NATIONAL LOW INCOME HOUSING COALITION

OUTLINE OF SELECT FEATURES OF THE AUGUST 14, 2018 CDBG-DR *FEDERAL REGISTER* NOTICE

(August 15, 2018)

INTRODUCTION

When Congress makes a special appropriation of Community Development Block Grant funds for disaster recovery (CDBG-DR), HUD has to issue a notice in the *Federal Register* that serves as regulations states must follow when they receive these funds.

On August 2, 2018 a HUD Exchange email distributed an advance copy of the notice guiding states' use of $10 billion in CDBG-DR funds intended to address unmet long-term disaster-related needs stemming from 2017 disasters. The formal *Federal Register* version of the notice was published on August 14.

On February 9, 2018, Congress appropriated $28 billion in CDBG-DR. Of that amount $16 billion was to be used to address unmet needs, $11 billion of which was to be allocated to states impacted by Hurricane Maria, with $2 billion of that the $11 billion set aside for rebuilding the electrical systems of Puerto Rico and the U.S. Virgin Islands. The remaining $12 billion was set aside for mitigation projects.

On April 10, 2018, HUD announced that $10 billion would be allocated for unmet needs, indicating how much would be available for each grantee. (HUD uses the term "grantee" to refer to states as well as to Puerto Rico and the Virgin Islands.) The notice released on August 14 only applies to the $10 billion for unmet needs; a future notice will provide direction pertaining to mitigation funds and the electrical power systems in Puerto Rico and the Virgin Islands.

This outline summarizes key features residents and advocates should know about the August 14, 2018 *Federal Register* notice that applies to the $10 billion in CDBG-DR funds Congress appropriated on February 9, 2018.

The August 14 notice amends the *Federal Register* notice published on February 9, 2018 (termed the "Prior Notice" in the new notice) that directs use of $7.4 billion in CDBG-DR funds appropriated by Congress on September 8, 2017. Except as indicated in the new notice, the funds allocated under it are subject to the requirements of the Prior Notice.

Page references in this outline are to the August 2, preview notice, not to the formal August 14 *Federal Register* version

FOUR KEY FEATURES OF THE AUGUST 14, 2018 NOTICE

1. The public review and comment period is increased to 30 calendar days (up from 14). [pages 9, 10, 16, 17]

2. For multifamily housing, the required affordability period is changed from 20 years to: [page 23]
   a. 15 years if CDBG-DR is used to rehabilitate or reconstruct a multifamily rental property that has eight or more units.
   b. 20 years if CDBG-DR is used to newly construct a multifamily rental property that has five or more units.

3. There is no reduction in the requirement that 70% of the funds must be used for activities that benefit low and moderate income households, those with income at or less than 80% of the area median income. [page 13]

4. Because incomes in Puerto Rico are "unusually low", HUD will increase the low and moderate income thresholds for determining whether an activity benefits "low and moderate income" people. HUD will publish the new thresholds on the HUD Exchange website. [page 22]

CDBG-DR ALLOCATIONS [page 6]

A table in the August 14 notice lists how much is available to each state from the $7.4 billion and $10 billion allocations. The table also indicates amounts available for the first time to California for the 2017 wildfires. [page 6 of August 2 preview notice]

	$7.4 Billion Appropriation	$10 Billion Appropriation
California:	$0	$124,155,000
Florida:	$615,922,000	$157,676,000
Puerto Rico:	$1,507,179,000	$8,220,783,000
Texas:	$5,024,215,000	$652,175,000
Virgin Islands:	$242,684,000	$779,217,000

SOME CDBG-DR BASICS

CDBG-DR Is Similar to Regular CDBG – But Different

CDBG-DR is a special appropriation intended to respond to Presidentially Declared Disasters. CDBG-DR is different from the regular CDBG that states and about 1,200 cities and counties receive each year. In general, CDBG-DR follows the regular State CDBG program's legal and regulatory provisions.

However, HUD is allowed to waive or modify regular CDBG provisions in order to enable the funds to be used in ways more appropriate to disaster recovery. Each *Federal Register* notice is tailored to each disaster and each Congressional appropriation. Each sets out the provisions grantees must follow when seeking and using CDBG-DR funds.

Grantees may request additional waivers at any time, as long as they provide data to support the requested waiver. Therefore, residents need to be vigilant at all times and respond to any requested waiver.

70% of CDBG-DR Must Benefit Low and Moderate Income Households

As indicated above, the August 14 notice does not reduce the requirement that 70% of the funds must be used for activities that benefit low and moderate income households, those with income at or less than 80% of the area median income. [page 13]

From the February 9, 2018 notice worth repeating [page 43 of that notice]:

A grantee may seek a waiver, but must present a compelling need.
To justify a waiver of the 70% low/mod income benefit rule, a grantee must:

a. Identify proposed activities that will meet the needs of low and moderate income households;

b. Describe proposed activities that will be affected by the reduced low/mod income benefit requirement, including the location of the activities and their role in the long-term recovery plan;

c. Describe how the activities identified in (b) prevent the grantee from meeting the 70% low/mod income benefit requirement; and

d. Demonstrate that low and moderate income persons' disaster-related needs have been sufficiently met and that the needs of those who are not low and moderate income persons or the needs of low/mod income areas are disproportionately greater, and that the jurisdiction lacks other resources to serve them.

CDBG-DR NOTICE PROVISIONS

Emphasis on Housing

August 14 *Federal Register* notice:

The August 14 notice acknowledges the February requirement that grantees primarily consider and address unmet housing needs, but allows grantees under the new notice and Prior Notice to propose using CDBG-DR funds for economic revitalization and infrastructure unrelated to unmet housing needs. To do so, a grantee must demonstrate in its needs assessment that there are no remaining unmet housing needs, or that remaining unmet housing needs will be addressed with other sources of funds. [page 4]

The Most Impacted and Distressed Areas [page 5]

The statutes providing CDBG-DR money requires the funds to be used for disaster-related expenses in "the most impacted and distressed areas". The February *Federal Register* notice required Florida, Puerto Rico, and Texas to spend at least 80% of their CDBG-DR allocation in areas that HUD has identified as "most impacted and distressed" based on data available to HUD. The list of those areas was on page 4 of the February notice. For the remaining 20% of CDBG-DR, Florida, Puerto Rico, and Texas may determine other areas that these grantees consider to be the "most impacted and distressed".

The Virgin Islands must spend 100% of its CDBG-DR on St. Thomas, St. Croix, and St. John.

August 14 *Federal Register* notice:

The 80%/20% provisions remain in place for Florida and Puerto Rico under the August 14 notice. However, now all of Puerto Rico, as well as the Virgin Islands, are considered "most impacted and distressed". [page 5]

The table on page 6 shows which counties and ZIP Codes HUD data suggests meet the "most impacted and distressed" standard. Since the February notice, HUD obtained updated data and changed its methodology for determining "most impacted and distressed". As a result, four counties were added in Texas, as well as four ZIP Codes, while four ZIP Codes were deleted (perhaps ZIP Codes in the four "new" counties). Five counties were added in Florida, as well as eight ZIP Codes, while one ZIP Code was deleted.

THE ACTION PLAN

The Prior Notice required [page 20] and the new notice does not change the requirement that grantees must draft a disaster Action Plan for public review and comment before submitting it to HUD. The Action Plan must identify how a grantee proposes to use its CDBG-DR funds and the eligibility criteria for those seeking assistance. The Action Plan must explain how the uses will address disaster relief, long-term recovery, and the restoration of housing, infrastructure, and economic revitalization – all in "the most impacted and distressed areas".

The August 14 notice increased the minimum public review and comment to 30 days. More details about public participation are on page 8 of this outline. [pages 9, 10, 16, 17]

August 14 *Federal Register* notice provides that states that received an allocation from the $7.4 billion appropriation (Florida, Puerto Rico, Texas, and the Virgin Islands) or local governments awarded funds from a state as a subgrantee (for example, Houston), do not have to draft a new Action Plan; rather, they only have to draft a Substantial Amendment to their existing Action Plan.

The Substantial Amendment must be prominently posted on a grantee's official website for not less than 30 calendar days for public review and comment.

The Substantial Amendment must be submitted no later than 90 days after the notice is published in the *Federal Register*, or 90 days after a state's initial Action Plan was approved in whole or in part, whichever is later. [pages 9, 13]

Each grantee's Action Plan must specify criteria for determining changes considered substantial. At a minimum, a Substantial Amendment is: a change in program benefit or eligibility criteria; the addition or deletion of an activity; or the dollar threshold of a reallocation of funds. [page 17]

Puerto Rico's Substantial Amendment must be reviewed for consistency with its fiscal plan and its 12- and 24-month economic and disaster recovery plan.

Because California is receiving CDBG-DR for the 2017 wildfires for the first time, the state must draft a complete Action Plan meeting the requirements of the Prior Notice, except California must have a 30 calendar day public notice and comment period. California must submit its Action Plan to HUD for approval within 120 days from the date the notice is published in the *Federal Register*. [pages 9, 13]

Components of the Action Plan

The *Federal Register* notice lists 13 components that must be in an Action Plan

1. Needs Assessment

   The Action Plan must contain an assessment of unmet needs. The purpose is to understand the types and locations of needs in order to target funds to activities and areas with the greatest needs. Grantees must indicate the sources of data used.

   August 14 *Federal Register* notice:

   Grantees required to submit a Substantial Amendment to reflect the additional CDBG-DR funds from the $10 billion allocation must consult with affected residents, stakeholders, local governments, and public housing agencies to determine updates to the previous needs assessment. [page 10]

   The August 14 notice dilutes the earlier emphasis on housing. It acknowledges the February requirement that grantees primarily consider and address unmet housing needs, but allows grantees under the new notice and Prior Notice to propose using CDBG-DR funds for economic revitalization and infrastructure unrelated to unmet housing needs. To do so, a grantee must demonstrate in its needs assessment that there are no remaining unmet housing needs, or that remaining unmet housing needs will be addressed with other sources of funds. [page 4]

2. Housing and Shelter Activities

   August 14 *Federal Register* notice:

   For multifamily housing, the required affordability period is changed from 20 years to: [page 23/24]

   a. 15 years if CDBG-DR is used to rehabilitate or reconstruct a multifamily rental property that has eight or more units.
   b. 20 years if CDBG-DR is used to newly construct a multifamily rental property that has five or more units.

   For newly constructed single-family housing, there must be a five-year affordability period. Grantees must develop and impose resale or recapture restrictions enforced through deed restrictions, covenants, or similar mechanisms. No affordability period is required for single-family housing rehabilitated or reconstructed with CDBG-DR. [page 24]

   Grantees must establish policies and procedures to assess the cost-effectiveness of proposed projects intended to assist households rehabilitate or reconstruct homes using CDBG-DR from either the Prior Notice or the new notice. Grantees must have criteria for determining when the cost of rehabilitation or reconstruction will not be cost-effective compared to other means of assisting a property-owner, such as buyouts or acquiring property, or constructing area-wide protective infrastructure, instead of individual building mitigation, such as elevating an existing structure. [page 25]

Amending the Action Plan

Unchanged from the Prior Notice [page 32] is the requirement that a grantee must amend its Action Plan to update its needs assessment, modify or create new activities, or reprogram funds. Each amendment must be highlighted, or otherwise identified, in the context of the entire Action Plan. The beginning of every Action Plan amendment must include:

- A section that identifies what is being added, deleted, or changed;
- A chart or table that shows where funds are coming from and where they are moving to; and
- A revised budget allocation table that reflects all funds, as amended.

The current version of an entire Action Plan must be accessible for viewing as a single document at any given time, rather than the public having to view and cross-reference changes among multiple amendments.

August 14 *Federal Register* notice:

A grantee required to submit a Substantial Amendment to reflect the additional CDBG-DR funds from the $10 billion allocation must amend its initial Action Plan to update the impact and needs assessment, modify or create new activities, or reprogram funds. Each amendment must be highlighted, or otherwise identified within the context of the entire existing Action Plan.

The beginning of every Substantial Amendment must include:
(1) A section that identifies exactly what content is being added, deleted, or changed;
(2) A chart or table that clearly illustrates where funds are coming from and where they are moving to; and
(3) A revised budget allocation table that reflects all funds. [page 10]

PUBLIC PARTICIPATION

Draft Action Plan

Public Review and Comment

Grantees must publish for public review and comment, a proposed Action Plan or Substantial Amendment to an Action Plan.

August 14 *Federal Register* notice:

HUD heard advocates and increased the minimum public review and comment period from 14 to 30 calendar days. [page 16]

As indicated earlier, California has to draft an Action Plan because it did not receive funds for the 2017 wildfires under the February 9, 2018 *Federal Register* notice. California has 30 days for public review and comment regarding its draft Action Plan. [page 9]

Also, as indicated earlier, Florida, Puerto Rico, Texas, and the Virgin Islands have 30 days for public review and comment regarding their Substantial Amendments to their previously approved Action Plans. [pages 10, 16, 17]

However, the August 14 notice [page 16], like the February 9, 2018 Prior Notice [page 37] eliminates the requirement that the grantee hold at least one public hearing.

Requirements for "Publishing" Draft Action Plan

August 14 *Federal Register* notice:

Each grantee's current version of its entire Action Plan must be accessible for viewing in a single document at any given time, rather than the public having to view and cross-reference changes among multiple amendments. [page 11]

Public Comments Must Be Considered

The February notice requires grantees to consider all comments received about the Action Plan or any Substantial Amendment to it. A summary of comments and the grantee's response to each must be submitted to HUD with the Action Plan or Substantial Amendment.

August 14 *Federal Register* notice: Grantees must respond to public comments. [page 11]

MISCELLANEOUS OTHER PROVISIONS

- Expenditure Deadline

  The Appropriations Act providing $7.4 billion for CDBG-DR required the funds to be spent within two years of the date that HUD executes a grant agreement obligating the funds to the grantee (in situations involving a partial obligation).

  August 14 *Federal Register* notice:

  The new notice indicates that the Office of Management and Budget (OMB) has waived this requirement for both the $7.4 billion from the previous appropriation as well as the full $28 billion for the new appropriation. [page 33]

  The new notice did not change the requirement that a grantee spend 100% of its CDBG-DR allocation within six years of HUD executing an initial grant agreement.
  [February 9 pages 12, 64/65, and 92/93; August 14 page 33]

- Puerto Rico and Virgin Islands May Use CDBG-DR for Tourism Marketing

  August 14 *Federal Register* notice: [pages 29-33]

  Puerto Rico and the Virgin Islands requested waivers to be able to use CDBG-DR for advertising and marketing to promote tourism in order to help rebuild their economies, both of which heavily rely on tourism. HUD has granted such waivers in the past and with this notice allows the Virgin Islands to use up to $5 million and Puerto Rico to use up to $15 million for tourism advertising and marketing. Puerto Rico also intends to use these funds to attract new businesses to generate jobs and tax revenues.

- New Limit on Eminent Domain

  August 14 *Federal Register* notice: [page 15]

  The new notice places limits on the use of funds for eminent domain. No funds allocated under this notice or the Prior Notice may be used to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use. Public use cannot include economic development that primarily benefits private entities.

  Public use can include:
  - mass transit, railroad, airport, seaport, or highway projects;
  - utility projects that benefit or serve the general public (including energy-related, communication-related, water-related, and wastewater-related infrastructure);
  - other structures designated for use by the general public or that have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government; and
  - projects for the removal of an immediate threat to public health and safety or brownfields

- Use of Another Agency's Environmental Review

  August 14 *Federal Register* notice: [page 22]

  Grantees that use CDBG-DR to supplement Stafford Act assistance may adopt, without review or public comment, any environmental review, approval, or permit performed by a federal agency, satisfying their CDBG environmental review, approval, or permit responsibilities.