

**THIS FINAL RULE IS PENDING PUBLICATION IN THE FEDERAL REGISTER. PUBLICATION IN THE FEDERAL REGISTER WILL ESTABLISH THE EFFECTIVE DATE OF THE RULE.**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Parts 115 and 125**

**[Docket No. FR-6355-F-02]**

**RIN 2529-AB07**

**Expanding the Fair Housing Testing Pool for FHIP and FHAP Funded Entities**

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

**ACTION:** Final Rule.

**SUMMARY:** Through this final rule, HUD eliminates the restrictions for Fair Housing Initiatives Program (FHIP) grantees and for Fair Housing Assistance Program (FHAP) agencies that currently bar FHIP and FHAP funded entities from using HUD funds to deploy fair housing testers with prior felony convictions or convictions of crimes involving fraud or perjury. The final rule ensures 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 a diverse group of testers with actual criminal convictions. This final rule also improves inclusivity in HUD programs for people with criminal convictions, consistent with President Joseph R. Biden’s March 31, 2022 Proclamation on Second Chance Month and Secretary Marcia Fudge’s April 12, 2022 Memorandum, “Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs,” and is based on a HUD determination that no valid interest is served by categorically barring FHIP and FHAP funded entities from using testers with such convictions.

**DATES:** *Effective date:* This final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Aztec Jacobs, Director, Office of Programs, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 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**

Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities because of race, color, religion, sex (including sexual orientation and gender identity), disability, familial status, or national origin.<sup>1</sup> Section 817 of the Fair Housing Act provides that the Secretary may reimburse State and local fair housing enforcement agencies that assist the Secretary in enforcing the Act.<sup>2</sup>

Although Section 817 was part of the original 1968 Act, it was not until 1980, through an annual appropriations act (P.L. 96-103), that Congress authorized funding for it, establishing the Fair Housing Assistance Program (FHAP). In requesting funding for the FHAP, the Carter administration cited limitations that localities had in processing fair housing complaints.<sup>3</sup>

While the FHAP funds State and local governmental agencies to assist in enforcement of the Fair Housing Act, the Fair Housing Initiative Program (FHIP) was established in 1987 to

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<sup>1</sup> 42 U.S.C. 3601–3619, 3631.

<sup>2</sup> 42 U.S.C. 3616.

<sup>3</sup> See The Fair Housing Act: HUD Oversight, Programs, and Activities, Congressional Research Service R44557 (April 7, 2021) and 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](http://sgp.fas.org/crs/misc/R44557.pdf).

fund private non-profits to do the same. Section 561 of the Housing and Community Development Act of 1987 (Section 561) established the FHIP as a temporary program, which Congress made permanent in 1992 through the Housing and Community Development Act of 1992.<sup>4</sup> In combination, the FHAP and FHIP strengthen HUD's enforcement of the Fair Housing Act and further fair housing.

Among other things, the FHAP and FHIP fund testing activities designed to enhance enforcement of the Fair Housing Act. Testing refers to the use of an individual or individuals who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as a prospective renter or purchaser for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws. Both FHIP and FHAP funded entities can use testing as a tool to investigate potential violations of the Fair Housing Act.

Section 561 specifically required HUD, during the demonstration period for the FHIP, to “establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program” and noted that 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.”<sup>5</sup> The Housing and Community Development Act of 1992 eliminated testing guidelines as a permanent requirement for the FHIP.<sup>6</sup>

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<sup>4</sup> Public Law 102–550, October 28, 1992, 106 Stat. 3672.

<sup>5</sup> Public Law 100–242, February 5, 1988, 101 Stat. 1943.

<sup>6</sup> 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.” 59 FR 44596 (Aug. 29, 1994).

## Current Regulatory Landscape

HUD regulations currently forbid FHIP and FHAP funded entities from using federal funds for fair housing testing that involves testers with prior felony convictions or convictions of crimes involving fraud or perjury.<sup>7</sup>

For FHIP funded entities, this restriction dates back to the 1988 proposed regulations for the demonstration period that, among many other requirements, prohibited testers under the FHIP from having “prior felony convictions or convictions of crimes involving fraud or perjury.”<sup>8</sup> HUD did not explicitly explain why it proposed this specific restriction, nor did HUD receive comments related to this specific restriction. The 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.<sup>9</sup>

In 1994, HUD proposed eliminating the testing guidelines, noting that Congress specifically limited the testing guidelines requirement to the demonstration period and did not include this requirement in its permanent authorization of the FHIP. However, HUD proposed keeping the restriction on hiring testers with “prior felony convictions or convictions of crimes involving fraud or perjury” and keeping a requirement that testers receive training or be

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<sup>7</sup> 24 CFR 125.107(a); 24 CFR 115.311(b).

<sup>8</sup> 53 FR 25581.

<sup>9</sup> 54 FR 6492, 6501.

experienced in testing procedures and techniques.<sup>10</sup> HUD did not provide an explanation for why it chose to retain the restriction regarding convictions in the proposed rule, nor in the 1995 final rule.<sup>11</sup> The language – “The following requirements apply to testing activities funded under the FHIP: Testers must not have prior felony convictions or convictions of crimes involving fraud or perjury” – has not changed since 1995.<sup>12</sup>

HUD did not address the criminal backgrounds of FHAP testers in its regulations until 2005.<sup>13</sup> While HUD established the eligibility criteria for participants in the FHAP in a 1980 interim rule and issued subsequent rules for the FHAP in 1982, 1988, and 1989, none of these addressed fair housing testing in any way.<sup>14</sup> The proposed rule in 2005 proposed a tester conviction restriction identical to that contained in the FHIP regulations. As with the FHIP rulemaking, there were no public comments on this restriction, and it was codified in 2007 in a final rule.<sup>15</sup>

### **The Proposed Rule**

On October 31, 2023, HUD issued a Notice of Proposed Rulemaking, which proposed to amend its regulations by eliminating the tester restrictions that restrict FHIP and FHAP funded entities from using fair housing testers with prior felony convictions or convictions of crimes involving fraud or perjury (the proposed rule).<sup>16</sup> The proposed rule was a response to an April 12, 2022 directive from Secretary Marcia Fudge to HUD to “review our programs and put forth

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<sup>10</sup> 59 FR 44596, 44604.

<sup>11</sup> 60 FR 58452, 58453.

<sup>12</sup> 60 FR 58452, 58453.

<sup>13</sup> See 45 FR 31880 (May 14, 1980); 47 FR 8991 (March 3, 1982); 53 FR 34668 (Sept. 7, 1988); 54 FR 20094 (May 9, 1989); 61 FR 7674 (Feb. 28, 1996); 61 FR 41282 (Aug. 7, 1996) (containing no conviction restrictions on testers) compare to 70 FR 28748 (May 18, 2005) (containing the conviction restrictions on testers at issue in this final rule).

<sup>14</sup> 45 FR 31880; 47 FR 8991; 53 FR 34668; 54 FR 20094.

<sup>15</sup> 72 FR 19070 (Apr. 16, 2007), currently codified at 24 CFR 115.311(b).

<sup>16</sup> 88 FR 74381.

changes that ensure that our funding recipients are as inclusive as possible of individuals with criminal histories.”<sup>17</sup>

In the proposed rule, HUD explained that it presumably first enacted the restrictions on testers’ criminal convictions 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), which provides that certain criminal convictions may be admitted to attack witness’s “character for truthfulness.”<sup>18</sup>

However, HUD explained that it viewed a categorical bar on anyone with a felony conviction, or conviction involving fraud or perjury to be overbroad, outdated, and unnecessary. First, such a broad and categorical bar includes a broader range of convictions than does FRE 609. Second, even for those convictions covered by FRE 609, HUD saw 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, especially because audio and video recording is often used in testing, which means that the recordings—more than the testers’ testimony—are often the most important evidence. HUD pointed out that FRE 609 itself is not always applied even where a conviction comes under its potential application. Further, other requirements in these regulations will continue to apply to testers to 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.<sup>19</sup> Testers cannot have an

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<sup>17</sup> “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](https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf).

<sup>18</sup> 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).

<sup>19</sup> 24 CFR 115.311(c); 24 CFR 125.107(b).

economic interest in the outcome of the test;<sup>20</sup> be a relative or acquaintance of any party in the case;<sup>21</sup> have had a recent employment history or other affiliation with the person or organization to be tested;<sup>22</sup> or be a competitor (or licensed competitor) of the person or organization to be tested.<sup>23</sup>

HUD also noted that it had been contacted by fair housing organizations urging reform of conviction restrictions because they prevent fair housing centers from testing for certain types of criminal background-based discrimination by preventing them from employing testers with felonies to test the entire application process. HUD recognized 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. HUD explained that when the restrictions on testers' criminal convictions were first promulgated as a demonstration regulation in 1989, landlords were unlikely to conduct criminal background checks on prospective applicants.<sup>24</sup> Since then, landlords have increasingly implemented policies and practices to screen applicants based on their criminal convictions.<sup>25</sup>

In 2016, HUD issued a memo explaining how these admissions policies and practices may be discriminatory under the Fair Housing Act.<sup>26</sup> One way landlords may discriminate is by

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<sup>20</sup> 24 CFR 115.311(d)(1); 24 CFR 125.107(c)(1).

<sup>21</sup> 24 CFR 115.311(d)(2); 24 CFR 125.107(c)(2).

<sup>22</sup> 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).

<sup>23</sup> 24 CFR 115.311(d)(4); 24 CFR 125.107(c)(4)(specifying such "licensed" competitors are barred from conducting testing).

<sup>24</sup> 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).

<sup>25</sup> See, e.g., *id.* at 12 (describing a 2005 survey of large landlords which revealed that 80 percent screened prospective tenants for criminal histories).

<sup>26</sup> 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

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. 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.<sup>27</sup> 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. HUD explained how testers *without* bona fide criminal records are limited to investigating discrimination that occurs pre-application. 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 and whether the policy is being applied (after the application is submitted) in a discriminatory manner.<sup>28</sup>

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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).")

<sup>27</sup> *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).

<sup>28</sup> *See, e.g.*, Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (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 landlord may have a policy in writing that differs from a policy in practice, and that fully "[i]dentify[ing] all policies, including written and unwritten policies or practices" is an important first step in investigating the potential discriminatory effects of a policy) *available at*



Finally, HUD pointed out that 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 in view of the other safeguards that apply to fair housing testing.

### **This Final Rule**

After reviewing and considering public comments on this Rule, HUD finalizes its proposal to remove the conviction restrictions for testers in the FHIP and FHAP regulations.

HUD notes that in addition to the reasons expressed in the proposed rule, summarized above, and echoed by many public comments summarized below, HUD received several public comments from local fair housing organizations regarding the difficulties they have had due to the conviction restrictions recruiting testers of color to conduct race and national origin-based testing. Further, commenters highlighted the catch-22 organizations are put in regarding compliance with these HUD restrictions and compliance with anti-discrimination employment restrictions and/or civil-rights based values. Finally, several commenters noted that removing this restriction is necessary for HUD to be consistent in terms of its own commitment to equity and civil rights. HUD believes these are important additional reasons to finalize the proposed rule and to remove the restrictions on testers with felony convictions and convictions involving fraud and perjury.

## **II. Public Comments and HUD's Response to Public Comments**

HUD received 192 comments from FHIP and FHAP funded entities, advocacy and re-entry organizations, appraisers, testers, persons with criminal convictions, and other individuals.

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<https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>. 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.

This public comments section includes a summary of the public comments that HUD received in response to the proposed rule.

### **A. General Support for the Proposed Rule**

Several commenters expressed their general support for HUD's proposal to eliminate the agency's restrictions on the use of fair housing testers with prior felony convictions or certain other convictions by FHIP and FHAP funded entities. Commenters writing in support of the rule emphasized the value of or necessity for testing, generally. One commenter said that "testers play a vital role and necessity in assisting to eradicate housing discrimination in America."

#### *Comments Criticizing the Current Regulation*

Some commenters noted that HUD's current restrictions are "antiquated" and "outdated." One of these commenters also described the current restrictions as "overbroad" and "unnecessary." Another questioned their policy justification. Two commenters said the current restrictions never should have been on the books in the first place.

Some commenters said the current restrictions amount to a discriminatory "blanket ban" on persons with criminal histories. Other commenters said the current restrictions constitute employment discrimination. Some commenters noted that the restrictions are inconsistent with Equal Employment Opportunity Commission guidance on the use of criminal records in employment decisions. One commenter said complying with the current regulation causes them to face potential liability for employment discrimination. One commenter noted that the proposed changes would also allow FHIP and FHAP funded entities to abide by state and local laws which prohibit employment discrimination based on criminal legal system interaction.

One commenter said the current regulation is inconsistently applied and frequently misunderstood with some grant technical monitors enforcing the regulation while others do not,

and several FHIP staff across the country have misunderstood the regulation to only bar testers with felonies related to fraud or perjury.

*Consistent Anti-Discrimination Message from HUD*

Commenters said the proposed rule would make it easier for housing organizations to uncover housing discrimination, and therefore further the current Administration's goal of advancing core values of equity, civil rights, racial justice, and equal opportunity.

Several commenters said that there is a contradiction between HUD forbidding housing providers from discriminating against tenants on the one hand, but on the other hand engaging in discrimination by forcing FHIP and FHAP funded entities to discriminate in employment. One commenter said HUD's "blanket ban" on testers with criminal convictions negates HUD's stated commitment to breaking down barriers for criminal justice system involved persons. One commenter said the existing regulation tells justice-impacted communities that fair housing organizations are "hypocrites" for indulging in the very discrimination those organizations work to combat. One commenter said it is hypocritical to test for discrimination on the basis of criminal record while barring those who have served their sentences from testing. Another commenter said revoking the current restrictions would meaningfully aid in HUD's commitment to make reentry into the workforce more accessible for persons with a prior felony conviction. This commenter cited prior HUD statements that align with the proposed rule, which note that criminal history is not a good predictor of housing success, and that denying housing to prospective tenants could violate the Fair Housing Act. Some commenters said eliminating the current restrictions would reinforce rather than contradict HUD's own guidance. These commenters said the proposed rule was essential to ensure a consistent anti-discrimination message from HUD and its grantees.

*Advancing Equity*

Several commenters supported the proposed rule, noting that it aligns with their organizational missions. Commenters supported the proposed rule because it would help to make HUD programs more fair and inclusive.

Commenters indicated specific populations that this rule would help, including those who are being discriminated against by housing authorities and employers, domestic violence survivors, people with disabilities who have felony convictions, and those needing a place to live. One commenter said the proposed rule takes a step to deter the criminal justice system's oppression and discrimination against people of color.

Several commenters said employment-based criminal history restrictions discriminate against Black people and minorities. Other commenters also pointed out that the current regulation disproportionately affects certain groups which have been unfairly impacted by mass incarceration and biases in the criminal justice system, including Black and Latino individuals and other racial minorities, and these people are the exact demographic of people who are needed to be fair housing testers. Some of these commenters said that excluding individuals with convictions from serving as fair housing testers undermines efforts to address the inequalities in housing by perpetuating inequalities in employment— a double negative impact. One commenter noted that the proposed changes are a step towards rectifying centuries of policies and practices that have created worse housing and employment outcomes for underserved groups.

*HUD Response:* HUD thanks these commenters for their comments and notes that this final rule mirrors the proposed rule.

## **B. General Opposition to the Proposed Rule**

Commenters opposing the proposed rule cited various potential disadvantages as outweighing values such as inclusion, equity, or anti-racism. One commenter said those values are not worth making testing worse, and potentially dangerous.

Some commenters opposed the proposed rule, expressing disapproval of fair housing testing in appraisal transactions. One commenter said that national rules outlined in USPAP (the Uniform Standards of Professional Appraisal Practice) already forbid appraisers from utilizing any kind of bias when preparing a report or opinion of value. Another commenter said that “[i]f a property is accurately evaluated, it is a non-biased issue. The property speaks for itself” and noted that those controlling testing are not knowledgeable about the appraisal process.

One commenter expressed disapproval of the proposed rule, stating that HUD Secretary Marcia Fudge has “commented publicly and on the record with her own racial bias without substantiating evidence or proof.” Another commenter said the proposed rule was an “egregious idea,” and that HUD should instead be promoting safe and affordable housing.

One commenter noted that “there are plenty of people who do not have criminal records that are from diverse populations and socio-economic backgrounds that can assist with this job.”

Another commenter said the proposed rule hides information from the screening decision process, and that if an applicant has prior felony convictions or convictions of crimes involving fraud or perjury, then it should be known.

*HUD Response:* HUD thanks the commenters for their comments.

HUD respectfully disagrees that there are enough candidates of diverse backgrounds to fill the job of testers. HUD notes that it received several comments from organizations that conduct fair housing testing that say that they find it either difficult or impossible to recruit a diverse set of fair housing testers under the current regulation. Based on those comments, this

problem seems to be particularly heightened in rural communities. Commenters also note that persons with criminal convictions are needed to effectively test for certain kinds of discrimination (i.e. using criminal convictions as a pretext for discrimination based on race), because only these people can complete the application process to effectively uncover this kind of discrimination.

HUD notes that this rulemaking does not hide any information from the tester screening process. Instead, the final rule *permits* FHIP and FHAP funded entities who hire testers to screen for felony convictions or crimes involving fraud or perjury and allows them to have discretion to reject such applicants based on such convictions.

HUD disagrees with the commenter that this rule could make testing potentially dangerous. HUD also believes this rule supports access to safe and affordable housing free from discrimination.

HUD notes that this rule is not related to the necessity of testing generally or in any particular industry such as the appraisal industry. It also does not change who controls testing or their knowledge of the appraisal process. Under this rule, testing remains an available option for FHIP and FHAP funded entities to utilize to enforce the Fair Housing Act in all covered housing transactions. This rule only changes who can qualify as a tester funded through FHIP and FHAP funds. HUD further notes that the fact that appraisers are legally prohibited from discriminating does not mean that they actually refrain from discriminating under the Fair Housing Act. Therefore, testing is still a potentially relevant tool.

### **C. Potential Impacts on Fair Housing Testing**

#### *Negative Impacts*

Two commenters said the proposed rule may make the testing process unsafe. One commenter cited general recidivism statistics, while others suggested that those who have broken

the law or committed a felony in the past are untrustworthy or more likely to break the law again. One of these commenters cited a 75% recidivism rate over five years from the Bureau of Justice Statistics to oppose the rule's inclusion specifically of crimes of fraud and perjury.

One commenter noted that a person who has knowingly broken a major law in the past may then be put in the position as a tester where they can lie for financial gain. Another commenter suggested that testers with criminal backgrounds may take a bribe from a housing provider so that the provider would "pass" the fair housing test. Another suggested that those who have committed felonies are more likely to commit criminal acts like blackmail against landlords.

One commenter noted that although past felony convictions in general may not have any bearing on the integrity of the FHIP and FHAP programs, proven past behavior of fraud and perjury should. The same commenter noted that allowing testers with fraud or perjury convictions would impact the integrity of the program, and that such a rule would be akin to, or lead to a slippery slope of, allowing contractors and others on the debarment list to participate in future endeavors.

### *Positive Impacts*

Some commenters stated that people with criminal histories are just as capable as those without criminal histories. One of these commenters said that justice involved individuals can be trustworthy, effective communicators, reliable, and brilliant. Several commenters dismissed concerns about the lack of credibility that may be attributed to a person with certain criminal convictions, noting that because most fair housing tests are now recorded, there is less concern that someone – including someone with a criminal conviction – is fabricating a narrative. One commenter said there are more reliable indicators of an individual tester's credibility than a prior criminal conviction. Another commenter said that a criminal conviction has no bearing on a

person's credibility or potential as a tester. Commenters said the other restrictions on testers, including barring them from having an economic interest in tests and other anti-bias restrictions, are sufficient to demonstrate tester credibility. One commenter pointed out that while some citizens may be guilty of fraud, it is not always a direct result of their character; instead, barriers related to poverty cause survival behaviors that can lead to conviction. Another commenter similarly stated that there are countless reasons why someone may be incarcerated, many of which have no bearing on an individual's character. One person commented that not all those convicted of felonies are "true criminals," noting they know someone convicted of a felony. Other commenters argued that tester applicants deserve an individualized assessment, even if they have a criminal background. One commenter said the vast majority of fair housing testers never testify at trial at all, nor is eliciting trial testimony a primary purpose of testing. The commenter stated that 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.

Commenters pointed out that in some ways, people with criminal convictions bring unique advantages to the role of fair housing tester or otherwise would make more effective housing equity enforcement. Commenters said it is important that people with conviction histories have the chance to work as federally funded fair housing testers because they are closest to the issue and have lived experiences that can benefit investigations. One commenter noted that a job as a tester is perfect for an individual with a felony, explaining that they would have true interest and passion in this role.

One commenter said the proposed rule would ensure that testing efforts are rooted in the community which promotes transparency and trust and encourage the participation of individuals who may have a personal stake in addressing housing discrimination, thereby strengthening the overall impact of FHIP and FHAP funded initiatives. Another commenter said allowing local



FHIP and FHAP funded entities the discretion to determine tester qualifications can also lead to increased community engagement by involving community members, advocates, and local experts in the testing process that will foster a sense of ownership and collaboration.

Many commenters said the proposed rule would 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. Commenters explained that testers with backgrounds are necessary to complete effective testing throughout a housing transaction, including during the application phase. Commenters said this is especially important because as more sophisticated landlords have learned about the ways that blanket bans against people with convictions may violate the Fair Housing Act, they have become less likely to openly admit discriminatory policies pre-application. One commenter said it needs to use testers with criminal histories to successfully litigate these types of fair housing cases “given [their] hostile court system.” Several commenters said removing these restrictions would make it possible to fully investigate and enforce local and state laws that limit tenant screening based on criminal histories of applicants.

Several commenters said the current regulation needlessly limits the pool of potential fair housing testers who are members of racial minorities, when the very thing that is needed to adequately test for fair housing is a wide variety of people who are members of racial minorities. Other commenters said broadening the scope of persons who can serve as testers—as the proposed rule would do— creates a more diverse and more effective testing pool. One commenter explained that their organization gets many complaints about housing discrimination, and one of the most difficult parts of trying to get justice for their clients is finding testers to do the work. This commenter wrote that allowing formerly incarcerated people to work as fair housing testers might go a long way to increasing the number of available testers in their area.

Another commenter stated that due to racial disparities in the local criminal justice system, they have had challenges in recruiting racially diverse testers, especially Native American testers. The commenter stated that this impedes their ability to assist their Native American clients who face housing discrimination. The commenter explained the current restrictions also restrict their ability to use Black testers, and explained how the current regulation is especially harmful to anti-discrimination efforts in rural states by needlessly limiting the pool of testers. Another organization commented that the current restrictions on working with testers with criminal backgrounds has presented obstacles in recruiting effective testers that have prevented their agency from hiring individuals with criminal convictions who would be excellent testers. One commenter said removing barriers to entering the tester workforce can help meet the urgency of the ongoing and evolving need to enforce fair housing.

Commenters said FHIP and FHAP funded entities should decide whether to hire a tester with a conviction record, as they are most equipped to know and be able to weigh the risk that a tester's past involvement in the criminal legal system poses in relation to the methods used in testing. One commenter noted that the proposed rule would not require FHIP and FHAP funded entities to hire testers with criminal convictions, it would just give them that discretion. Another commenter stated that FHIP and FHAP funded entities should have sufficient latitude to identify and select testers that meet minimum training standards and support their work without undue interference, restrictions, and burdensome requirements.

*HUD Response:* HUD appreciates the comments related to the impacts of the rule on the quality of fair housing tests and the integrity of the FHIP and FHAP. HUD has considered how this rule may impact fair housing testing negatively and how this rule may impact fair housing testing positively and believes that the positive impacts will outweigh any potential negative impacts.

HUD believes that FHIP and FHAP funded entities, who are responsible for the conduct of their testers, are well positioned to decide whether there is a risk in employing an applicant with a particular criminal conviction as a tester. This rule leaves them free to make the same kind of discretionary determination, based on the totality of the circumstances (including how long ago the conviction was, the circumstances surrounding the conviction, and life someone has lived since) that employers, landlords, and others are free to - and often - make. Far from posing a risk to public safety, providing opportunities to those with criminal convictions to be employed as fair housing testers opens up meaningful employment opportunities, and may actually reduce the risk of recidivism among ex-offenders, increasing public safety overall.<sup>29</sup>

HUD disagrees with commenters that individuals with felony and convictions involving fraud or perjury should be barred to serve as testers because they are more likely to accept bribes, blackmail landlords, or lie for financial gain. HUD believes that the local FHIP or FHAP funded entity - rather than HUD - is in the best position to know the extent to which applicants with certain convictions may jeopardize testing and the extent to which local judges and juries may find particular convictions relevant to witness credibility. Those entities can use this local expertise, along with weighing the particulars of the conviction, such as the time that has passed

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<sup>29</sup> See, e.g., Matthew Makarios, Benjamin Steiner, Lawrence F. Travis III. (2010). "Examining the Predictors of Recidivism among Men and Women Released from Prison in Ohio", *Criminal Justice and Behavior*. 37(12): 1377-1391 (finding that "offenders who maintained stable employment throughout their first year of parole [were] significantly less likely to recidivate than those that did not hold a job at all"); Michele Staton, Megan F. Dickson, Martha Tillson, J. Matthew Webster, Carl Leukefeld. (2019). "Staying Out: Reentry Protective Factors Among Rural Women Offenders", *Women & Criminal Justice*. 29(6) (following a group of women who exited county jails to rural Appalachian communities for 12 months, concluding that having at least part-time employment was one of many "protective factors" associated with staying out of jail); Stephen J. Tripodi, Johnny S. Kim, Kimberly Bender. (2010). "Is employment associated with reduced recidivism? The complex relationship between employment and crime" *International Journal of Offender Therapy and Comparative Criminology*, 54(5): 706-720 (overviewing research that "most criminological research indicates a strong inverse relationship between employment and crime, suggesting that ex-prisoners who obtain employment are at significantly reduced risk for reoffending" and finding, based on following a group of male parolees released from Texas prisons, a significant association between employment and increased time until reincarceration); Robert Apel, Julie Horney. (2017). "How and why does work matter? Employment conditions, routine activities, and crime among adult male offenders", *Criminology*, 55 (2): 307-343 (finding that having a job that a person is "very committed to" versus a job that was "just a job" significantly lowers crime risk).

since the conviction, the nature of the conviction, and evidence of post-conviction reform, in making their own local hiring decisions.

Secondly, as HUD explained in the preamble to the proposed rule, under modern day testing methodologies allowed in many states, a tester's main role on the witness stand is testifying that the recording being presented is an authentic recording of the event at issue in the case. Thus, in many cases, the tester merely needs to be credible enough for the judge or jury believe that testimony.

In addition, HUD believes other requirements that are not impacted by this final rule help ensure that testers are objective, credible, and well qualified, regardless of their criminal convictions. For example, testers must be trained in testing procedures and techniques and they are prohibited from having an economic interest in the outcome of the test, being a relative or acquaintance of any party in the case, having had a recent employment history or other affiliation with the person or organization to be tested, or being a competitor (or licensed competitor) of the person or organization to be tested. 24 CFR 125.107(c) and 115.311(d).

HUD declines to retain restrictions on individuals with convictions involving fraud or perjury in this final rule. While this final rule *allows* FHIP and FHAP funded entities to use HUD funds to hire testers with convictions involving fraud or perjury (in addition to those with felony convictions generally), HUD expects many FHIP and FHAP funded entities will still screen for these convictions and consider whether to hire an applicant on a case-by-case basis, in line with their own needs, investigations, and litigation efforts. A FHIP or FHAP funded entity may, for example, view an applicant with a 40-year-old conviction for writing a bad check much differently than someone more recently convicted of embezzling funds from a non-profit or governmental organization. Whether for fraud or perjury crimes, or for felony convictions more generally, HUD finds that an automatic, blanket ban is unable to account for the numerous

different circumstances which may make a particular conviction an inappropriate disqualifier to a testing applicant's candidacy for employment with a FHIP or FHAP funded agency. While HUD notes that recidivism statistics can have value in some contexts, the inferences that can be drawn from these statistics are limited, and HUD believes that these statistics are inappropriate to use here to justify categorical bans against people applying to be testers.<sup>30</sup> HUD reiterates the messages in "Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality", published on May 17, 2022 by HUD's Office of Policy, Development, and Research, which notes that "predicting future criminal involvement is a complicated business. Even using the best assessment and screening tools that undergo regular validations and enhancements, predictions are often wrong.... prediction is not causality, [and] we have to accept that predictions look backward to estimate an outcome that has not yet occurred and may never occur." Further, basing risk assessments on criminal convictions means using "measures that are inherently biased because of discriminatory criminal justice practices." *Id.* Thus, HUD believes that examining each applicant on a case on a case-by-case basis, with full contextual information, is a fairer and more effective means to determine someone's qualification for a job, compared to automatically assuming someone will not be a good candidate based on a conviction for a specific category of crime (here, either a felony or a crime involving fraud or perjury).

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<sup>30</sup> First, it should be noted that recidivism rates in the BJS study that the commenter appears to be citing from are measured by *arrest for any* offense, including parole and probation violations, and include arrests that do not result in convictions. See U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, Special Report "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010" (April 2014), available at <https://bjs.ojp.gov/content/pub/pdf/rprts05p0510.pdf>. Of note, this report (and data tables accompanying it) shows that 11.9% of re-arrests within five years were for fraud offenses, and that the overall recidivism rate after 5 years was 55.4 percent if measured by any arrest resulting in a new conviction. Second, even where recidivism is measured in the same way, rates can vary widely depending on the study. See *id.* (detailing that of a cohort of state prisoners released in 2005, those convicted of fraud or forgery offenses had one of the highest recidivism rates (77 percent were re-arrested for *any* offense after five years)) compare to Kim Steven Hunt and Robert Dumville, U.S. Sentencing Commission, Recidivism Among Federal Offenders: A Comprehensive Overview 11 (2016), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) (detailing that of a cohort of federal prisoners released in 2015, those convicted of fraud had the lowest recidivism rates (34.2 percent were re-arrested for *any* offense after eight years)).

HUD believes that integrity of the FHIP and FHAP is jeopardized by: 1) imposing rigid and automatic bans based on convictions that may have no bearing on a person's ability to be a quality tester, 2) forbidding FHIP and FHAP funded entities from taking into account all the relevant information about candidates for testers (including the age of any conviction, evidence of rehabilitation, circumstances surrounding any conviction), and 3) forcing FHIP and FHAP funded entities to make decisions based on convictions that may have been the result of the same kind of discrimination that these entities are meant to combat. HUD believes that these issues pose more of a threat to the integrity of the FHIP and FHAP than allowing FHIP and FHAP funded entities the discretion to allow people with convictions for fraud and perjury become testers. HUD further notes that providing discretion to FHIP and FHAP funded entities to hire testers who have past convictions involving fraud or perjury is consistent with current debarment regulations, which allow federal agencies to debar individuals based on certain criminal convictions (see 2 CFR 180.800), and also allow the government to take into account a long list of mitigating circumstances to decide *not* to debar an individual based on such convictions. See 2 CFR 180.860.

HUD agrees with commenters who said testers with actual criminal convictions 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. HUD also agrees that engaging individuals with experiences that are relevant to a fair housing investigation is beneficial to both fair housing enforcement and HUD's mission to advance equity more generally. HUD agrees with commenters that broadening the scope of persons who can serve as testers allows FHIP and FHAP funded entities to build and maintain a more diverse testing pool that is best poised to respond to all types of fair housing allegations. The final rule is in line with these goals.

HUD agrees that FHIP and FHAP funded entities are in the best position to make decisions about how to screen their own testers because those entities know the specific characteristics and challenges of their local housing markets and can select the most appropriate testers for their investigations. As stated in the proposed rule, HUD sees no reason to categorically bar those who conduct testing using FHIP or FHAP funds from employing testers with certain criminal convictions. By rescinding the Federal prohibitions on tester criminal convictions, this final rule provides necessary discretion to FHIP and FHAP funded entities.

#### **D. Increased Opportunities and Benefits for People with Criminal Convictions and Society**

Commenters noted the struggles of individuals who have made mistakes, and noted that despite being rehabilitated, not a threat, and active members of their community, people with criminal convictions are continually unfairly excluded from desperately needed opportunities, including career opportunities some of which are blocked by the current regulation's stipulations. Commenters said the collateral consequences of felony convictions can lead to mental health issues and recidivism.

Many commenters said that the current regulations unfairly punish those who have already been punished through the criminal justice system and should not be punished further. Commenters said if someone has "served their time" and "paid their debt to society," they should be able to put the past behind them and have a second chance, including the chance to assist in positive change and serve in the role of a fair housing tester.

Commenters said the proposed rule will improve the lives of people with criminal convictions by expanding opportunities to develop marketable skills and jobs in order gain self-sufficiency, stability, and contribute positively to society. Commenters specifically talked about the value of those reentering society becoming more involved in their communities through serving in the role of a fair housing tester. Commenters stated that the proposed rule would

reduce stigma against people with felony convictions, which commenters noted as an important goal.

One commenter stated that this rule is especially needed to support single fathers and men, especially Black men who are struggling to regain their identity without stability or sources of income because of criminal records.

*HUD Response:* HUD agrees with commenters that the final rule will expand important opportunities for individuals with criminal convictions because of the compensation these opportunities will provide for individuals who are hired through the FHIP and FHAP programs, the valuable experience these individuals will gain to help further career prospects, and because of the empowerment that comes from employment generally, and particularly employment focused on rooting out discrimination in one's community. HUD notes that opening access to fair housing enforcement should increase housing opportunities more generally by increasing detecting discriminatory policies and practices that impact those with criminal convictions.

HUD agrees with the commenters that by opening up employment opportunities for people with criminal convictions in our FHIP and FHAP programs, this final rule contributes to a stronger, healthier, safer society at large.<sup>31</sup>

## **E. Other**

One commenter requested that guidance be issued to clarify to grant managers and FHIP staff that a blanket ban on testers with past convictions will no longer be enforced. Another commenter said HUD should ensure that FHIP and FHAP funded testing programs are actively advertising to people with prior criminal convictions, encouraging people from all backgrounds

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<sup>31</sup> While research has demonstrated that employment lowers recidivism risks generally, there is also evidence that meaningful jobs may be the most impactful. *See, e.g.*, Robert Apel, Julie Horney. (2017). "How and why does work matter? Employment conditions, routine activities, and crime among adult male offenders", *Criminology*, 55 (2): 307-343 (finding that having a job that a person is "very committed to" verses a job that was "just a job" significantly lowers the risk that person will commit a crime),



to apply, and evaluating their applications fairly. One commenter recommended that once the prohibition is removed, HUD should partner with organizations that serve those with felony convictions and convictions involving fraud or perjury to create and fund a training program and pipeline for those with records to become testers.

Several commenters wrote regarding their support for or their opposition to expanding housing opportunities for individuals with criminal convictions.

Other commenters wrote with specific concerns and requests relating to their individual housing situations.

*HUD Response:* HUD thanks commenters for their recommendations and will take them under advisement.

HUD also appreciates all comments relating to expanding housing opportunities for individuals with criminal histories. However, this final rule does not change any regulation regarding whom landlords—including HUD-assisted housing providers and public housing agencies—may accept as tenants. Instead, this final rule removes prohibitions on the use of HUD funds to hire testers with certain criminal convictions.

Finally, regarding comments outlining specific concerns and requests relating to individual housing situations, HUD thanks these commenters for their thoughts, however, HUD is unable to take any of the requested actions under this rulemaking.

### **III. Findings and Certifications**

#### **Regulatory Review—Executive Orders 12866, 13563, and 14094**

Under E.O. 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. E.O. 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.” E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. E.O. 14094 (Modernizing Regulatory Review) amends section 3(f) of E.O. 12866, among other things.

The final rule revises 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.

### **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 final rule will 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. Therefore, this final rule will not have a significant economic impact on a substantial number of small entities.

### **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 and 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 final 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.

### **Environmental Impact**

This final 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).

### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule will not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

### **List of Subjects in parts 115 and 125**

#### **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.

For the reasons described in the preamble, HUD amends 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) and redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

#### **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) and redesignate paragraphs (b) and (c) as paragraphs (a) and (b), respectively.

/s/

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Damon Y. Smith,  
General Counsel

[Billing Code: 4210–67]

