

# INITIAL SUMMARY OF HIGHLIGHTS IN 2018 *FEDERAL REGISTER* NOTICE FOR \$7.4 BILLION

Wednesday, February 7

## Introduction

This summary is based on a reading of the advance copy of the *Federal Register* notice linked to a February 6 HUD Exchange email. Two portions of the notice were not read due to time constraints: “Evaluation of Management and Oversight of Funds” (pages 13-19) and “Program Income” (pages 50-52).

This summary compares the 2018 text to that of the November 21, 2016 *Federal Register* notice. To a considerable degree, the two documents are identical. Fun fact, instead of “climate change” the 2018 version uses “extreme weather events”. This summary highlight differences between the two notices, as well as selected key language in both versions. The intent is not to provide a comprehensive summary of the 2018 notice; for example it does not include the extensive provisions pertaining to the Action Plan, public participation, and reporting.

## The Big Issues

1. **Grantees must continue to use at least 70% of their CDBG-DR for activities that benefit “low- and moderate-income” households** (those with incomes less than 80% AMI). Item 8, bottom of page 42 and top of page 43. As in the past, a grantee may seek a waiver but must present a compelling need. The notice provides four criteria to justify a waiver. Note: In 2017 Louisiana sought a waiver down to 50% for flooding in 2016; HUD granted a waiver in a notice on August 7, 2017, but down to 55% based on the information Louisiana provided.
2. Unfortunately, but not unexpectedly, the 2018 notice only provides for a **14-day public review and comment period**, as did the 2016 notice. Pages 10, 37, and 38. In addition, it waives the requirement for at least one public hearing. Page 37.
3. As with 2016, the 2018 notice states on the first page, “...this notice requires each grantee to primarily consider and address its unmet housing recovery needs.” And as before, the 2018 notice states (four times) that “each grantee [is required] to primarily consider and address its unmet housing recovery needs. A grantee may also allocate funds to address unmet economic revitalization and infrastructure needs, but in doing so, the grantee must identify how unmet housing needs will be addressed or how its economic revitalization or infrastructure activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas. Pages 3, and 22/23 and 30 (pertaining to uses for economic revitalization and infrastructure). This doesn’t as directly address the stated priorities of Texas Housers and the Disaster Housing Recovery Coalition.

4. There is new language under public participation: “Action Plan publication efforts must meet the effective communications requirements of 24 CFR 8.6 and other fair housing and civil rights requirements, such as the effective communication requirements under the Americans with Disabilities Act.” Page 37.
5. The notice reminds grantees “...that all fair housing and nondiscrimination requirements continue to apply in administering the funds described in this notice (page 9). This is new.
6. Item #34 (page 71), “Addressing Unmet Affordable Rental Housing Needs” is mostly the same as 2016, but new in 2018 is, “The grantee must impose a minimum affordability period of 20 years enforced with recorded use restrictions or other mechanisms to ensure that rental housing remains affordable for the required period of time.” [2016 said, “The period that the rental housing is affordable must be reasonably related to the amount of CDBG-DR funding used for the rental housing.” (page 83270, #32)]
7. Item #28 (page 64), “Timely distribution of funds” has a new provision: “The Appropriations Act, as amended, requires that funds provided under the Act be **expended within two years of the date that HUD obligates funds to a grantee...**” and “each grantee is required to expend all obligated funds within two years of HUD’s execution of the grant agreement...” As with 2016, “...each grantee must also **expend 100 percent** of its allocation of CDBG-DR funds on eligible activities **within 6 years** of HUD’s **execution of the initial grant agreement**. This is repeated on pages 92/93.

(Once HUD approves an Action Plan, it will sign a grant agreement **obligating** allocated funds to the grantee. (page 31)

8. There are several new pieces pertaining to the Action Plan (basic discussion starts on page 20).
  - a. Grantees must cite data sources. (page 21)
  - b. Grantees may use HUD's AFFH mapping tool or the CPD Mapping tool to inform their analysis. (page 21)
  - c. The needs assessment must: “Assess whether public services (e.g., housing counseling, legal counseling, job training, mental health, and general health services) are necessary to complement activities intended to address housing, infrastructure, and economic revitalization *and how those services are to be made accessible to individuals having wide-ranging disabilities including mobility, sensory, developmental, emotional, and other impairments.*” (new language in italics) page 21.

- d. The needs assessment must: “Describe the extent to which expenditures for planning activities will benefit the HUD-identified most impacted and distressed areas.” (page 22)
- e. Regarding infrastructure (item 10 on page 26), the Action Plan must: “...also describe how they [grantees] will address the construction or rehabilitation of storm water management systems in flood impacted areas. State grantees must work with local governments in the most impacted and distressed areas to identify the unmet needs and associated costs of needed storm water infrastructure improvements.”

### Smaller Items

- 9. As in the past 80% of a grantee’s CDBG-DR must be spent in HUD-identified “most impacted and distressed areas”. HUD lists these on page 4. The remaining 20% can be used in areas that states determine as “most impacted and distressed”. For the Virgin Islands, 100% must be spent in St. Thomas, St. Croix, and St. John. (page 5)
- 10. Grantees that received an allocation pursuant to a “Prior Appropriation” (eg Texas, Florida?) must submit an action plan within 90 days of the effective date of the notice. All other grantees (eg Puerto Rico, Virgin Islands?) receiving an allocation under the notice must submit an action plan within 120 days of the effective date of the notice. (pages 6 and 31)
- 11. Item 4 on page 30, “Preparedness and Mitigation”, is the same as 2016, except 2018 deletes: “Furthermore, the costs associated with these measures may not prevent the grantee from meeting unmet needs.”
- 12. HUD expects grantees to financially contribute to their recovery through the use of reserve or “rainy day” funds, borrowing authority, or retargeting of existing financial resources. (page 7)
- 13. Grantee’s Grantee Performance Reports (QPRs) “must include a description of actions taken in that quarter to affirmatively further fair housing, within the section titled “Overall Progress Narrative” in the Disaster Recovery Grant Reporting (DRGR) system.” (Page 36) This is unchanged from 2016. At least AFFH was not deleted.
- 14. However, under the Consolidated Plan section (item #6, page 41) regarding ConPlan waiver provisions (that were also in 2016), the section concludes on page 42: “This [ConPlan] waiver does not affect the current applicability of HUD’s July 16, 2015, final rule on Affirmatively Furthering Fair Housing (80 FR 42272) to grantees.”

At least HUD notes that the AFFH rule exists.

However, the 2018 version **deletes** the following that was in the 2016 version (page 83263, bottom of first column): “...which requires grantees, among other

requirements, to complete an Assessment of Fair Housing in accordance with the requirements of 24 CFR 5.160 and incorporate fair housing strategies and actions consistent with the AFH into the Consolidated Plan.”

So the 2018 notice reflects the recent effective suspension of the AFFH rule. However, how can the AFFH rule actually apply because of the suspension on submitting an AFH for the vast majority of local jurisdictions and because HUD has yet to provide a new draft AFH for states?

15. Item 16, pages 48/49, “Recordkeeping” retains 2016 text: “For fair housing and equal opportunity (FHEO) purposes, as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program. All grantees must report FHEO data in the DRGR system at the activity level.”
16. The 2018 notice does not include the following DRGR language that was in the 2016 notice: “Grantees must describe activities in DRGR at the necessary level of detail in order for HUD to release funds and make available for use by the grantee.” (page 83261, middle column)
17. As in 2016, “Within 3 days of submission to HUD, each QPR must be posted on the grantee’s official website.”
18. Item #38 (pages 78-80) is new. It provides two new Low/Mod Benefit criteria, one for buyouts and one for housing incentives for people to move out of a floodplain. These two new provisions were introduced in the December 27, 2017 *Federal Register* notice awarding 2015 and 2016 “leftover” CDBG-DR funds to Texas.
19. The 2018 notice deletes a paragraph in the 2016 notice pertaining to infrastructure. (page 83272, bottom of third column, item #38) I think this is good:

38. *Buildings for the general conduct of government.* 42 U.S.C. 5305(a) is waived to the extent necessary to allow grantees to fund the rehabilitation or reconstruction of public buildings that are otherwise ineligible. HUD believes this waiver is consistent with the overall purposes of the HCD Act, and is necessary for many grantees to adequately address critical infrastructure needs created by the disaster.

## Other Items

20. HUD has 45 days to review an Action Plan (page 11). In 2016 it was 60 days. If HUD does not approve an Action Plan, it must identify deficiencies and the grantee has 45 days to resubmit.
21. Grantees may use up to 5% of their total grant award (and program income) for grant administration by the state, units of general local government, or by subgrantees. (pages 6 and 45) As in 2016, a state can spend no more than 15% of its total grant amount on planning costs. (page 45)

22. Grantees should begin to draw down funds from DRGR no later than 180 days after the effective date of the notice. (pages 12 and 32)
23. New in 2018, a state may also carry out activities in tribal areas, but should coordinate with the Indian tribe when providing assistance to individuals in tribal areas. States carrying out projects in tribal areas must obtain the consent of the Indian tribe. (page 40)
24. As in 2016, the new notice limits relocation assistance to tenants displaced by CDBG-DR activities to the 42 months called for in the Uniform Relocation Act (URA). This is greatly annoying for one who worked hard to get better tenant relocation assistance under Section 104(d) of the Housing and Community Development Act of 1987 (the “Barney Frank Amendment”) that provides for 60 months of rental assistance. HUD’s rationale is to “assure uniform and equitable treatment by setting the URA and its implementing regulations as the sole standard for relocation assistance under this notice.” This is specious. HUD has never liked and has always attempted to evade all aspects of the Barney Frank Amendment (except briefly under Kemp’s Assistant Secretary for CPD, Anna Kondratas).
25. As in 2016, the 2018 notice allows states to establish optional relocation policies. (page 57) Advocates with disaster experience need to decide whether this could be problematic.
26. The 2018 notice does not include a provision from 2016 at #34 page 83270.

34. *Rental assistance to displaced homeowners.* The requirement of 42 U.S.C. 5305(a)(8) are modified to authorize grantees to extend rental assistance payments on behalf of qualified homeowners for up to 24 months. After a disaster, many homeowners encounter unanticipated delays and scarcity of available construction and/or elevation contractors in their area. While undergoing rehabilitation of their homes, most of these homeowners are forced to pay not only a mortgage, but rental payment as well since their homes are not inhabitable. In other cases, homeowners who have paid off their mortgages must accommodate this additional rental expense into their budgets. In order to provide temporary financial assistance to these families, many of whom are low or moderate income households, HUD is modifying the requirements at 42 U.S.C. 5305(a)(8) to the extent necessary to allow grantees to provide up to 24 months of homeowner rental assistance to eligible applicants within the grantee’s single family rehabilitation/reconstruction programs. In the case of rehabilitation programs in which the homeowner is responsible for construction oversight, the grantee must establish performance milestones for the rehabilitation that are to be met by the homeowner in order to receive such payments. A grantee using this alternative requirement must document, in its policies and procedures, how it will determine the amount of assistance to be provided is necessary and reasonable. Homeowners receiving interim mortgage assistance are not eligible for rental assistance.

27. There is a new paragraph waiving Section 414 of the Stafford Act. In the interest of time, most of the provision is pasted in below without analysis. Advocates more familiar with Stafford and disasters will have to assess. (page 57 and 58)

f. *Waiver of Section 414 of the Stafford Act.* Section 414 of the Stafford Act (42 U.S.C. 5181) provides that "Notwithstanding any other provision of law, no person otherwise eligible for any kind of replacement housing payment under the Uniform Relocation Assistance and Real Property

Acquisition Policies Act of 1970 (Pub. L. 91-646) [42 U.S.C. 4601 et seq.] ["URA"] shall be denied such eligibility as a result of his being unable, because of a major disaster as determined by the President, to meet the occupancy requirements set by [the URA]". Accordingly, homeowner occupants and tenants displaced from their homes as a result of the identified disaster and who would have otherwise been displaced as a direct result of any acquisition, rehabilitation, or demolition of real property for a federally funded program or project may become eligible for a replacement housing payment notwithstanding their inability to meet occupancy requirements prescribed in the URA. **Section 414 of the Stafford Act** (including its implementing regulation at 49 CFR 24.403(d)(1)), **is waived** to the extent that it would apply to real property acquisition, rehabilitation or demolition of real property for a CDBG-DR funded project commencing more than one year after the Presidentially declared disaster undertaken by the grantees, or subrecipients, provided that the project was not planned, approved, or otherwise underway prior to the disaster.

The waiver will simplify the administration of the disaster recovery process and reduce the administrative burden associated with the implementation of Stafford Act Section 414 requirements for projects commencing more than one year after the date of the Presidentially declared disaster considering the majority of such persons displaced by the disaster will have returned to their dwellings or found another place of permanent residence.

28. Discussion of environmental requirements begins on page 59. Those with technical expertise should assess these.
29. Discussion of various green building standards and elevation standards start on page 66. Those with technical expertise should assess these.
30. As in 2016, CDBG-DR cannot be used for second homes. However, item #39 (page 80) adds language that allows grantees to “adopt policies and procedures that provide for limited exceptions to providing assistance to a second home in order to meet specific disaster recovery needs (e.g. adding affordable housing capacity); provided however that such exceptions are developed in consultation with and approved by HUD prior to implementation.”
31. Item #40 (b) has a new provision (page 82). Paragraph (2) states:

“Grantees receiving funds under this notice are prohibited from providing CDBG-DR assistance for the rehabilitation/reconstruction of a house, if (a) the combined household income is greater than 120% AMI or the national median, (b) the property was located in a floodplain at the time of the disaster, and (c) the property owner did not maintain flood insurance on the damaged property, even when the property owner was not required to obtain and maintain such insurance. When a homeowner located in the floodplain allows their flood insurance policy to lapse, it is assumed that the homeowner is unable to afford insurance and/or is accepting responsibility for future flood damage to the home. HUD is establishing this alternative requirement to ensure that adequate recovery resources are available to assist lower income homeowners who reside in a floodplain but who are unlikely to be able to afford flood insurance.”
32. Item #41, “Elevation of Nonresidential Structures” (pages 83/84) adds a definition of “Critical Actions” as “activity for which even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons or damage

to property. For example, Critical Actions include hospitals, nursing homes, police stations, fire stations and principal utility lines.”

33. Item #43, “Requirements for flood control structures” (page 84) is new. “Grantees that use CDBG-DR funds to assist flood control structures (i.e., dams and levees) are prohibited from using CDBG-DR funds to enlarge a dam or levee beyond the original footprint of the structure that existed prior to the disaster event.”