimination

<sup>21</sup> HUD provided similar guidance to recipients and subrecipients that place eligible persons in single-sex temporary, emergency shelters or other facilities receiving ESG, CoC, or HOPWA funds. See Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities, (Notice: CPD–15–02 (February 20, 2015)).

protections in housing, HUD does not believe the introduction of such legislation warrants delaying issuance of this important rule. Because many transgender persons are being denied access to temporary, emergency shelters and other building and facilities or are being placed and served in such shelters in accordance with their sex assigned at birth instead of in accordance with their gender identity, HUD believes it is necessary to issue this rule at this time to ensure that transgender and gender nonconforming persons are accorded equal access and are accommodated in accordance with their gender identity in programs, shelters, buildings, and facilities assisted by CPD. Given that this rulemaking applies only to providers that receive HUD funds and not more broadly, HUD does not believe that its rulemaking in this important area will impact any broader legislative action that Congress may choose to take.

*Comment:* Commenters stated that the rule is not based on sufficiently exhaustive research and data, such as interviews with people not in the LGBT community, and only presents one-sided research on the issue of gender identity. A commenter said that while the rule notes that many transgender shelter-seekers would choose sleeping on the street rather than a shelter for their sex assigned at birth, HUD's rule does not address whether biological women would choose to sleep on the streets if their only other option were to share sleeping and bathing spaces with anatomically biological males who self-identify as women. Commenters stated that, before HUD institutes this rule, HUD needs more research on what risks placing males in female-only facilities will pose to women, and HUD should continue to search for solutions for providing safe services for particularly vulnerable males and, if vulnerable males must be placed at a women's shelter, female clients should be able to sleep, bathe, and use the toilet away from biological males.

*HUD Response:* As HUD program participants and the public are aware, HUD spent considerable time studying this issue. During the development of HUD's 2012 Equal Access Rule, commenters requested HUD to address the issue of temporary, emergency shelters that contain shared sleeping quarters and shared bathing facilities. HUD, however, declined to address that issue in the 2012 Equal Access Rule because of the need to conduct further research and examination of the issue. During the time since the 2012 Equal Access Rule was issued, HUD monitored and reviewed its own programs, national research, and other

Federal agency policy to determine if transgender individuals had sufficient access to temporary, emergency shelters or if additional guidance or a national policy was warranted. HUD considered the issue not only from the perspective of transgender persons and other gender nonconforming persons, but also from the perspective of individuals whose sex assigned at birth and whose gender identity are the same. HUD has learned through its review that all individuals, including transgender persons and other gender nonconforming persons, can be safely accommodated in shelters and other buildings and facilities in accordance with their gender identity. Privacy concerns can be addressed through policy adjustments, such as the use of schedules that provide equal access to bathing facilities, and modifications to facilities, such as the use of privacy screens and, where feasible, the installation of single occupant restrooms and bathing facilities. Further, the 2016 Center for American Progress study cited in the Background section of this preamble revealed that shelters were willing to provide transgender women with appropriate shelter only 30 percent of the time. Given the 4-year examination of this issue prior to this rule and the recent evidence of continued and widespread practices that deny access or subject transgender individuals to unequal treatment, HUD is ready to address this matter in regulation and believes that this final rule sets the right approach.

*Comment:* Commenters stated that because the rule requires shelters and other programs and services to change their policies and procedures, oversight and accountability should be created or strengthened. Commenters stated that current lack of oversight within the shelter and emergency housing system threatens the lives of transgender, gender nonconforming, and intersex people; subjects them to violence and degradation without any accountability or protection; and violates their basic human rights and the equal protections that should be accorded them. Commenters stated that HUD should clarify, in the final rule or in another form, how HUD will monitor and enforce the CPD Equal Access Rule, including an amendment stating that without meaningful monitoring and enforcement as is done for protected groups under the Fair Housing Act, the promise of the rule may go unfulfilled. Other commenters stated that the system for filing complaints needs to be improved, and a complaint filing system needs to be incorporated at the local

level, where marginalized transgender and gender nonconforming individuals seeking shelter have ready access to advocates who can assist them. A commenter stated that no organization should receive Federal funds without standing proof of compliance.

*HUD Response:* HUD agrees that safety, respectful treatment, and equal access are critical issues for transgender and gender nonconforming individuals, as they are for everyone, and HUD's regulations for the ESG program make it clear that all ESG-funded emergency shelters, including those with configurations that require shared sleeping quarters or shared bathing facilities, have had, and continue to have, a responsibility to create a safe environment for all occupants, particularly those of special populations (see 24 CFR 576.400(e)(3)(iii) for more information). Recipients, subrecipients, owners, operators, and managers of temporary, emergency shelters and other buildings and facilities and providers of services are expected to take the steps necessary to comply with this rule and maintain safe conditions for all shelter and facility residents and employees. When there is a threat to the safety of any resident, HUD expects recipients, subrecipients, and shelter or facility owners, operators, managers, and providers to take appropriate steps to address such threats. Such mitigating steps may include proactive measures to reduce risks such as increasing the shelter's security personnel, making adjustments to a facility's operating policies and schedules, and modifying shelter facilities to provide a single occupant bathing facility. HUD has heard from providers that adjusting a facility's operating policies and schedules is usually sufficient and does not cost additional funds, and thus HUD encourages agencies to start with this modification. HUD also notes that, for additional modifications that are necessary, some funded facilities, such as those under the ESG program, can use ESG funds to modify the shelter facility or provide additional security.

HUD believes that by requiring equal access for transgender individuals and other gender nonconforming persons in this regulation, HUD will be better able to monitor and enforce actions required to ensure equal access in temporary, emergency and other CPD-assisted buildings, facilities, and programs. Section 5.106(b) requires that recipients, subrecipients, operators, managers, and providers of temporary, emergency shelters, other buildings and facilities, programs, and services update their policies, if not already updated, to comply with providing equal access,

which HUD can review when monitoring its recipients', subrecipients', and providers' compliance with the new requirements established by this final rule. In addition, § 5.106(d) requires that providers must document and maintain records of compliance with the requirements in § 5.106(b) of this rule for a period of 5 years.

Transgender and other gender nonconforming persons are encouraged to file complaints if they have been denied equal access to temporary, emergency shelters, other buildings and facilities, programs, or services in accordance with their gender identity. Individuals may file complaints of discrimination based on gender identity by calling 1-800-669-9777 (toll-free) or online at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/online-complaint](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint). Persons who are deaf or hard of hearing or who have speech impairments may file a complaint via TTY by calling the Federal Relay Service at 1-800-877-8339 (toll-free).

Transgender and other gender nonconforming persons are encouraged to file complaints with HUD's CPD program office if they have been denied equal access to any services, accommodations, or benefits under CPD programs. Whenever a recipient (including subrecipients) of HUD funds fails or refuses to comply with program requirements, whether in statute or regulation, such failure or refusal shall constitute a violation of the requirements under the program in which the recipient is operating, and the recipient is subject to all sanctions and penalties for violation of program requirements, as provided for under the applicable program. Sanctions may include the withholding of HUD assistance. In addition, 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. As previously discussed, along with this rule, HUD is publishing in today's **Federal Register** for public comment a notice entitled "Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD's Community Planning and Development Programs" that HUD proposes to require owners or operators of CPD-funded programs and facilities to post on bulletin boards and in other public spaces.

*Comment:* A commenter stated that the rule may place a significant burden upon the associational and religious

liberty of beneficiaries and other stakeholders; for example, by requiring residents to share facilities with opposite-sex adults where their religions prohibit that.

*HUD Response:* The exclusion of an individual or family from CPD-funded shelter because the individual is transgender or the family has one or more transgender members is inconsistent with HUD's mission to ensure decent housing and a suitable living environment for all. It is equally inappropriate to isolate or ostracize individuals because their gender identity is not the same as their sex assigned at birth. It is incumbent on HUD to ensure that the regulations governing its housing programs make clear that such arbitrary exclusion, isolation, and ostracism will not be tolerated in HUD-assisted housing and shelters. Moreover, as noted in response to prior comments, in dwellings covered by the Fair Housing Act, exclusion or unequal treatment based on an individual's gender identity or nonconformance with gender stereotypes is discrimination because of sex and violates the Act. HUD would not tolerate denial of access, isolation, or ostracism on the basis of race, color, national origin, or disability relating to one shelter resident in order to accommodate the religious views of another shelter resident. The same is true with respect to the treatment of transgender and other gender nonconforming persons.

Faith-based organizations have long been involved in HUD's programs and provide many 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's CPD programs and provide services to transgender persons in accordance with the requirements set in this rule.

*Comment:* A commenter stated that the rule does not reflect the reality of providing shelter to people in challenging environments and with limited resources. Commenters stated that HUD should consider the following: (1) Providing additional resources to shelters to help them meet the privacy, health, and safety needs of clients; (2) examining what scope of client interview is permissible to enable staff to identify an attempted misuse of the proposed mandate without fear of legal challenge; (3) determining whether staff would be placed in an untenable position of pressure to accede to a request or demand contrary to their situational awareness and the reasonable concerns of other (often traumatized) shelter clients; (4)

examining how a provider would gather timely and appropriate information that it believes is relevant to the actual situation but not necessarily a matter of health or safety; (5) determining whether the privacy concerns of other clients are legitimate criteria for placement; (6) examining how single-sex women shelter providers will reconcile differences between the Violence Against Women Act's (VAWA) "due consideration" approach for single-sex housing and the mandate in this rule, and how shelter providers will be expected to reconcile differences between the mandate of this regulation and the often conflicting regulations and guidance provided by other Federal, State and local housing agencies. A commenter said that the proposed rule will increase guesswork and the paperwork burden surrounding client placement and expressed concern about the legal repercussions to a provider for denying placement where there is a question as to "valid" gender identity.

*HUD Response:* HUD appreciates the items for consideration raised by the commenters and these were the very issues that HUD did, in fact, take into consideration before issuing this CPD Equal Access Rule, more than 4 years after the 2012 Equal Access Rule. In addition, before commencing this rulemaking, on February 20, 2015, CPD released Notice CPD-015-02, "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities," applicable to CPD's HOPWA, ESG, and CoC programs. This notice provides that HUD expects recipients, subrecipients, and providers to accommodate individuals in accordance with the individual's gender identity.<sup>22</sup> HUD has had over 1 year of experience with this guidance in place and such experience further informed HUD in development of the final rule. There is no reason to assume that transgender persons pose risks to health or safety. Indeed, experience under this guidance has shown that transgender and other gender nonconforming persons can be and have been safely accommodated in accordance with their gender identity in single-sex facilities without the types of disruptions feared by the commenter.

In response to the commenter's concern about the extent of questioning and investigation that shelter staff may perform prior to determining appropriate accommodations for

<sup>22</sup> See notice at <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

transgender and other gender nonconforming persons, HUD has made modifications to the proposed rule at this final rule stage. Specifically, in § 5.106(b) of this final rule, HUD makes clear that it is inappropriate to subject individuals seeking accommodations to unnecessary, intrusive questioning about their gender identity or to ask them to provide anatomical information or documentary, physical, or medical evidence of their gender identity. Examples of unnecessary, intrusive questioning would be asking about surgeries, anatomy, and any other topics that are not necessary for placing and serving a client in the facility. Consistent with the approach taken by other Federal agencies, HUD has determined that the most appropriate way for shelter staff to determine an individual's gender identity for purposes of a placement decision is to rely on the individual's self-identification of gender identity. As for the comment about how to "reconcile differences between the VAWA's 'due consideration' approach to single-sex housing," HUD reviewed DOJ's guidance regarding the VAWA's nondiscrimination provision and does not see a conflict that needs to be reconciled.

HUD recognizes that emergency shelters are not the ideal placement for anyone, and that is why HUD is encouraging communities to move individuals and families into permanent housing as quickly as possible. In the meantime, HUD recognizes that there are security risks in operating shelters, but the obligation to provide for safety and security is not new, and the denial of equal access cannot be justified based on unfounded concerns about safety or security. Under this final rule, policies and procedures for CPD programs covered by this rule will have to include, if appropriate, provisions on nondiscriminatory measures to ensure the health, safety, security, and privacy of all occupants and staff in accordance with applicable Federal laws and regulations. Further, under this rule, recipients, subrecipients, owners, operators, managers, and providers of shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants, and, as needed, update their admissions, occupancy, and operating policies and procedures. It would be appropriate for a recipient,

subrecipient, owner, operator, manager, or provider to update its operating policies and procedures to reflect nondiscriminatory steps to address privacy concerns if providers repeatedly receive the same request from occupants that can be accommodated in the same manner. However, an update to their policies and procedures in order to address rare case-specific situations may not be necessary, although an exception to policies and procedures may be appropriate in such circumstances to avoid infringement on an individual's privacy concern. HUD believes that this final rule clarifies compliance and greatly reduces responsibility of the staff to determine gender identity for the purposes of placement.

*Comment:* A commenter stated that the proposed paperwork and record retention requirements of the proposed rule distract from the prime objective of shelters, disincentivizes participation in HUD programs, and make meeting the overarching objective of ensuring access to shelter for all more costly and burdensome.

*HUD Response:* This final rule eliminates most of the provisions of the proposed rule that required recordkeeping requirements, and as a result HUD has removed most of the recordkeeping requirements in this final rule. The only recordkeeping requirement that remains is the requirement to maintain records of policies and procedures to ensure that equal access is provided, and individuals are accommodated, in accordance with their gender identity. This requirement will aid HUD in monitoring compliance with this rule and taking enforcement action where needed.

*Comment:* Commenters expressed support for the rule's definitions of gender identity and perceived gender identity. A commenter said the original definition of gender identity encouraged discrimination by implying or directly giving providers the ability to determine gender through discriminatory perceptions based on gender stereotypes. A commenter stated that "transgender women are women and transgender men are men." Commenters stated that the rule's separation of definitions of actual and perceived gender identity will help to ensure that LGBT individuals receive equal access to shelter, for example, by clarifying concepts that may be unfamiliar to grant recipients.

*HUD Response:* HUD appreciates the commenter's support for the revised definition and agrees that it is important to differentiate between actual gender identity and perceived gender identity.

As discussed earlier, the definition of "perceived gender identity" in this final rule includes a perception based on documents, to make clear that the identification of gender or sex on an individual's identity document may be different than a person's actual gender identity, and that the perceived gender identity of an individual based on information on the documents may not be the basis of discrimination against that individual.

*Comment:* Commenters stated that HUD's rule should allow persons to determine gender identity and expression free from harassment and violence, whether actual or perceived gender. Commenters stated that they appreciated that the definition of "perceived gender identity" covers discrimination based on gender expression, and they urged HUD to include consistent clarifying language to this effect in both the preamble to the final rule and in training and technical assistance for grantees.

*HUD Response:* As HUD noted in a prior response, by incorporating gender expression into the definition of perceived gender identity, the final rule requires recipients, subrecipients, and providers to make shelter available without regard to gender expression. HUD will take the commenter's recommendations into account when developing training and technical assistance materials.

*Comment:* Commenters stated their belief that self-reported gender identity should be afforded a lesser status than binary biological sex, because gender is subjective, mutable, and theoretical, whereas biological sex is objective, immutable, and demonstrable. Commenters stated that research demonstrates a lack of scientific consensus as to transgender status or that gender fluidity is a mental illness. Commenters stated that the rule contravenes the Constitution's recognition of a "fundamental, irreducible reproductive asymmetry" between women and men. Commenters stated that the rule should require the use of verifiable criteria, e.g., medical history, to establish the authenticity of a self-identified transgender individual. A commenter stated that the rule puts "staff in the position of adjudicating who is a (transgender) woman and who is not," and that this is unfair to such staff and the populations they serve. A commenter stated that biological sex is relevant to decisions about single-sex housing and shared sleeping and bathing areas. Another commenter said HUD conflates the definitions of "sex," and "gender," and suggested that HUD define "sex" as the actual biological

maleness or femaleness of a person and “gender” as the cultural sex-role, although the commenter stated that even this revision is still problematic because there are no universally agreed upon attributes for what constitutes particular roles.

Other commenters stated that sex is not “assigned” at birth, but is presented, observed, and recorded, and commenters recommended that the rule refer to the sex “presented” at birth rather than the sex “assigned” at birth. This commenter also supported the view that “perceived” gender identity is problematic, as perception varies from individual to individual, and asked how a provider is expected to perceive somebody else’s identity. The commenter suggested that the rule state that perceived gender identity means the social sex-role the person is assumed to have an affinity for based on exhibited stereotyped behaviors commonly acknowledged to be associated with being either male or female and/or the actual biological sex of the person, but stated that there still needs to be some objective criteria for the definition to be of any real use, but using stereotyped behaviors in place of biological sex is problematic. A commenter said that the rule also does not define “transgender” or explain how a provider could distinguish between those who are sincere in their sex-role identity and those who are not. Further, the commenter said that because this rule enshrines expressions and characteristics as a legal sex category, it will negatively affect other laws concerning women’s rights, and the definition of “woman” should be based on biological sex.

*HUD Response:* HUD appreciates and has considered the suggested revisions to the definition of “gender identity” offered by commenters. However, HUD declines to make the suggested changes at this final rule stage. As HUD observed in the 2012 Equal Access Rule, the number of suggested revisions to the definition of “gender identity” highlights a range of differing views among commenters regarding the meaning of this term. Consequently, HUD was required to determine which definition makes the most sense in this context. As noted earlier in this preamble, in the 2012 Equal Access Rule, HUD based its definition on the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, on the basis that both this statute and HUD’s policy sought to protect LGBT individuals. Subsequently, however, HUD evaluated its program recipient practices, reviewed research on

discrimination of transgender individuals in shelter settings, solicited input on the experiences and concerns of both clients and providers, and reviewed its own guidance, as well as several other Federal agencies’ gender-identity nondiscrimination policies. HUD found helpful, for instance, that the DOJ’s guidance states that a program recipient “should ask a transgender beneficiary which group or service the beneficiary wishes to join,” but may not “ask questions about the beneficiary’s anatomy or medical history or make burdensome demands for identity documents.” As noted in the proposed rule, HUD determined, in light of its review, that it would be more effective for the specific purpose of ensuring equal access to HUD programs to separate the definitions of actual and perceived gender identity and to require that any gender identity determinations in the context of CPD programs be based on an individual’s self-identification. That does not mean that staff workers conducting intake procedures must account for perceived gender identity in determining placement. In fact, it means that staff workers must not use perceived gender identity and must only place an individual based on the individual’s actual gender identity, without additional questions about anatomy, medical history, or identification documents. Transgender and gender nonconforming persons must not be placed based on perceived gender identity when it is in conflict with an individual’s self-identified gender identity. This approach is consistent with current research, with HUD’s existing guidance, and with other Federal agency policy. This approach does not require the provider to make any determination as to an individual’s sincerity with respect to their gender.

In response to the comment with regard to this rule’s impact on a “legal sex category,” this rule does not provide a definition of “woman” or “sex.” In this rule, HUD notes that gender identity—and whether a person identifies with their sex assigned at birth or not—is a component of sex. As such, HUD believes it was important to recognize the role of gender identity in its 2012 Equal Access Rule and to provide further guidance on how individuals are treated based on gender identity in this rule. In view of its role in ensuring access to housing for all Americans, HUD could not countenance denying equal access to shelter on the basis of gender identity, just as it could not countenance such treatment for characteristics such as race, color, national origin, or disability. As previously noted, HUD does not believe

it is appropriate to isolate, ostracize, or treat people differently because of the way others, such as other shelter residents or shelter employees, view them.

Given the comments requesting guidance on the efforts a provider may use to identify an individual’s gender identity, HUD revised the proposed rule, in this final rule, to provide clarity on this point. Specifically, HUD has included a provision in § 5.106(b) that makes clear that individuals may not be asked to answer intrusive questions, provide anatomical information, or provide documentary, physical, or medical evidence of the individual’s gender identity. HUD notes that documents such as identification documents may list an individual’s sex assigned at birth and not an individual’s gender identity. Thus, an identification card or other document is not dispositive of an individual’s gender identity. By including language that prohibits intrusive questioning or requests for anatomical information, documentation, or physical or medical evidence, HUD makes clear to providers, owners, operators, and managers that an individual’s self-identification of gender identity is sufficient evidence of the individual’s gender identity for purposes of making a decision regarding admission, placement, accommodation, placement, or services under this final rule. While documentation of gender identity may not be required for purposes of establishing an individual’s gender identity or determining eligibility for a program, HUD recognizes that an individual may need to provide documentation of identity in order to apply for certain types of assistance, such as healthcare, Social Security benefits, or employment. In instances where the provider receives documentation and that documentation states a different gender marker than was identified by the individual as their gender identity, the provider must continue to serve the individual in accordance with their self-identified gender identity.

As previously stated, it is not uncommon for transgender persons to have identification documents that indicate the individual’s sex assigned at birth instead of the individual’s gender identity, so identity documents should not be viewed as evidence contesting an individual’s self-identification of gender identity.

*Comment:* A commenter stated that the rule recognizes that some people do not identify as either male or female and that such persons must be permitted to choose which option is most consistent

with their gender when accessing single-sex shelters or other buildings or facilities or services. Commenters asked HUD to clarify how the rule applies to people who identify in nonbinary, gender-fluid, intersex, or gender nonconforming terms. Commenters stated that nonbinary individuals constitute a vulnerable subgroup within the transgender population, particularly because their identity may be less familiar to program staff, but they are nevertheless entitled to the same acceptance and respect for their gender identities as are others. A commenter said the medical community has widely recognized the importance of recognizing gender identities other than male or female, or nonbinary genders, and providing those with nonbinary genders equal access to services. Commenters stated that an individual whose gender identity is neither male nor female should have the right to state which program or facility is most consistent with their identity and asked HUD to include language to this effect in the preamble to the final rule. The commenters also asked HUD to discuss in its training and technical assistance for grantees the rule's application to persons who are gender nonconforming or who do not identify as male or female, in training and technical assistance for grantees. Commenters stated that the rule should expressly state that refusing service or access to individuals who are gender nonconforming or who do not identify as either male or female violates the proposed rule. Commenters stated that when only male or female accommodations are available, equal access requires that persons who do not identify as either male or female must be permitted to determine which option is most consistent with their gender identity. A commenter stated that HUD should amend its forms and databases to permit individuals to identify as something other than male or female and to instruct program staff that individuals must be permitted to self-identify their own gender. Another commenter said that the rule does not mention intersex persons or persons with a difference of sexual development (DSD) and, consistent with current trends in case law, coverage of the rule should be expanded to include persons with intersex conditions and DSD.

Another commenter said that while it understands that the proposed regulations are requiring nonbinary users to choose between facilities for the two majority genders, the commenter believes that, over the long term, single-sex systems are going to have to become

integrated if they are to cost-effectively serve an expanding variety of gender identities. This commenter asked HUD to start conceptualizing a new system that can comfortably accommodate nonbinary users. A commenter said HUD should encourage recipients to undertake the following: The development and creation of all-gender spaces; the creation of policies, practices, and staffing structures that would allow programs and facilities to be safely designated as all-gender; and the creation of practices and facility upgrades that afford all residents increased personal privacy.

*HUD Response:* HUD appreciates the comments regarding individuals who do not identify as either male or female and individuals who are nonbinary, gender-fluid, intersex, or gender nonconforming. While HUD did not reference each of these groups in its proposed rule or the regulatory text of this final rule, HUD's use of terminology is not intended to exclude people because of the words they use to describe themselves. HUD recognizes that there is more work to do in this area to ensure that, to the greatest extent possible, all individuals are treated equally and appropriately accommodated in HUD-funded programs, shelters, services, and other facilities. In circumstances where an individual does not identify as male or female and such information is relevant to placement and accommodation, the individual should be asked the gender with which the individual most closely identifies. In these circumstances, the individual is in the best position to specify the more appropriate gender-based placement as well as the placement that is most likely to be the safest for the individual—either placement with males or placement with females.

While HUD appreciates the suggestions about future actions it may take to better accommodate everyone in shelters, HUD declines to address these comments in detail as these issues are beyond the scope of this rulemaking. HUD will consider these issues for future rulemaking. As the commenters suggest, HUD will also consider training and guidance for shelter providers, operators, and managers on best practices for dealing with individuals who do not identify as male or female and individuals who are nonbinary, intersex, or gender nonconforming. HUD agrees that individuals in these groups may be particularly vulnerable, and that training and technical assistance may be helpful in addressing the needs of these populations of shelter residents.

*Comment:* A commenter stated that HUD should not follow the approach taken by DOJ in implementation of the Prison Rape Elimination Act because DOJ regulations included provisions allowing correctional agencies broad discretion to make "case-by-case" decisions regarding whether placement in a male or female facility would ensure the individual's health and safety. The commenter stated that while DOJ explained in its rule's preamble that "an agency may not simply assign the inmate to a facility based on genital status," few, if any, State agencies are complying with this provision, with the result that agencies are maintaining their prior practices of automatically placing individuals exclusively based on their genital anatomy, even when nominally adopting policy language that mirrors the Federal rule. The commenter stated that such discretion is not appropriate or permissible under regulations implementing Federal nondiscrimination requirements. Another commenter stated that the most essential element of a successful nondiscrimination policy is the basic rule that housing must be based on a person's self-identified gender, not on their sex assigned at birth. A commenter stated that placement should not be conditioned on whether a transgender person has undergone any medical treatment or been able to change the gender markers on their identification documents, or have to look a certain way. Another commenter stated, citing several examples in the United States and elsewhere, that shelters that have adopted a rule basing gender on self-identification, as opposed to sex assigned at birth, report uniform success in being able to serve and integrate transgender people into their programs and services.

*HUD Response:* HUD has never intended to give broad discretion to recipients and providers to make case-by-case decisions. The proposed rule required providers of temporary, emergency shelter and services to document the specific facts, circumstances, and reasoning relied upon in any case-by-case determination that results in an alternative admission, accommodation, benefit, or service to an individual or their family.

To clarify that placement is to be made on the basis of an individual's self-identification of gender, § 5.106(b) of this final rule includes a provision stating that individuals may not be subjected to intrusive questioning relating to their gender identity or asked to provide anatomical information, documentation, or physical or medical evidence of gender identity. Therefore,

this final rule makes clear that placement in accordance with an individual's gender identity cannot be conditioned on whether a transgender person has undergone medical treatment, has been able to change identification documents to reflect their gender identity, or has a certain appearance or gender expression.

Additionally, as discussed earlier in this preamble, in § 5.106(c) of this final rule, which addresses placement and accommodation in temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, HUD removes the proposed rule language that, under narrow circumstances, a written case-by-case determination could be made on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety. In its place, HUD provides that placement and accommodation of individuals in shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with an individual's gender identity. Further, this revised paragraph (c) provides for post-admission accommodations, where, after an individual has been admitted to a shelter or other building and facilities, providers must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants. This provision for post-admission accommodations applies to all individuals, regardless of gender identity.

*Comment:* In contrast to the preceding comment, commenters stated that the requirements that an accommodation be permitted only in "narrow" or "rare" circumstances, and then only when "necessary" to ensure two specified interests—health and safety—is too circumscribed to adequately protect the interests of all residents. The commenter stated that an accommodation that furthers the interests in protecting the health and safety of residents should be allowed, for example, even if not, strictly speaking, "necessary," and not only at the request of the person "claiming" to be transgender. Commenters stated that, even as to housing facilities that admit both men and women, residents should not be required to share with persons of the opposite sex those areas, such as sleeping and bathing areas, properly

reserved to persons of one sex, for reasons of privacy.

*HUD Response:* As discussed above, this final rule notes that providers need to take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants. HUD stresses the use of the term "nondiscriminatory" in this provision. An example of a nondiscriminatory step to address privacy concerns would be accommodating a request of a domestic violence victim who has specific privacy concerns to bathe at specific, separate times from other shelter or facility occupants.

As HUD has noted, it has studied the issue for 4 years and determined, following the lead of other Federal agencies, that to ensure equal access, the general rule must be that individuals are accommodated in accordance with their gender identity. If HUD were to provide broader discretion, placement decisions would rely on more subjective factors that might differ from provider to provider based on the views, beliefs, and unsubstantiated fears of individual shelter staff.

*Comment:* A commenter said the rule prohibits a determination from being based on complaints of other shelter residents when those complaints are based on actual or perceived gender identity, but HUD should provide guidelines to help providers distinguish complaints that are based on recognition of threat because of a client's biological sex, as opposed to "gender identity."

*HUD Response:* HUD agrees that the language referenced by the commenter could cause confusion. HUD, therefore, has removed the language and makes clear that in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities, placements and accommodations shall be made in accordance with an individual's gender identity. Once an individual is accommodated, providers shall take appropriate steps to address privacy concerns raised by all residents and occupants. By considering complaints, and taking appropriate action in response, a provider will minimize the risk of harassment occurring among occupants and between staff and occupants.<sup>23</sup> Such

actions must, however, be nondiscriminatory.

*Comment:* Commenters stated that the rule should clarify that shelters may give transgender people case-by-case alternative or modified accommodations only when they request them and not at the mandate of shelter staff and/or to accommodate the wishes, fears, or discomfort of others—and that such alternatives or modifications shall not be based on a person's actual or perceived gender identity. Commenters also stated that the rule should clarify that shelters shall provide accommodations requested by a transgender shelter-seeker, and only when those accommodations are reasonable and appropriate to protect the health, safety or privacy of that individual. Commenters stated that a person's ability to request an alternative or modified placement should not be limited to "shared sleeping quarters or shared bathing facilities" and recommended that the provision for such accommodations be incorporated into paragraph (b) of § 5.106 (which is titled Equal Access in accordance with gender identity) rather than in separate paragraph (d) of § 5.106 (which is titled Referrals). A commenter said that many shelters find that, where possible, providing increased privacy for all residents is ideal; for example, private rooms and bathrooms and showers with locks. A commenter stated that the rule should mandate that shelters provide unisex bathrooms with individual showers.

Commenters stated that the rule should clarify that any alternative or modified placements must provide access to the same or substantially equivalent services, or a "comparable alternative program." Commenters stated that HUD should clarify that shelters will be in noncompliance with the rule if they provide some services (e.g., hotel vouchers) but otherwise deny equivalent services, such as the same length of stay, other supportive services offered by the shelter, or services provided at the primary program site due to a lack of transportation. A commenter stated that a provider that refers an individual to another program should be required to confirm that the individual received shelter or services at that alternative program.

*HUD Response:* As previously discussed, this final rule removes the case-by-case determination language in the proposed rule and establishes that individuals in HUD-funded shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared

<sup>23</sup> Unlawful harassment in shelters that qualify as dwellings violates the Fair Housing Act. See *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, proposed rule, 80 FR 63720 (Oct. 21, 2015).

bathing facilities must be accommodated in accordance with their gender identity. This final rule makes clear that providers do not have the discretion to suggest that individuals may not be accommodated in shelters that match their gender identity because their gender identity differs from their sex assigned at birth. As a result, HUD has eliminated the referral provision that was in § 5.106 (d) of the proposed rule. Section 5.106(b) of this final rule broadly discusses how policies and procedures must ensure equal access to CPD programs based on gender identity.

As discussed earlier in this preamble, the revisions to this final rule do not preclude the existing possibility that any occupant may request a referral to an alternate project or that, in such cases, staff may provide a referral to another project or, where none is available and funding permits, offer clients a hotel or motel voucher. HUD appreciates the commenters' concerns that a transgender individual who is provided an alternative accommodation at the individual's request should be provided an accommodation that is comparable to the shelter within which the individual originally sought accommodation and agrees that when providers make referrals they should ensure that an opportunity to access equivalent alternative accommodations, benefits, and services is provided, or the requestor should receive a referral to a comparable alternative program with availability and equivalent accommodations, benefits, and services.

HUD is encouraged that many shelters are providing increased privacy for all residents, such as private rooms and bathrooms and showers with locks, and as discussed earlier in this preamble, HUD encourages this where feasible. This rule, however, does not mandate this configuration. Mandatory configuration of shelters is beyond the scope of this rulemaking.

*Comment:* Other commenters stated that they oppose any exception to the requirement that shelter be provided based on gender identity to protect the health and safety of shelter employees or other people staying in the shelter, because such an exception is not necessary and will be used as pretext to deny shelter to transgender individuals. Commenters stated that under the proposed rule language, it is not clear whose health and safety the exception is intended to protect. A commenter stated that the very allowance of an exception reinforces the attitude that a person is a threat to others based solely on her or his status as a transgender individual. The commenter stated that if a shelter provider is concerned that a transgender

individual's behavior or conduct poses a threat to others' health or safety, then the provider can and should address that in the same way that it addresses the problematic conduct of any other person staying in the shelter.

Another commenter stated that the exception, which is ambiguous, should be removed, because it is unclear from the preamble what kind of "health and safety" circumstances would (or should) ever justify denying shelter to a transgender individual in accordance with their gender identity. A commenter stated that the exception should apply only to the health and safety of the shelter seeker, meaning that only shelter seekers could make these requests for other accommodations for themselves. Other commenters stated that HUD should take special care to ensure that providers are not choosing these alternatives in order to circumvent the general prohibition on discrimination. A commenter stated that it would be very helpful for HUD to provide guidance in the form of specific examples of effective policy adjustments, as well as other ways shelter and housing providers can mitigate actual or perceived threats to health or safety, in a less burdensome way. A commenter stated that guidance is needed to address what covered providers should do in scenarios where they lack financial resources to provide alternative accommodations or referrals, so as not to violate the rule.

*HUD Response:* HUD appreciates these comments and, as discussed previously, HUD has revised the rule to clarify that placement and accommodation must be made in accordance with an individual's gender identity.

*Comment:* A commenter stated that the goals of this rule could conflict with the goals of "Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs," a rule that seeks to offer expanded protections to victims of domestic violence, dating violence, sexual assault, and stalking within HUD-assisted and HUD-insured housing. The commenter suggested that HUD provide additional guidance to operating facilities with shared sleeping quarters on how to offer alternative accommodations to transgender individuals when there are residents that are sensitive to sharing facilities with the opposite sex due to their experiences with domestic violence.

*HUD Response:* HUD's proposed rule implementing the housing protections of VAWA, which as the commenter noted would expand protections to victims of domestic violence, dating

violence, sexual assault, and stalking in HUD-assisted and HUD-insured housing, does not conflict with this final rule. HUD's proposed rule on VAWA would implement statutory requirements that: (1) Prohibit housing providers under certain HUD programs (covered housing providers) from denying or terminating assistance or occupancy rights to individuals because they are or have been victims of domestic violence, dating violence, sexual assault, or stalking; (2) require covered housing providers to notify tenants and applicants of their rights under VAWA, and detail what documentation covered housing providers may ask for; (3) require covered housing providers to create emergency transfer plans; and (4) provide for lease bifurcations. Nothing in HUD's rule proposing to implement VAWA contradicts this rulemaking requiring that individuals be housed and receive services in accordance with their gender identity.

Further, as HUD explained in the CPD Equal Access proposed rule, VAWA imposed a new grant condition that prohibits discrimination by recipients of grants administered by DOJ, including grants to provide housing assistance for survivors of domestic violence. Although this provision relates to DOJ, and not to HUD, HUD noted that on April 9, 2014, DOJ's published guidance entitled "Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013," which addresses how a recipient of DOJ funds can operate a single-sex facility funded through VAWA and not discriminate on the basis of gender identity. The DOJ guidance states that recipients that operate sex-segregated or sex-specific programs should assign a beneficiary to the group or service that corresponds to the gender with which the beneficiary identifies, and may consider on a case-by-case basis whether a particular housing assignment would ensure the victim's health and safety, but recipients may not make a determination about services for one beneficiary based on the complaints of another beneficiary when those complaints are based on gender identity. The guidance further states that, for the purpose of assigning a beneficiary to sex-segregated or sex-specific services, best practices dictate that the recipient should ask a transgender beneficiary which group or service the beneficiary wishes to join, but the recipient may not ask questions about the beneficiary's anatomy or medical history or make burdensome demands for identity documents.



HUD's rule requires that individuals be accommodated in accordance with their gender identity. It is beyond the scope of this rule to detail methods for best serving victims of domestic violence, dating violence, sexual assault, or stalking. However, as discussed earlier, this final rule requires that providers must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by all residents or occupants. HUD notes that both victims and perpetrators of domestic violence and other VAWA crimes include persons who are transgender or gender nonconforming individuals and persons who are not.

*Comment:* Commenters asked that HUD include other CPD programs that will be active in the near future, including the Housing Trust Fund and the Rural Housing Stability Assistance program, or provide an indicator that the list is nonexhaustive so the Secretary can add more CPD programs.

*HUD Response:* HUD's intent was to cover all CPD programs, as noted in the preamble to the proposed rule. Therefore, HUD makes clear in § 5.106(a) that additional CPD programs, such as the Housing Trust Fund and Rural Housing Stability Assistance programs, are included.

*Comment:* Commenters stated that the rule should clarify that transgender persons have a right to housing and treatment consistent with their gender identity in all circumstances—in the preamble and training and technical assistance. Other commenters said it is essential that the rule address more directly the problem of violence, including the high rates of sexual assault, against LGBT and gender nonconforming persons in federally funded shelters.

*HUD Response:* HUD's 2012 Equal Access Rule and this CPD Equal Access Rule explicitly acknowledge the higher rate of discrimination and acts of violence experienced by transgender persons and both rules address the issue that transgender individuals and other gender nonconforming persons must be able to participate in HUD programs on an equal basis as all other program participants. HUD guidance and training on its Equal Access rules cover these subjects.

*Comment:* The rule must address public and staff perceptions.

*HUD Response:* The final rule makes clear that transgender and other gender nonconforming individuals are to be admitted, placed, accommodated, and provided with services in accordance with their gender identity. Public and staff perceptions are not an appropriate

basis for denial or limitation of access. Any additional rulemaking to address public and staff perceptions of transgender and gender nonconforming persons is beyond the scope of this rulemaking. HUD acknowledges, however, that such topics may be appropriate for training and technical assistance materials for shelter providers.

*Comment:* Commenters stated that HUD-funded programs should be required to create and implement written policies specifying how they will combat harassment, violence, and sexual assault and, in particular, how they will protect the health and safety of LGBT and gender nonconforming persons and others who are at increased risk of sexual violence. A commenter recommended that HUD require its recipients and subrecipients to create written policy and guidelines combating violence against persons marginalized due to their sexual orientation or gender identity and to require data collection to help monitor accountability.

Commenters stated that HUD should provide guidance detailing necessary provisions of such policies and recommended best practices, for example, guidance or best practices pertaining to the shelter-seeker's own individualized safety assessment, through training and technical assistance for grantees. Commenters also stated that HUD should specify that the failure to create and implement such policies could result in noncompliance with the regulations and, thereby, jeopardize Federal funding and/or result in HUD taking action under its regulations. Another commenter stated that it is unclear who has the responsibility to establish and amend policies and procedures under the rule, so HUD should clarify that the covered recipients, subrecipients, owners, operators, managers, and providers must create, implement, and revise these policies and procedures as necessary. The commenter stated that HUD should identify in a subsequent notice the specific types of individuals and entities that have these duties within each housing program. The commenter also stated that HUD should provide sample policies and procedures, especially regarding privacy and security, so that covered individuals or entities that are unfamiliar with gender identity issues can have access to models in devising their own policies and procedures.

Commenters stated that the rule should mandate training for shelter staff as a prerequisite to receiving HUD funding. Another commenter stated that guidance from advocacy organizations suggests that ongoing resident training

should be implemented in addition to current HUD-required staff training. A commenter stated that HUD should ensure that community organizations are made aware of the rule, once the rule is implemented, in order to better support their outreach work to transgender and gender nonconforming people in poverty.

Other commenters asked HUD to provide training on the requirement that recipients and subrecipients must treat transgender individuals respectfully by using an individual's self-identified name and pronouns, regardless of whether they have been able to legally change it.

*HUD Response:* HUD agrees with the commenters that successful implementation of this rule depends in no small part on guidance and training. HUD undertook intensive training efforts following publication of its 2012 Equal Access Rule and 2015 Notice CPD-15-02, and HUD intends to do the same for this CPD Equal Access Rule. With respect to commenters' questions about the establishment of policies, § 5.106(b) of this final rule (and of the proposed rule) requires that the admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers (covered by this rule), including policies and procedures to protect privacy, health, safety, and security, shall be established or amended, as necessary, and administered in a nondiscriminatory manner so: (1) Equal access to programs, shelters and other buildings and facilities, benefits, services, and accommodations is provided to an individual in accordance with the individual's gender identity, and in a manner that affords equal access to the individual's family; (2) an individual is placed, served, and accommodated in accordance with the individual's gender identity; (3) an individual is not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity; and (4) consistent with § 5.105(a)(2), eligibility determinations are made and assisted housing is made available in CPD programs without regard to actual or perceived gender identity.

*Comment:* A commenter stated that the rule's case-by-case analysis, training, and referral requirements will involve more time and resources than HUD estimates. The commenter stated that HUD should provide additional resources and tools to program grantees so that proper training can be

conducted, particularly for small grantees with limited resources.

*HUD Response:* As discussed earlier, this final rule eliminates the provision regarding a case-by-case analysis. As HUD noted in response to the preceding comment, HUD will undertake training and provide training and guidance to assist recipients and subrecipients under the CPD programs covered by this rule.

*Comment:* Commenters stated that they support the elimination of the inquiries prohibition provision for the following reasons: (1) The prohibition would likely cause confusion in the context of applying § 5.106, as it may be construed to prohibit any discussion of gender identity and (2) it appears to prohibit the routine and voluntary collection of demographic data regarding sexual orientation and gender identity for purposes of program evaluation—and, while an inquiry regarding sexual orientation or gender identity may constitute discrimination or be evidence of discrimination under the rule, inquiries for legitimate and nondiscriminatory purposes should be permitted. Commenters stated that they supported the removal of the prohibition to the extent that the final rule is clear that shelter and housing providers can only inquire about an applicant's or resident's sexual orientation and gender identity for lawful purposes; for example, to determine unit size and as part of the routine and voluntary collection of demographic data concerning sexual orientation and gender identity for program evaluation, so long as the data is collected and used for nondiscriminatory purposes in a nondiscriminatory fashion. A commenter stated, in support of removing the prohibition, and providing suggested language, that they urged HUD to require that specific protocols be put in place to protect the confidentiality of information about sexual orientation or transgender status.

*HUD Response:* HUD is committed to ensuring the safety and privacy of all individuals, including transgender and gender nonconforming individuals, in CPD programs. In the proposed rule, HUD expressed its intent in proposing the removal of the inquiries prohibition. HUD emphasized that it would only permit recipients or subrecipients to inquire about a person's sexual orientation or gender identity for lawful, nondiscriminatory purposes. In the final rule, to prohibit inappropriate inquiries related to gender identity, HUD included language in § 5.106(b) stating that it would be inappropriate to subject individuals to intrusive questioning or

ask them to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity. In addition, as noted previously in this preamble, CPD previously issued guidance, "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities" (Notice CPD-15-02, Feb. 20, 2015), which outlines best practices for appropriate and inappropriate inquiries related to sex and provides guidance, and recommends staff training, on addressing safety or privacy concerns. HUD intends to issue further guidance in connection with the issuance of this final rule.

*Comment:* A commenter stated, citing recommended guidance and model policies, that Massachusetts prohibits gender-based inquiries only in cases where shelter guests are perceived as transgender, suggesting that implementation of the proposed rule would be possible without removing the prohibition.

*HUD Response:* As noted in HUD's proposed rule, removal of the inquiries prohibition would allow temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities to ask the individual's gender identity, and it would permit inquiries of the individual's gender identity and sexual orientation to determine the number of bedrooms to which a household is entitled. This is an inquiry that could be asked of all individuals, and not solely of those who are perceived to be transgender. Further, as HUD has stated, removal of the inquiries prohibition also reaffirms that HUD permits mechanisms for voluntary and anonymous reporting of sexual orientation or gender identity for compliance with data collection requirements of State and local governments or Federal assistance programs.

*Comment:* Commenters stated that the rule should expressly prohibit program staff from asking individuals questions about their anatomy, medical procedures, or medical history or making requests for identity documents or other documentation of gender as a precondition for being housed consistent with their gender identity,

*HUD Response:* Although the final rule removes the provision of § 5.105 that prohibited inquiries into an individual's sexual orientation or gender identity for purposes of facilitating providers' compliance with the requirement of § 5.106 that an individual is to be admitted, placed,

accommodated, and provided services in accordance with the individual's gender identity, HUD agrees with commenters that transgender and gender nonconforming individuals should not be required to answer invasive questions about their anatomy or medical history in order to be accommodated and provided services in CPD programs. To address this concern, HUD has revised § 5.106(b) to prohibit intrusive questions related to gender identity and prohibit requests for anatomical information and requests for documentary, physical, or medical evidence.

*Comment:* Commenters recommend that HUD emphasize in the preamble, and in training and technical assistance, the importance of protecting the privacy of information related to a shelter seeker's sexual orientation and gender identity. A commenter stated that transgender people in particular face serious risks of danger, including verbal harassment and physical assault, when their transgender status or gender identity is revealed without their consent. The commenter said that steps to keep a shelter seeker's sexual orientation and/or gender identity confidential include, without limitation: (1) Safeguarding all documents and electronic files, (2) containing this information and having conversations about these topics in private to prevent disclosure, (3) establishing explicit nondiscrimination provisions, (4) ensuring safe environments in programs and shelters, (5) implementing rigorous confidentiality safeguards, and (6) ensuring that shelter staff members receive appropriate training. The commenter said that successful implementation of these important requirements will facilitate the collection of much needed data, allowing HUD to better determine the populations its programs serve, their needs and consumer experiences, and their use of programs and facilities.

*HUD Response:* Many of CPD's programs that govern temporary, emergency shelters and other buildings and facilities impose strict confidentiality requirements to ensure the privacy of individuals that are housed in these facilities. (See §§ 574.440, 576.500(x), 578.103(b) and (d)(2), and 578.23(c)(4)(i).) This final rule requires that privacy be considered in adopting admissions, occupancy, and operating policies and procedures in § 5.106(b) and provides that shelters and other buildings and facilities take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants in § 5.106(c). Further

guidance will address privacy and confidentiality in data collection.

*Comment:* Commenters stated that HUD should clarify in the preamble to the final rule, and in training and technical assistance to its field staff, that inquiries that are used to limit the provision of shelters or housing, to harass an individual, or to further any other discriminatory purpose fall under the prohibition on discrimination. Commenters stated that, by contrast, HUD should state clearly in those areas that the routine and voluntary collection of demographic information from all clients or program participants is permissible, so long as it is collected and used in a nondiscriminatory fashion.

*HUD Response:* HUD appreciates the commenters raising this issue and will address this issue in guidance. HUD reiterates that conduct that violates the rule may also violate the Fair Housing Act if the facility is subject to the Fair Housing Act's nondiscrimination requirements and the conduct is because of race, color, religion, national origin, familial status, sex, or disability.

#### IV. Findings and Certifications

##### *Regulatory Review—Executive Order 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made on 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 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. A determination was made that this final rule is a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 (although not economically significant, as provided in section 3(f)(1) of that order).

This final rule is consistent with Administration policy in its direction that providers in all CPD programs must ensure that their policies and procedures to protect privacy, health, safety, and security are administered so that equal access is provided to HUD programs in accordance with an

individual's gender identity. This final rule also clarifies how temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities comply with the requirement that equal access be provided to programs, buildings, facilities, services, benefits, and accommodations in accordance with an individual's gender identity. This clarification will benefit clients accessing CPD-funded programs, including those with temporary, emergency shelters and other buildings and facilities, by assuring that all clients receive equal access and will benefit the CPD-funded facilities by making compliance with HUD's equal access requirements easier.

These requirements benefit all occupants by ensuring that providers understand that they need to be responsive to individual health, safety, security, and privacy concerns, while ensuring that they do not take any discriminatory steps to address these concerns. This final rule also amends the definition of gender identity and sexual orientation in § 5.100 to clarify the difference between actual and perceived gender identity, which is necessary to the adoption of § 5.106, and to reflect recent changes in the definition of sexual orientation that uses updated terminology but does not expand the coverage of the term. This final rule eliminates the prohibition on inquiries relating to sexual orientation or gender identity in § 5.105(a)(2)(ii). Both of these changes make it easier for recipients and subrecipients of CPD funding, as well as owners, operators, and managers of shelters, buildings, and other facilities, and providers of services funded by CPD programs to comply with the requirements of both §§ 5.105(a)(2)(i) and 5.106.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Approximately 4,000 providers participating in the CPD programs covered by this rule are small organizations, but the rules requirement that organizations maintain records will be limited. Organizations are already required to maintain up-to-date policies and procedures in accordance with HUD guidance and regulations. The only change is that all CPD programs

must now maintain records of prior policies and procedures for up to 5 years from when they make changes to comply with these requirements. HUD believes that these limited recordkeeping requirements on small organizations are reasonable to ensure equal access to CPD programs, facilities, services, benefits, and accommodations in accordance with an individual's gender identity. Accordingly, for the foregoing reasons, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

##### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number. The information collection requirements for the CPD programs impacted by this rule—HOME, CDBG (State and entitlement), HOPWA, ESG, and CoC—have been approved by OMB and assigned OMB control numbers 2506–0171, 2506–0085, 2506–0077, 2506–0133, 2506–0089, and 2506–0199. The information collection requirements for CPD's Housing Trust Fund and Rural Housing Stability Assistance programs will be included when those programs are implemented.

##### **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 does 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 does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 5

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

Accordingly, for the reasons stated in the preamble, and in accordance with HUD’s authority in 42 U.S.C. 3535(d), HUD amends 24 CFR part 5 as follows.

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

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

- 2. In § 5.100, revise the definitions for “Gender identity” and “Sexual orientation” to read as follows:

§ 5.100 Definitions.

\* \* \* \* \*

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

\* \* \* \* \*

Sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex (e.g., homosexuality, heterosexuality, or bisexuality).

\* \* \* \* \*

§ 5.105 [Amended]

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

- 4. Add § 5.106 to read as follows:

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

(a) Applicability. This section applies to assistance provided under Community Planning and Development (CPD) programs, including assistance under the following CPD programs: HOME Investment Partnerships program (24 CFR part 92), Housing Trust Fund program (24 CFR part 93), Community Development Block Grant program (24 CFR part 570), Housing Opportunities for Persons With AIDS program (24 CFR part 574), Emergency Solutions Grants program (24 CFR part 576), Continuum of Care program (24 CFR part 578), or Rural Housing Stability Assistance Program (24 CFR part 579). The requirements of this section apply to recipients and subrecipients, as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by any CPD program.

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

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

(2) An individual is placed, served, and accommodated in accordance with the gender identity of the individual;

(3) An individual is not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual’s gender identity; and

(4) Eligibility determinations are made and assisted housing is made available in CPD programs as required by § 5.105(a)(2).

(c) Placement and accommodation in temporary, emergency shelters and other buildings and facilities with shared sleeping quarters or shared bathing facilities—(1) Placement and accommodation of an individual in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations

that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with the individual’s gender identity.

(2) Post-admission accommodations. A recipient, subrecipient, owner, operator, manager, or provider must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants and, as needed, update its admissions, occupancy, and operating policies and procedures in accordance with paragraph (b) of this section.

(d) Documentation and record retention. Providers shall document and maintain records of compliance with the requirements in paragraph (b) of this section for a period of 5 years.

Dated: September 14, 2016.

Julián Castro,

Secretary.

[FR Doc. 2016–22589 Filed 9–20–16; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150916863–6211–02]

RIN 0648–XE880

Fisheries of the Exclusive Economic Zone Off Alaska; Exchange of Flatfish in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is exchanging unused flathead sole and rock sole Community Development Quota (CDQ) for yellowfin sole CDQ acceptable biological catch (ABC) reserves in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2016 total allowable catch of yellowfin sole in the Bering Sea and Aleutian Islands management area to be harvested.

DATES: Effective September 21, 2016 through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands management area (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and