controlled substances to a non-retrievable state in order to prevent diversion and protect the public health and safety.[12] The rule also provides that controlled substances in a registrant's inventory shall be destroyed in compliance with applicable Federal, State, tribal, and local laws and regulations.[13]

DEA established the non-retrievable standard as the intended final result of a registrant's disposal and destruction process in order to prevent the potential diversion of controlled substances into illegitimate channels. DEA believes the permanent and irreversible alteration of controlled substances is the cornerstone of the non-retrievable standard.[14]

In the final rule, in order to allow public and private entities to develop a variety of destruction methods that are secure, convenient, and responsible, DEA explained that it would not require a particular method of destruction, so long as the desired result of non-retrievability is achieved, and the method is consistent with preventing the diversion of controlled substances.[15]

Comments Requested

DEA is aware that since the publication of the final rule in 2014, various chemical and technological processes have been developed and employed to render controlled substances non-retrievable. In the final rule, DEA stated its intent that methods of destruction should remain current with continuously changing technology.[16] DEA now invites stakeholders engaged in the destruction and disposal of controlled substances to respond to the questions provided in this ANPRM. If proprietary information is included in the response, please submit two copies, and clearly indicate which copy ''Contains Confidential Information'', and which is the redacted version ''To Be Publicly Posted'' to ensure the correct information is posted on *Regulations.gov*. See Submitting Public Comments section, above.

ANPRM Questions

Please identify destruction methods or technology currently being utilized or developed to render the controlled substances non-retrievable. For each method or technology identified, please include:

1. If known, the potential users of this method or technology.
2. A detailed description of the method of destruction or technical process utilized to achieve the non-retrievable standard. Does this method or technology involve incineration at any point to attain the non-retrievable standard?
3. The controlled substance(s) to which the method of destruction or technology to render the controlled substance(s) non-retrievable may be applicable.
4. If known, list any controlled substances that will not be rendered non-retrievable by this method.
5. The volume or throughput (per hour) required to render the controlled substance non-retrievable.
6. The registrant's anticipated cost to execute, implement, or utilize the method of destruction or technology discussed above.
7. The analytical process utilized to evaluate the effectiveness of the method of destruction or technology. Provide the analytical results validating attainment of the non-retrievable standard.
8. The characteristics or constituents of any by-products or waste generated through the process used to render the controlled substance non-retrievable. Provide the waste profile sheet or similar documentation showing analytical results of the by-products or waste generated.
9. The disposal process of the by-products or waste generated.
10. The Federal, state, or local regulatory requirements associated with the disposal process and/or disposal of the by-products or waste.

Regulatory Analysis

This ANPRM was developed in accordance with the principles of Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' E.O. 13563, ''Improving Regulation and Regulatory Review,'' and E.O. 14094, ''Modernizing Regulatory Review.'' Since this action is an ANPRM, it does not create or propose to create any new requirements. Therefore, this regulatory action is not significant under section 3(f) of E.O. 12866.

Furthermore, the requirements of the Regulatory Flexibility Act do not apply to this action because, at this stage, it is an ANPRM and not a ''rule'' as defined in 5 U.S.C. 601. Following review of the comments received in response to this ANPRM, if DEA proceeds with a notice of proposed rulemaking regarding this matter, DEA will conduct all relevant analyses as required by statute or Executive Order.

Signing Authority

This document of the Drug Enforcement Administration was signed on October 26, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–23984 Filed 10–30–23; 8:45 am]

BILLING CODE 4410–09–P

[12] 21 CFR 1317.90(c).
[13] 21 CFR 1317.90(a).
[14] 79 FR 53520, 53527.
[15] *Id.* at 53522.
[16] *Id.* at 53548.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 115 and 125

[Docket No. FR–6355–P–01]

RIN 2529–AB07

Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs

AGENCY: Office of Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: Through this proposed rule, the U.S. Department of Housing and Urban Development (HUD) seeks to eliminate the tester restrictions for Fair Housing Initiatives Program (FHIP) grantees and for Fair Housing Assistance Program (FHAP) agencies that forbid FHIP and FHAP recipients from using fair housing testers with prior felony convictions or convictions of crimes involving fraud or perjury. This proposed rule would make HUD's programs as inclusive as possible for people with criminal records, consistent with Secretary Marcia Fudge's April 12, 2022 Memorandum, ''Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Program,'' and ensure that FHIP and FHAP funded entities are able to fully investigate criminal background screening policies that are potentially discriminatory under federal civil rights laws by using testers with actual criminal backgrounds.

DATES: Comment due date: January 2, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding

this proposed rule. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Demetria McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, 451 7th Street SW, Room 5250, Washington, DC 20410–8000, telephone number 202 402–7861 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION:

I. Background

On April 12, 2022, Secretary Marcia Fudge directed HUD to ''review our programs and put forth changes that ensure that our funding recipients are as inclusive as possible of individuals with criminal histories.'' [1] Two HUD programs, the Fair Housing Initiative Program (FHIP) and the Fair Housing Assistance Program (FHAP) fund local private and governmental agencies who further enforcement of the Fair Housing Act. Current regulations forbid these entities from using these program funds for fair housing testing that involves testers with prior felony convictions or convictions of crimes involving fraud or perjury. The applicable regulations containing these restrictions can be found at 24 CFR 125.107(a) (the FHIP regulation) and 24 CFR 115.311(b) (the FHAP regulation).

A. Fair Housing Initiatives Program (FHIP)

In 1987, Congress established the FHIP to strengthen the Department's enforcement of the Fair Housing Act and to further fair housing. This program funds, among other things, ''testing'' activities undertaken by fair housing organizations and other private non-profits designed to enhance enforcement of the Fair Housing Act.

Testing refers to the use of an individual or individuals (''testers'') who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.

B. History of the FHIP and its Testing Guidelines

Section 561 of the Housing and Community Development Act of 1987 (Section 561) established the FHIP as a temporary program, and specifically required HUD to ''establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program.'' Section 561 noted the purpose of the guidelines was ''to ensure that investigations in support of fair housing enforcement efforts [. . .] shall develop credible and objective evidence of discriminatory housing practices.'' In the FHIP's first iteration, the enabling law imposed a sunset on the ''demonstration period'' for September 30, 1989.[2]

In 1988, HUD proposed regulations for the demonstration period that, among many other requirements, forbid testers under the FHIP from having ''prior felony convictions or convictions of crimes involving fraud or perjury.'' This restriction followed a proposed requirement for a ''formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers.'' [3]

The Department's FHIP regulations for the demonstration period were finalized in 1989 at 24 CFR part 125, and contained a section titled ''Guidelines for private enforcement testing'' (previously codified at § 125.405). The Guidelines contained numerous prescriptive requirements about how eligible testing was to be designed and conducted (*e.g.,* allowing testing only in response to a ''bona fide allegation''), including the requirement for a ''formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers,'' followed by a restriction on testers having felony convictions or convictions of crimes involving fraud or perjury.[4] The 1989 final rule for the demonstration period describes comments both in support and in opposition of the proposed guidelines. None of the comments pertained specifically to the conviction restrictions for testers. Accordingly, HUD did not discuss that particular portion of the guidelines in the final rule.

Section 953 of the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990) extended the FHIP sunset to September 30, 1992. Then in 1992, Congress made the FHIP program permanent through the Housing and Community Development Act of 1992 that codified the FHIP provisions in the Fair Housing Act at 42 U.S.C. 3616a.[5]

[1] ''Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs'' *available at https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf.*

[2] Section 561(e).

[3] 53 FR 25581 (July 7, 1988).

[4] 54 FR 6492, 6501 (Feb. 10, 1989).

[5] Public Law 102–550, October 28, 1992, 106 Stat. 3672.

The guidelines section at 24 CFR 125.405 that had been established in 1989 changed significantly when regulations for the permanent program were issued in 1995, but the tester conviction restriction remained.[6] As explained in the 1994 proposed rule, ''the passage of section 905 establishes FHIP as a permanent program, and with the expiration of the demonstration period, the requirement for testing guidelines is removed. The revised § 125.405 [retitled ''Testers''] proposed here would remove the testing guidelines, but would still require that testers must not have prior felony convictions or convictions of crimes involving fraud or perjury, and that they receive training or be experienced in testing procedures and techniques.'' [7]

HUD did not provide an explanation for why it chose to retain the tester restriction in the 1994 final rule. Like with the 1989 final rule, HUD received comments in support of and in opposition to removing most of the testing guidelines, but none of the comments discussed the tester conviction portion that remained. The operative section was moved to 24 CFR 125.07—Testers: [8] ''The following requirements apply to testing activities funded under the FHIP: a) Testers must not have prior felony convictions or convictions of crimes involving fraud or perjury.'' This language has not changed since 1995.

C. The Fair Housing Assistance Program (FHAP)

While the FHIP funds private non-profits to assist in enforcement of the Fair Housing Act and substantially equivalent local laws, the FHAP funds State and local governmental agencies to do the same. Section 817 of the Fair Housing Act, 42 U.S.C. 3616, provides that the Secretary may reimburse State and local fair housing enforcement agencies that assist the Secretary in enforcing the Act. HUD has implemented section 817 at subpart C of 24 CFR part 115, which sets forth the requirements for participation in the FHAP. Under the FHAP, a State or local agency is certified for participation if the Department determines that the agency adequately enforces a law or laws that provide rights, procedures, remedies, and judicial review provisions that are substantially equivalent to the federal Fair Housing Act.[9]

D. History of the FHAP and its Testing Guidelines

In 1980, the Carter administration asked Congress to authorize funding for HUD to assist State and local agencies in enforcing fair housing laws, citing limitations that localities had in processing fair housing complaints. This request was approved by Congress in Public Law 96–103 (FY1980 Appropriations Act for HUD), which marked the establishment of the FHAP.[10] That same year, HUD issued an interim final rule that established ''the eligibility criteria for participants in the Fair Housing Assistance Program (FHAP) and the minimum standards which specific project proposals must meet.'' [11] HUD issued subsequent rules for the FHAP in 1982, 1988, and 1989. None of these initial rules addressed fair housing testing in any way.[12] The interim and final rules in 1996 mention testing only to note that any ordinances that include ''anti-testing provisions'' would prevent a jurisdiction from achieving substantially equivalent status.[13] In 2005, HUD first addressed the criminal backgrounds of FHAP testers in FHAP regulations.

The proposed rule in 2005 and final rule in 2007 created a new definition of testing [14] and included a new section on testing, which read in part: ''The following requirements apply to testing activities funded under the FHAP: [. . .] Testers must not have prior felony convictions or convictions of any crimes involving fraud or perjury.'' [15] There was no commentary about this restriction from the public or HUD in these rules.

E. Basis for Tester Restrictions

As is explained above, in 1987, Congress required HUD to establish guidelines for the FHIP demonstration period that would help ensure that FHIP grantees' investigations developed ''credible evidence'' of discriminatory housing practices. While HUD has never been explicit, it presumably first enacted the restrictions on testers' criminal histories and then continued them in subsequent rulemakings because of the idea that certain criminal convictions would undermine a tester's credibility in testifying in court to what the tester witnessed under Rule 609 of the Federal Rules of Evidence (FRE) 609, which provides that certain criminal convictions may be admitted to attack witness's ''character for truthfulness.'' [16]

Specifically, in civil cases where the witness is not the defendant, FRE 609 requires the admission of evidence of two categories of criminal convictions: (1) a crime punishable by death or imprisonment for more than one year, and (2) any conviction of a crime involving dishonesty or false statement. However, both categories are subject to a number of exceptions that limit admissibility.[17]

---

[6] 60 FR 58452, 58453 (Nov. 27, 1995).

[7] 59 FR 44596–01 (Aug. 29, 1994) (''The Department considered two factors to be significant and determinative in the decision to eliminate testing guidelines from the regulation. First, in the original authorizing statute for FHIP, Congress specifically limited the requirement for testing guidelines to the demonstration period; and second, Congress did not include this requirement in its permanent authorization of FHIP by section 905.'')

[8] In addition to the conviction restrictions, 24 CFR 125.107 also imposes these requirements on testers: (b) Testers must receive training or be experienced in testing procedures and techniques, and (c) Testers and the organizations conducting tests, and the employees and agents of these organizations may not: (1) Have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury; (2) Be a relative of any party in a case; (3) Have had any employment or other affiliation, within one year, with the person or organization to be tested; or (4) Be a licensed competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.

[9] *See* 42 U.S.C. 3610(f); 24 CFR part 115.

[10] *See* The Fair Housing Act: HUD Oversight, Programs, and Activities, Congressional Research Service R44557 (April 7, 2021) (citing U.S. Department of Housing and Urban Development, *FY1980 Budget Justifications,* p. Q–2 and Pub. L. 96–103) *available at sgp.fas.org/crs/misc/R44557.pdf.*

[11] 45 FR 31880 (May 14, 1980).

[12] *Id.;* 47 FR 8991 (March 3, 1982); 53 FR 34668 (Sept. 7, 1988); 54 FR 20094 (May 9, 1989).

[13] 61 FR 7674 (Feb. 28, 1996); 61 FR 41282 (Aug. 7, 1996).

[14] ''Testing refers to the use of an individual or individuals (''testers'') who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.'' 70 FR 28748 (May 18, 2005); 72 FR 19070 (Apr. 16, 2007); currently codified at 24 CFR 115.100(c).

[15] 70 FR 28748 (May 18, 2005); 72 FR 19070 (Apr. 16, 2007); currently codified at 24 CFR 115.311(b). Unlike the FHIP criminal conviction restriction, the FHAP restriction was not proceeded by any reference to credibility.

[16] FRE 609(a). Also, twenty-four states have local rules of evidence with substantially similar provisions to FRE 609. 6 Weinstein's Federal Evidence Article VI (2021).

[17] Specifically, although FRE 609(a)(1)(A) requires the admission of a crime that was punishable by death or by imprisonment for more than one year (what is often categorized as a felony), this requirement is explicitly subject to Rule 403. Rule 403 says that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Although FRE 609(a)(2) requires admission of any crime if the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement (*i.e.,* crimes of dishonesty), evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect, if the conviction is older than 10 years. *See* FRE 609(b). Also under both categories, juvenile convictions are explicitly not admissible. 609(d). Nor are convictions that

Continued

F. How HUD's Conviction Restrictions Are Overbroad, Outdated, and Unnecessary

Notably*, the disqualifying convictions covered by HUD's regulations are much broader than those in FRE–609. For example, unlike 609,* HUD's current regulations always disqualify testers for prior convictions, even those that are over 10 years old and have little or no probative value. In addition, HUD's current regulations do not have explicit carve outs for testers whose convictions have been the subject of a pardon, annulment, certificate of rehabilitation or similar findings of innocence. Moreover, HUD's current regulations may disqualify testers with certain juvenile convictions.

More broadly, even with respect to convictions that could be admissible under FRE 609, HUD now sees no reason to categorically bar those who conduct testing using FHIP or FHAP funds from employing testers with such convictions. Those entities may reasonably conclude that the prospect of admissibility under FRE 609 in litigation is of little consequence.[18]

Based on HUD's experience investigating fair housing complaints, testers today generally audio and/or video record their testing experiences, meaning that the recordings—not the testers' testimony—are of utmost importance in most fact-finding hearings.[19] Recording fair housing tests has become ubiquitous as cost of devices and technology has gone down and the utility of such recordings has become evident. Such recording is not only relatively inexpensive, it is also explicitly legal: Federal law and state law in many states allow a party to a communication like a telephone call to record without the knowledge or consent of other parties.[20] In many cases, sharing recorded evidence of fair housing testing facilitates early resolution and settlement, negating the need to interrogate tester credibility. And in housing discrimination cases that go to trial, the main role of testers as witnesses is to introduce the recorded evidence of the interaction, not to recount their experience in detail. In short, testing evidence often speaks for itself and a tester merely needs to be credible enough for the judge or jury to believe their testimony that the recording being presented is an authentic recording of the events at issue in the case.

In addition, other requirements in these regulations that will continue to apply to testers help ensure that testers are objective, credible, and well qualified, regardless of their criminal backgrounds. For example, testers still must be trained in testing procedures and techniques.[21] Testers cannot have an economic interest in the outcome of the test;[22] be a relative or acquaintance of any party in the case;[23] have had a recent employment history or other affiliation with the person or organization to be tested;[24] or be a competitor (or licensed competitor) of the person or organization to be tested.[25]

HUD also observes that FRE 609 itself is not always applied even where a crime of conviction comes under its potential application. First, fair housing cases using testers are not only heard in federal courts; they are also heard in state courts, which sometimes have different rules of evidence. At least one state (Montana) has chosen to adopt a Rule 609 variation that *prohibits* admission of evidence that a witness has been convicted of a crime for the purpose of attacking the credibility of a witness, explaining that ''[t]he Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony'' and that conviction evidence has ''low probative value in relation to credibility.'' [26] And even in Federal courts, while no survey appears to have been conducted to see the frequency with which judges admit prior convictions to impeach witnesses in civil matters, one survey done in the criminal context has shown that ''federal judges do not routinely admit prior convictions to impeach criminal defendants.'' [27] Judges sometimes exclude or find unpersuasive prior criminal convictions of witnesses in civil matters, preferring to focus on more reliable indicators of credibility tied to the facts of the case at hand.[28] Ultimately, HUD believes it is better left to FHIP and FHAP funded entities to decide whether to hire a tester with criminal convictions, as they are in the best position to know and be able to weigh the risk that a testers' former criminal convictions will be admitted—and matter—in their local courts, and based on the kind of testing that will be done.

Indeed, HUD recognizes that many FHIP and FHAP funded entities now have an affirmative need to hire testers with criminal histories, who in cases that are of great priority to HUD may actually be better positioned to help those entities uncover discrimination.[29] When the restrictions on testers' criminal histories were first promulgated as a demonstration regulation in 1989, housing providers were unlikely to conduct criminal background checks on prospective applicants.[30] Since then, landlords have increasingly implemented policies and practices to screen applicants based on their criminal backgrounds—including those with felony convictions and convictions involving fraud or perjury.[31]

---

have been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of innocence. 609(b).

[18] Several fair housing organizations from across the country recently wrote HUD noting that ''[p]eople with conviction histories commonly testify credibly in civil matters, and organizations can make individual determinations, consistent with HUD and EEOC guidance, as to the facts or circumstances surrounding the proposed tester's criminal conduct and whether these facts would be likely to present barriers to credibility. . . . Critically, the vast majority of fair housing testers never testify at trial at all, nor is eliciting trial testimony a primary purpose of testing. Instead, test results often serve as the basis to start a broader investigation and enforcement strategy and provide helpful data to guide education efforts. Even when cases do go to litigation, only a very small percentage go to trial and a smaller percentage still involve the testimony of a tester.''

[19] *See also, id.,* noting that ''39 of the 50 states allow for single party consent to record, which means that tests are audio recorded in most states, removing any doubt about the veracity of accounts.''

[20] *See, e.g.,* Recording Phone Calls and Conversations: 50-State Survey, available at *https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/.*

[21] 24 CFR 115.311(c); 24 CFR 125.107(b).

[22] 24 CFR 115.311(d)(1); 24 CFR 125.107(c)(1).

[23] 24 CFR 115.311(d)(2); 24 CFR 125.107(c)(2).

[24] 24 CFR 115.311(d)(3) (prohibiting any such affiliation within five years of the testing); 24 CFR 125.107(c)(3) (prohibiting any such affiliation within one year of the testing).

[25] 24 CFR 115.311(d)(4); 24 CFR 125.107(c)(4)(specifying such ''licensed'' competitors are barred from conducting testing).

[26] Mont. Code Ann. Rule 26–10–609.

[27] Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform,* 59 B.C. L. Rev. 993 (2018).

[28] *See, e.g., Sanchez* v. *Jiles,* No. CV 10–09384 MMM (OPx) ''Final Order on Motions In Limine'' 2012 U.S. Dist. LEXIS 200372 (C.D. Cal. June 14, 2012) (finding felony convictions involving fraud and forgery to not highly relevant to the plaintiff's witness's credibility and ordering that defendants not introduce it into evidence); 3 Federal Rules of Evidence Manual § 609.03 (2022).

[29] HUD has been contacted by fair housing organizations urging reform of the 24 CFR 105.107 because its restrictions prevent fair housing centers from testing for certain types of criminal background discrimination by preventing them from employing testers with felonies to test the entire application process.

[30] *See* David Thatcher, Law & Social Inquiry Volume 33, Issue 1, 12, Winter 2008 (explaining the upward trend since the 1990s in criminal background checks, including that no ''how to'' landlord books reviewed in a literature review prior to 1990 suggested conducting criminal background checks on tenants whereas all ''how to'' books suggested such checks as of the article's publication in 2008).

[31] *See, e.g., id.* at 12 (describing a 2005 survey of large landlords which revealed that 80 percent screened prospective tenants for criminal histories).

In 2016, HUD issued a memo explaining how these kinds of admissions policies and practices may be discriminatory under the Fair Housing Act.[32] One way landlords may discriminate is by using a criminal records policy as a cover (or pretext) for intentional discrimination because of a protected class. For example, a landlord may tell Black applicants that they are being rejected because of their criminal record but accept white applicants with the same or similar record. The real reason for the rejection is the person's race, even though the landlord is saying the reason is the person's criminal record.[33] Another example of how a landlord may violate the Fair Housing Act is if a landlord has a criminal records policy that disproportionately excludes people of a certain protected class, and that policy is not necessary to achieve a substantial, legitimate, nondiscriminatory interest, or if there is a less discriminatory policy that can achieve that interest.[34]

Testers with actual criminal records ranging from misdemeanor to felony convictions are in certain circumstances the best suited to obtain evidence of what modern-day criminal record screening practices are and whether these policies are being applied in a discriminatory way because of a protected characteristic. For example, testers with no criminal histories cannot submit actual applications to test a criminal records screening policy where the landlord runs a typical computer-based ''background check'' on its applicants; they are limited to investigating discrimination that occurs pre-application. Testers without criminal backgrounds can inquire about what a criminal records policy is at a property, reveal a fabricated history, and ask whether they would be accepted or rejected. However, only testers with real criminal records will be able to submit an application to obtain evidence of what the policy is in practice at the admission stage [35] and whether the policy is being applied (after the application is submitted) in a discriminatory manner. Absent a change in regulation, FHIP and FHAP funded entities do not have the option of conducting testing using HUD funds that investigates modern criminal records policies through the application phase.[36]

Finally, HUD's current regulation disproportionately excludes people of color from opportunities to work for FHIP- and FHAP-funded entities, even as it serves questionable value in ensuring credible evidence. These issues are particularly problematic in the context of a fair housing investigation, where sometimes people with criminal records are best able to investigate discriminatory activity, and where a factfinder is particularly unlikely to find a tester's criminal records to undermine their credibility (as in the common case where testing evidence is audio and/or video recorded and speaks for itself).

G. Removing the Tester Conviction Restrictions Is Legally Permissible

Outside of the considerations discussed above, removing these restrictions is legally permissible. As HUD has previously noted, the original authorizing statute for the FHIP specifically limited the requirement for testing guidelines to the demonstration period. Congress did not include this requirement in its permanent authorization of the FHIP. HUD maintains the position that it took in 1994 that HUD is not required by any statute to have regulations containing testing restrictions for the permanent FHIP.[37] Nor are these restrictions statutorily required for the FHAP.

II. This Proposed Rule

This rule proposes to amend the regulations in 24 CFR part 115 and 125 for the reasons discussed above.

At 24 CFR 115.311, the proposed regulatory text would delete paragraph (b), which wholly contains the tester background restriction but no other content.

At 24 CFR 125.107, the proposed regulatory text would delete paragraph (a) which wholly contains the tester background restriction but no other content.

HUD seeks comments on these proposals.

III. Findings and Certifications

Regulatory Review—Executive Orders 12866, 13563, and 14094

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where

[32] *See* Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016) (''While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (*i.e.,* discriminatory effects liability). Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (*i.e.,* disparate treatment liability).'')

[33] The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. 42 U.S.C. 3601 *et seq.*

[34] *See id.* (explaining that achieving resident safety and/or protecting property may be substantial and legitimate interests, assuming they are the actual reasons for the policy, but that a housing provider must be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property).

[35] *See, e.g.,* June 10, 2022 Memorandum directed to FHIP and FHAP funded entities highlighting the different ways in which criminal records policies may violate the Act, and explaining that a housing provider may have a policy in writing that differs from a policy in practice, and that fully ''[i]dentif[ing] all policies, including written and unwritten policies or practices'' is an important first step in investigating the potential discriminatory effects of a policy. Without having testers that go through the entire application process, it is difficult to find out whether there is a difference between what a tester is told the policy is and what the policy is in practice.

[36] *See, e.g.,* Locked Out: Criminal Background Checks as a Tool for Discrimination, available at *https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf.* This report demonstrates how a FHIP grantee was able to uncover evidence that criminal records policies were being used as pretext for intentional discrimination by showing that landlords used the criminal backgrounds of black testers to treat those testers less favorably at the pre-application stage compared to white testers, even though the black and white testers had similar (but made-up) criminal backgrounds. The investigation found that paired white testers were quoted more lenient criminal records policies than black testers, were encouraged to apply where black testers were discouraged, and were uniquely told that exceptions would be made to the landlord's criminal records policies. These investigations were not able to see if landlords were discriminating *after* applications were submitted, however, because the criminal histories of the testers were not real. If this FHIP grantee was able to use paired testers with *actual* similar criminal backgrounds, it would have the ability to investigate the discriminatory use of a criminal records policy beyond just the pre-application stage.

[37] See footnote 7 (citing 59 FR 44596–01 (Aug. 29, 1994)). Of note, even if HUD had taken the position that 561(c)(2) of the 1987 Act was still in effect, that section of the Act only required, generally, for HUD to ''establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program . . . to ensure that investigations in support of fair housing enforcement efforts . . . develop credible and objective evidence of discriminatory housing practices.'' § 561(c)(2) of the Housing and Community Development Act of 1987. It did not require restricting testers based on their criminal history in order to ensure credible and objective evidence.

relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter referred to as the ''Modernizing E.O.'') amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

The proposed rule would revise 24 CFR parts 115 and 125 to remove fair housing tester restrictions. The revised regulations would allow FHIP and FHAP funded entities the ability to use HUD funds to compensate testers with felony convictions and convictions for crimes involving fraud or perjury. This rule was not subject to OMB review. This rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 and is not an economically significant regulatory action.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or Tribal Government, or on the private sector, within the meaning of the UMRA.

Environmental Review

This proposed rule is a policy document that sets out fair housing and nondiscrimination standards and provides for assistance in enforcing fair housing and nondiscrimination. 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).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would remove tester restrictions from the FHIP and FHAP regulations which prohibit fair housing testers with prior convictions of a felony, fraud, or perjury. This will not create an undue burden on small entities, instead it will allow FHIP and FHAP funded entities the ability to use testers with felony convictions and convictions for crimes involving fraud or perjury. Identifying potential discriminatory screening policies will positively impact small entities and assist with maintaining compliance with the Fair Housing Act. Accordingly, it is HUD's determination that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

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

List of Subjects

24 CFR Part 115

Administrative practice and procedure, Aged, Fair housing, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Mortgages, Reporting and recordkeeping requirements.

24 CFR Part 125

Fair housing, Grant programs—housing and community development, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR 115 and 125 as follows:

PART 115—CERTIFICATION AND FUNDING OF STATE AND LOCAL FAIR HOUSING ENFORCEMENT AGENCIES

■ 1. The authority citation for part 115 continues to read as follows:

Authority: 42 U.S.C. 3601–19 and 42 U.S.C. 3535(d).

§ 115.311 [Amended]

■ 2. In § 115.311, remove paragraph (b), redesignate paragraph (c) as paragraph (b), and redesignate paragraphs (d) through (d)(4) as paragraphs (c) through (c)(4).

PART 125—FAIR HOUSING INITIATIVES PROGRAM

■ 3. The authority citation for part 125 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3616 note.

§ 125.107 [Amended]

■ 4. In § 125.107, remove paragraph (a), redesignate paragraph (b) as paragraph (a), and redesignate paragraphs (c) through (c)(4) as paragraphs (b) through (b)(4).

Demetria McCain,

Principal Deputy, Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2023–23678 Filed 10–30–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

31 CFR Part 323

[FISCAL–2023–0002]

RIN 1530–AA28

Disclosure of Records

AGENCY: Bureau of the Fiscal Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking with request for comment.

SUMMARY: The Bureau of the Fiscal Service within the Department of the Treasury (Fiscal Service or Treasury) proposes to adopt regulations to implement statutory requirements under the SECURE 2.0 Act of 2022 requiring Treasury to provide information on applicable savings bonds to states. A state receiving the information with respect to an applicable savings bond may use the information to locate the owner of the bond pursuant to Treasury's regulations and the state's own standards and requirements under abandoned property rules and regulations of the state. Regulations adopted by Treasury are required to protect the privacy of savings bond owners, prevent fraud, and ensure that any information disclosed to a state under these rules shall be used solely to locate savings bond owners.

DATES: Comments on the proposed rule must be received by November 30, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Mail:* Department of the Treasury, Bureau of the Fiscal Service, Attn: