ETHICS AND PUBLIC POLICY CENTER

April 28, 2025

Via Federal eRulemaking Portal

Secretary Scott Turner
Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410-0500

RE: EPPC Scholar Comment on HUD IFR "Affirmatively Furthering Fair Housing Revisions," RIN 2529-AB08

Dear Secretary Turner:

I am a Fellow at the Ethics and Public Policy Center (EPPC), director of EPPC's Administrative State Accountability Project, and a former attorney with the Equal Employment Opportunity Commission. I write to offer public comment on the Department of Housing and Urban Development's (HUD) interim final rule "Affirmatively Furthering Fair Housing" (IFR).[1]

The Fair Housing Act (FHA) prohibits discrimination by direct providers of housing based on a person's race or color, religion, sex, national origin, familial status, or disability.[2] The FHA directs the HUD Secretary to administer HUD's program and activities "in a manner that affirmatively furthers fair housing."[3]

The rule in effect prior to this IFR was a 2021 IFR.[4] As my EPPC colleague Senior Fellow Stanley Kurtz has explained, that rule "is classic regulatory activism. It reads contemporary policy goals back into a law that mandated no such thing."[5]

As such, I support the IFR's replacement of the 2021 IFR and the Department's goals of promoting affordable, fair, decent, safe, and better housing for Americans by means of deregulation and providing states and localities with more flexibility. Below, I provide several recommendations for HUD's consideration when finalizing the rule.

---

[1] 90 Fed. Reg. 11020 (Mar. 3, 2025), https://www.federalregister.gov/d/2025-03360.

[2] 42 U.S.C. 3601 et seq.

[3] 90 Fed. Reg. at 11020.

[4] HUD, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 FR 30779 (June 10, 2021), https://www.federalregister.gov/d/2021-12114. There was a 2023 proposed rule that would have required the submission and approval of Equity Plans to address "inequities" based on race, sex (which HUD interpreted to include gender identity, sexual orientation, and nonconformance with gender stereotypes), and other protected characteristics that allegedly cause "unequal and segregated access to housing." HUD, Affirmatively Furthering Fair Housing, 88 FR 8516 (Feb. 9, 2023), https://www.federalregister.gov/d/2023-00625. But that rule was withdrawn on January 16, 2025, without explanation. HUD, Affirmatively Furthering Fair Housing; Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025), https://www.federalregister.gov/d/2025-00981.

[5] Stanley Kurtz, *Trump Kills an Intrusive Housing Rule, Again*, Nat'l Rev. (Mar. 6, 2025), https://www.nationalreview.com/corner/trump-kills-affh-again/.

A. HUD is right to replace "gender" with "sex."

I support the IFR's replacement of the term "gender" with "sex" in 24 CFR § 570.490(a)(1) and (b) to align the regulatory text with the statutory text. There is no explanation for this change in the preamble to the IFR, but such a change is warranted because the Fair Housing Act uses the term "sex," not "gender," and any FHA regulations should reflect the statutory text. While "gender" historically was used synonymously with sex, the term is now often used to mean something other than the biological binary of sex. Indeed, the prior administration sought to extend FHA protections to "gender identity."

Regulations that reflect that the FHA prohibits discrimination based on sex, not gender or gender identity, comply with HUD's obligations under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which requires agencies to adhere to the "single, best meaning" of the statute. Further, not extending the FHA's prohibition against discrimination to gender or gender identity—an important issue of vast political significance that Congress should decide—avoids violating the Major Questions Doctrine under *West Virginia v. EPA*, 597 U.S. 697 (2022).

This change also aligns with President Trump's day-one executive order "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which states that "It is the policy of the United States to recognize two sexes, male and female."[6] The final rule should also recognize that there are two sexes, male and female.

I urge HUD to closely review *all* relevant FHA regulations still in effect for references to "gender" that should be replaced with "sex." Looking only at the CFR parts that the IFR is amending, the following regulations contain references to "gender":

- 24 CFR § 5.100 ("*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.").
- 24 CFR § 5.655(c)(1)(4) ("… based on the race, color, ethnic origin, *gender*, religion, disability, or age of any member of an applicant family.").
- 24 CFR § 570.506(c)(g)(2) ("Data on the extent to which each racial and ethnic group and single-headed households (by *gender* of household head) … No recipient is required to attain or maintain any particular statistical measure by race, ethnicity, or *gender* in covered programs.").
- 24 CFR § 570.506(c)(g)(4) ("Data indicating the race and ethnicity of households (and *gender* of single heads of households) … No recipient is required to attain or maintain any particular statistical measure by race, ethnicity, or *gender* in covered programs.").
- 24 CFR § 570.506(c)(g)(6) ("… solely or in part on the basis of race or *gender*.").
- 24 CFR § 570.904(b)(1) ("The extent to which persons of a particular race, *gender*, or ethnic background are represented …").
- 24 CFR § 570.904(b)(2) ("The extent to which persons of a particular race, *gender*, or ethnic background participate …").

[6] 90 Fed. Reg. 8615 (Jan. 30, 2025), https://www.federalregister.gov/d/2025-02090.

- 24 CFR § 570.904(d) ("… by race, ethnicity, or *gender* of the contractor's owners or managers.")
- 24 CFR § 92.508(a)(7)(i)(A) ("… by *gender* of household head …").
- 24 CFR § 92.508(a)(7)(ii)(B) ("… including data indicating the racial/ethnic or *gender* character of each business entity …").

B. HUD's removal of racial preferences in 24 CFR §§ 91.205(b)(2) and 91.305(b)(2) complies with the FHA and nondiscrimination obligations under the Constitution and federal civil rights laws.

The IFR eliminates provisions in 24 CFR §§ 91.205(b)(2) and 91.305(b)(2) that prioritized needs based on racial or ethnic characteristics over other protected characteristics listed in the FHA.[7] The FHA prohibits discrimination based on multiple categories (race or color, religion, sex, national origin, familial status, or disability) and does not prioritize certain categories over others. Prioritizing racial and ethnic characteristics would be inconsistent with HUD's obligations under *Loper Bright*, *West Virginia v. EPA*, and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). As such, HUD is right to ensure that its regulations treat all FHA protected categories equally, as Congress contemplated.

I agree with HUD that this removal provides local communities "maximum flexibility" to create policies that respond to their "unique local needs" and eliminates reporting and monitoring requirements that are "overly burdensome, intrusive and inconsistent."[8]

C. HUD should remove the recordkeeping requirements in 24 CFR § 570.490.

The recordkeeping requirements in 24 CFR § 570.490 necessitate records that "include data on the racial, ethnic, and sex characteristics of persons who are applicants for, participants in, or beneficiaries of the program." It is unclear why this data is limited only to race, ethnicity, and sex, and does not include other characteristics, such as religion, familial status, and disability, protected by the FHA. Those protected characteristics are equally important under the FHA and should be treated the same as race, ethnicity, and sex.

The FHA does not require disclosure of protected characteristics, so unless such characteristics are voluntarily disclosed, housing providers are left to guess as to a person's race, ethnicity, and sex to fulfill the recordkeeping requirements. This is particularly problematic regarding race and ethnicity, as there are increasing numbers of Americans who are multiracial. Why solicit guessing when such information is not voluntarily disclosed?

Such data can also be used to encourage quotas, as any existing disparity could be perceived as intentional discrimination, even without other evidence. This data collection could be used to support a disparate-impact theory of liability, which President Trump has disavowed. As a recent executive order explained:

---

[7] The eliminated text in both provisions stated: "For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole."

[8] 90 Fed. Reg. at 11022.

> A bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes. It promises that people are treated as individuals, not components of a particular race or group. It encourages meritocracy and a colorblind society, not race- or sex-based favoritism. Adherence to this principle is essential to creating opportunity, encouraging achievement, and sustaining the American Dream.[9]

In contrast, disparate-impact liability:

> holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed. Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.[10]

Eliminating the data collection contemplated in 24 CFR § 570.490 is not without precedent. For example, during the first Trump administration, the Equal Employment Opportunity Commission took action to suspend collecting EEO-1 data from employers. According to the OMB, the costs outweighed the benefits, and the "data collection lacks practical utility, is unnecessarily burdensome, and does not address privacy and confidentiality issues."[11]

As such, I urge HUD to remove the recordkeeping requirements in 24 CFR § 570.490.

D. HUD should further simplify the certification in 24 CFR § 5.151.

The IFR greatly simplifies participant certifications by removing 24 CFR § 5.152 and revising 24 CFR § 5.151. Under § 5.151, participants must certify that they "will affirmatively further fair housing," and such certification will be deemed "sufficient" provided they took "any action" during the relevant period that is "rationally related to promoting" fair housing, such as helping to eliminate housing discrimination. Significantly, the IFR does not "reinstate the obligation to conduct an Analysis of Impediments or mandate any specific fair housing planning mechanism."[12]

In addition to eliminating the forementioned certification requirements, I recommend that HUD deregulate further and remove the requirement that participants certify that "it will affirmatively further fair housing." While the FHA requires the Secretary to issue regulations that affirmatively further fair housing, Congress placed no such obligation on participants. Because the FHA does not mandate that participants affirmatively further fair housing, participant certification should merely require that participants comply with the FHA, which prohibits discrimination because of a person's race or color, religion, sex, national origin, familial status, or disability.

This additional simplification of participant certifications aligns with *Loper Bright* and *West Virginia v. EPA* by adhering to the text of the FHA and not adding additional requirements beyond what Congress legislated. It would also have the added benefit of eliminating many False Claims Act suits over whether sufficient action was taken to affirmatively further fair housing.

---

[9] Exec. Order, Restoring Equality of Opportunity and Meritocracy (Apr. 23 2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/.

[10] *Id.*

[11] Mark Brookstein, *Trump Administration Suspends EEO-1 Equal Pay Reporting Requirements*, Hum. Res. Law Blog, Sept. 7, 2017, https://www.humanresourceslawblog.com/trump-administration-suspends-eeo-1-equal-pay-reporting-requirements/.

[12] 90 Fed. Reg. at 11020.

Conclusion

HUD should finalize the IFR with the above recommendations.

Sincerely,

Rachel N. Morrison, J.D.
Fellow and Director
Administrative State Accountability Project
Ethics & Public Policy Center