MICHAEL N. FEUER
CITY ATTORNEY

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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Via electronic submission

RE: *Housing and Community Development Act of 1980: Verification of Eligible Status,* Notice of Proposed Rulemaking, 84 Fed. Reg. 20589, HUD Docket No. FR-6124-P-01.

I. INTRODUCTION

The City of Los Angeles ("City" or "Los Angeles") submits this comment in response to the proposed rule ("Proposed Rule") published by the Department of Housing and Urban Development ("HUD" or the "Department"). The Proposed Rule is an impermissible, unlawful, and unfortunate attempt to use the rulemaking process to deny United States citizens and non-citizens with eligible immigration status their right to access critical public housing resources simply because they have family members with ineligible status. The Proposed Rule breaches HUD's mandate to create strong, sustainable, inclusive communities and to provide quality affordable homes for all.

For more than two decades, HUD has met its charge, in part, by allowing mixed-status families, i.e., those families containing members with and members without eligible immigration status, to live in federally subsidized affordable housing. These subsidies are prorated such that only those family members who are lawfully present and eligible for benefits receive them. HUD seeks to roll back this longstanding practice by way of the Proposed Rule.

For the first time since Congress created the current program, households with even a single family member who is unable to verify their immigration status, even if that person is a United States citizen, and households with a single ineligible family member, would be required either to separate, move out, or see their housing assistance terminated. And the City is not presenting unrealistically dire outcomes simply to amplify its argument. HUD's own analysis of the impact of the Proposed Rule presents data showing that the majority of mixed-status households have 3 eligible members, all of whom are lawfully entitled to housing subsidies, and only 1 ineligible member.[1] All told, this rule could result in the displacement of 108,000 residents in 25,000 households across the United States, of which 55,000 residents are children who are either U.S. citizens or have an eligible class of lawful immigration status.[2]

For Los Angeles, the repercussions of this rule are not abstract or distant: they would be felt firsthand in our neighborhoods and our economy. The Housing Authority of the City of Los Angeles ("HACLA") — one of the nation's largest public housing authorities — reports that the proposal would threaten the housing security of approximately 2,587 households in our city, or 11,517 people, many of whom are U.S. citizens or have lawful immigrations status and all of whom are following HUD rules that have been in effect for the past 25 years. The impact of the Proposed Rule would be particularly dramatic here in the City because HACLA data show that nearly one-third of ***all*** public housing occupants in Los Angeles would be at risk of potential eviction.

This fact, coupled with the changes to the Section 8 program proposed in HUD's rule, would cause HACLA to face dire financial consequences. The associated costs that HUD fails to consider include lost rent, tenant turnover, evictions that will be challenged in court, and rehabilitation of units to prepare for new residents. The City's interest in this Proposed Rule is compounded by the fact that the City's Housing and Community Investment Department provided capital funding to finance the development, rehabilitation, and preservation of many the affordable housing projects that would be directly impacted by the Proposed Rule. Worse still, given the density of Los Angeles's impacted population, the Proposed Rule is likely to cause severe dislocation of entire communities, exacerbating the already chronic homeless situation in Los Angeles.

In short, the Proposed Rule will result in needless human suffering and the dismantling of family units, and cause thousands of U.S. citizens and eligible immigrants with lawful immigration status to lose their most critical safety net:

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[1] HUD, Regulatory Impact Analysis, *Housing and Community Development Act of 1980: Verification of Eligible Status*, Docket No. FR-6124-P-01, at 6 (Apr. 15, 2019).
[2] *Id.*

their housing. Thus, the Proposed Rule, which would undo existing regulations created to promote family unity,[3] is nothing but a veiled attempt to continue the Administration's efforts to expand state-sponsored immigrant family separation. Families would be forced to make the impossible decision of either splitting up to ensure that eligible members can continue to receive housing assistance, or forgo their lawful eligibility to benefit from HUD's housing program so that they can stay together.

II. THE RULE IS UNLAWFUL

The Proposed Rule is not in accordance with the governing statute and is arbitrary and capricious. For these reasons and others, the Proposed Rule is unlawful.

A. The Proposed Rule Violates the APA because it Conflicts with the Governing Statute.

The power of an agency to prescribe rules and regulations "is not the power to make law … but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute" and any rule that "operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *see also Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990) (agencies do "not have the power to adopt a policy that directly conflicts with [the] governing statute"). Thus, agency actions that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be rejected. *S. Cal. Edison Co. v. Fed. Energy Regulatory Com.,* 770 F.2d 779, 782 (9th Cir. 1985).

The Proposed Rule conflicts with the plain meaning of, and congressional intent behind, the Housing and Community Development Act of 1980 (the "Act"). The primary impetus for the conflict comes from HUD's misunderstanding of the definition of "financial assistance." In the language of the Proposed Rule, HUD believes that any individual with ineligible immigration status residing in a qualifying HUD supported residence is, by definition, receiving "financial assistance."[4]

A plain reading of the Act shows that Congress did prohibit HUD from providing "financial assistance" to persons with ineligible immigration status.[5] But,

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[3] *See* 24 C.F.R. § 5.506(b)(2).
[4] *Housing and Community Development Act of 1980: Verification of Eligible Status,* Notice of Proposed Rulemaking, 84 Fed. Reg. 20589, 20591 (NPRM).
[5] *See* 42 U.S.C. § 1436a(a).

Congress did so by enumerating certain individuals who are eligible for assistance and explicitly stating that any assistance provided to families with ineligible members shall be reduced "based on the number of individuals in the family for whom eligibility has been affirmatively established under the program of financial assistance and under this section, as compared with the total number of individuals who are members of the family."[6]

HUD attempts to harmonize this statutory language with the Proposed Rule by stating that the Act only allows ineligible family members to live in a HUD subsidized household for the narrow period of time that it takes to verify their eligibility status. And, because, according to HUD, in 2019, eligibility determinations are "almost instantaneous" using the Systematic Alien Verification for Entitlements online system, "prorated assistance should rarely be applicable."[7] Therefore, HUD asserts, the Proposed Rule is necessary because existing regulations allow family members who "do not have citizenship or eligible immigration status" to choose "not to contend to have eligible immigration status."[8] HUD believes that this "do not contend" provision is "inconsistent with the statutory requirements to the extent that it permits prorated assistance of unlimited duration."[9]

By restricting Congress's carefully crafted system of prorated subsidies to a term of mere minutes or hours, HUD's Proposed Rule renders the entire statutory scheme of proration as superfluous. HUD's attempt to prohibit any and all ineligible individuals from living in households with family members receiving housing assistance, even though that assistance is prorated to support eligible family members only, clearly conflicts with the plain reading of the statute, which, as noted above, allows "financial assistance" to be provided to those individuals of a household who have eligible status (i.e. on a prorated basis). Consider, for example, 42 U.S.C. § 1436a(d)(6), which requires the Secretary to "terminate the eligibility for financial assistance" of an individual's entire household if that individual "has knowingly permitted another individual who is not eligible for such assistance to reside in the public or assisted housing unit of the individual."[10] If that were the entire provision, it might support HUD's position. But, the subsection goes on to say that this provision "shall not apply to a family if the ineligibility of the ineligible

[6] *See*, *e.g.*, 42 U.S.C. § 1436a(a) & 1436a(b)(2).

[7] NPRM, *supra,* n. 4 at 20591.

[8] Regulatory Impact Analysis, at 4; s*ee also* 24 C.F.R. § 5.508(a) & (e).

[9] NPRM, *supra,* n. 4 at 20591.

[10] 42 U.S.C. § 1436a(d)(6).

individual at issue ***was considered in calculating any proration of assistance provided for the family***."[11]

Also consider the fact that, for the past twenty-three years, HUD regulations have defined mixed-status family to mean "a family whose members include those with citizenship or eligible immigration status, and ***those without citizenship or eligible immigration status***."[12] If Congress thought that HUD incorrectly defined the term back in 1996 and had intended the definition of mixed-status family to read as the Proposed Rule assumes (i.e. a family whose members include those with citizenship or eligible immigration status, and those who are still waiting to have their citizenship or eligible immigration status "verified"), Congress could have amended 42 U.S.C. § 1436a to make that clear in any one of the three subsequent times Congress amended the Act, including as part of the 2016 amendments when Congress substituted "any citizen or national of the United States shall be entitled to a preference or priority in receiving financial assistance before any such alien who is otherwise eligible for assistance" in place of "such alien shall not be entitled to a preference in receiving assistance under this Act over any United States citizen or national resident therein who is otherwise eligible for such assistance" in 42 U.S.C. § 1436a(a)(7).[13]

In addition to being in conflict with the plain reading of the statute, the Proposed Rule is also "out of harmony" with Congress's legislative intent. As the City of New York highlighted in its Comment on the Proposed Rule,[14] this is not the first time HUD has used a mistaken assumption in an attempt to use immigration status to restrict access to public housing. In 1986, HUD published a final rule requiring all family members to submit immigration documentation and requiring public housing authorities to terminate financial assistance for and evict those beneficiaries unable to provide evidence of eligible immigration status.[15]

Congress undertook action to address HUD's action legislatively and, in 1988, countermanded HUD's interpretation of the Act and HUD's plans to implement the 1986 rule. A 1987 House Report from the House Banking, Finance, and Urban Affairs Subcommittee on Housing and Community Development analyzing amendments to the Act that would ultimately be enacted in 1988 states the following:

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[11] *Id.* (emphasis added).
[12] 24 C.F.R. § 5.504(b).
[13] Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 804 (2016).
[14] City of New York Comments on *Housing and Community Development Act of 1980: Verification of Eligible Status*, Docket No. FR-6124-P-01, Dkt. ID # HUD-2019-0044-2921, (July 3, 2019).
[15] *Restriction on Use of Assisted Housing*, 51 Fed. Reg. 11198-01 (April 1, 1986).

> The injustice that would be caused by implementation of [the Act] include: the mandatory eviction of thousands of families now residing in federally-subsidized housing; the eviction of individuals who are citizens or who are properly documented aliens because other members of their household cannot meet the documentation requirements; the denial of admission to families which include citizens and properly documented aliens because not all family members can be properly documented; and the imposition of documentation and verification requirements upon citizens and aliens alike which are not only unduly burdensome, but also impossible even for some citizens to meet. Since these hardships and burdens have not been made obvious, this statute is amended by the bill to address these concerns. In addition, the Committee is including these changes because [HUD] has incorrectly interpreted the original Act. The modifications are intended to clarify the original intent of Congress that families in which at least one person is eligible are not disqualified and that the rules not be applied retroactively.[16]

During this time, Congress did not require a prorating of HUD subsidies. As long as a single member of the family qualified for subsidies, the entire family could continue to receive the full measure of housing assistance. Congress's unambiguous goal in passing the 1988 amendments was to promote family unity first and foremost. And, in 1996, when Congress reconsidered the practice of not disqualifying families with ineligible members, Congress could have mandated evictions of ineligible members or forced family separations quite easily. Instead, Congress continued its support for family unity by introducing the current practice of prorating subsidies, making clear that the definition of "financial assistance" was not so broad as to prohibit ineligible members from living in subsidized households, so long as they were not the direct beneficiaries of that financial assistance.[17]

With HUD, however, the past is prologue. Once again, the Department is attempting to implement a Proposed Rule that would prohibit an entire class of persons from residing in subsidized housing when the Act explicitly allows them to do so. The statute is unambiguous. Congress acknowledged and permitted "mixed-status households" to obtain prorated housing assistance for a non-time limited tenancy, when and where at least one household member can provide proof of eligible immigration status.

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[16] H.Rpt. No. 100-122 (Part I), at 49-50 (1987).
[17] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sections 571-73) (1996).

Thus, the Proposed Rule is unlawful because it directly conflicts with the Act and frustrates the policy that Congress sought to implement.

B. The Proposed Rule Is Arbitrary and Capricious and Therefore Violates the Administrative Procedure Act.

1. The Rule Is Not Supported by a Legitimate Rationale.

The Administrative Procedure Act ("APA") requires courts to "hold unlawful and set aside" agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)-(D); *see also Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 608 (7th Cir. 2015). An agency acts arbitrarily or capriciously "when it fails to provide a reasoned explanation for its action." *Schurz Commc'ns v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992); *see also Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must show that it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."); *American Ass'n of Cosmetology Schools v. Devos*, 258 F. Supp. 3d 50, 71 (D.D.C. 2017) (the "touchstone of arbitrary-and-capricious review is reasoned decisionmaking.").

Separate and apart from their statutory arguments, HUD relies on conclusory and irrational presumptions to justify its Proposed Rule. A primary justification for the Proposed Rule was re-stated by HUD Secretary Ben Carson in recent testimony before Congress. In responding to questions from members of the House Committee on Financial Services, Secretary Carson noted that it was the administration's intent to move mixed-status families out of subsidized housing in order to make room for U.S. citizens presently on HUD's waiting list.[18] This rationale is echoed by Secretary Carson in a post he made to his Twitter account, where he stated: "Thanks to @realdonaldtrump's leadership, we are putting America's most vulnerable first. Our nation faces affordable housing challenges and hundreds of thousands of citizens are waiting for many years on waitlists to get housing assistance."[19] That tweet included a link to a story published by The Daily Caller, which quoted a Trump Administration official as saying, "Because of past loopholes in HUD guidance, illegal aliens were able to live in free public housing desperately needed by so many of our own citizens. As illegal aliens attempt to

[18] U.S. House Comm. on Financial Srvcs., Full Comm. Hearing, *Housing in America- Oversight of the U.S. Department of Housing and Urban Development*, Oral Testimony of the Honorable Dr. Benjamin S. Carson (May, 21, 2019).
[19] Tweet available at: https://twitter.com/secretarycarson/status/1118906738688843777

swarm our borders, we're sending the message that you can't live off of American welfare on the taxpayers' dime."[20]

On a micro level, by proposing to eliminate the ability of U.S. citizens to provide a declaration of their citizenship or nationality status signed under penalty of perjury in order to establish eligibility for housing assistance and instead require those citizens to, for the first time, provide specific documentation to remain eligible,[21] the Proposed Rule makes it a statistical probability that U.S. citizens in households made up entirely of U.S. citizens will be evicted in direct conflict with the administration's stated rationale. A 2006 study from the Brennan Center for Justice at the NYU School of Law shows that for U.S. citizens who are over the age of 50, are minorities, have low incomes, or have disabilities, providing documented proof of their citizenship or nationality is either not possible, or takes a significant amount of time and resources.[22] The Proposed Rule's ironic consequence will be the eviction of entire U.S. citizen households to "make room" for other U.S. citizens. The family displacement and resulting homelessness will, of course, be devastating to those American citizens who would be evicted and to the communities, like Los Angeles, in which they reside.

On a macro level, HUD will be constrained, by its own Proposed Rule, into housing 25,000 fewer U.S. citizens and eligible immigrants, in direct contradiction to the Department's stated rationale. Specifically, HUD's Regulatory Impact Analysis estimates that there are 76,000 qualified residents who are either U.S. citizens or immigrants with lawful immigration status currently living in subsidized mixed-status households.[23] HUD estimates that, under the Proposed Rule, 16,000 of those eligible residents will choose to remain in subsidized housing by asking ineligible family members to leave and the remaining 60,000, many of whom are U.S. citizen children, will be forced out of their housing because of the new regulations.[24]

This mass displacement of American citizens and their families would "free up" approximately $141,200,000 annually in HUD's budget that the Department could use to house people who are on a waiting list.[25] If one divides that budget

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[20] Amber Athey, *SCOOP: HUD Planning Crackdown On Illegal Immigrants Taking Advantage Of Public Housing*, THE DAILY CALLER (April 17, 2019).
[21] NPRM, *supra,* n. 4 at 20590-91.
[22] *See* Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), available at https://perma.cc/8BQY-MUAV.
[23] Regulatory Impact Analysis, at 7.
[24] *Id.* at 6, 8.
[25] *Id.* at 8, 12.

amount by HUD's stated average per-person subsidy for U.S. citizen households,[26] the Department will have enough money to subsidize the housing of approximately 35,000 waitlisted people. Those 35,000 previously waitlisted residents combined with the 16,000 eligible residents, who HUD assumes will separate from their families in order to remain in subsidized housing, would equal a total population of 51,000 eligible residents housed after the implementation of HUD's Proposed Rule. Contrast that with the 76,000 qualified residents who are either U.S. citizens or immigrants with lawful immigration status currently living subsidized housing under the existing regulations and it becomes clear that the Proposed Rule would result in 25,000 fewer U.S. citizens and eligible immigrants actually being housed.

There are two reasons for this result. First, mixed-status households receive, in accordance with the Act, prorated subsidies, so they are given less federal support than non-mixed households for the exact same housing. And, second, mixed-status households also pay higher rent for the exact same housing as compared to non-mixed households because the rent is adjusted based on total household income, including the income of the ineligible members who cannot receive assistance.

Thus, the Trump administration official's comment in The Daily Caller that ineligible immigrants are "able to live in free public housing desperately needed by so many of our own citizens" is disproven by HUD's own impact analysis. Mixed-status families pay some $195 million in annual rent, thereby subsidizing HUD's ability to house more U.S. citizens than the Department would otherwise be able to support. The bottom line is that it costs HUD more than twice as much money to support a non-mixed household.[27] This is why the Proposed Rule will result in 25,000 fewer U.S. citizens and eligible immigrants being housed than there are today while simultaneously evicting or otherwise terminating the housing of 60,000 U.S. citizens and eligible immigrants and 92,000 total residents.

HUD might respond that it could still accomplish the goal of moving eligible residents off of the waiting list without reducing the number of total residents housed by simply increasing subsidies by roughly $227 million annually. However, that claim would be disingenuous. HUD has no interest in increased subsidies as HUD budget proposals have recommended severe spending cuts every year since President Donald J. Trump took office.[28] HUD's own analysis acknowledges that it

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[26] According to HUD, the subsidy for mixed-status families is $1,900 per person annually. The subsidy for the non-mixed household is $4,000 per person. *Id.* at 12.
[27] *Id.*
[28] *See, e.g.,* National Low Income Housing Coalition, *Analysis of President Trump's FY2020 Budget Request,* (May 12, 2019) (noting that the "administration proposes to cut HUD by an astounding $9.6

is more "likely" that the actual impact of the rule would result in "fewer" families being housed or in a "decline" in the quality of the housing provided, or both.[29]

HUD's lack of factual support for its position is not surprising, because the true motivation for this rule is to use the cudgel and fear of family separation to get immigrant families to act against their own interests and to get Congress to accede to President Trump's immigration proposals to block asylum seekers and other immigrants from, in the words of the official noted above, "swarm[ing] our borders."[30] Stated plainly, HUD looks to punish a subset of U.S. citizens and immigrants with lawful status simply because they live with ineligible members and use those families as pawns in a legislative parlor game. HUD's actions are arbitrary and capricious and not supported by a legitimate rationale.

2. The Rule Does Not Adequately Consider the Associated Costs

An agency also acts arbitrarily and capriciously when it does not adequately consider the costs of its proposed action. *See, e.g.*, *National Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (when an agency decides to rely on cost-benefit analysis as part of its rulemaking, serious flaws undermining that analysis can render a rule arbitrary); *City of Portland v. EPA,* 507 F.3d 706, 713 (D.C. Cir. 2007) ("we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses").

Here, the Department purports to have performed a cost-benefit analysis. However, the "Benefits of the Proposed Rule" section of HUD's own 17-page long Regulatory Impact Analysis[31] is just two paragraphs — or 136 words — in length, whereas the "Costs of the Proposed Rule" section runs nearly 4 pages and more than 1300 words, highlighting negative impacts as varied as increased homelessness, moving costs, and administrative costs. And, yet, despite its relative length, HUD's cost analysis is woefully inadequate.

In addition to incurring the extensive and expensive costs outlined in the Department's own analysis in an effort to house 25,000 fewer eligible individuals,

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billion or 18% below 2019 enacted levels, imposing deep cuts to affordable housing and community development, as well as other essential programs that ensure basic living standards").

[29] Regulatory Impact Analysis, at 11-12.

[30] *See*, *supra*, n. 20; *see also* Tracy Jan, *HUD Secretary Ben Carson defends plan to evict undocumented immigrants: 'It's not that we're cruel, mean-hearted. It's that we are logical.'*, THE WASHINGTON POST (May 21, 2019) (reporting that Secretary Carson told a Democratic senator that ***the motivation behind the Trump administration's plan to inventory all immigrants living in public housing is to build pressure on Congress***)(emphasis added).

[31] A regulatory impact analysis is required under Executive Order 12866 because the HUD staff determined that the economic impact of the rule is expected to have cost than $100 million in annual funding.

HUD neglects to consider the burdensome administrative costs that will be incurred by states, localities, housing authorities, and private landlords. These costs include, but are not limited to: 1) litigation expenses resulting from evictions; 2) unpaid rents and turnover costs for landlords and housing authorities; 3) costs to the City's homeless shelters and service providers that will result from so many residents being removed from their safe and secure housing; 4) increased health care and mental health costs incurred by the City's partners, including increased rates of hospitalization at Los Angeles County medical centers, resulting from families being forced into the dangerous conditions and severe negative impacts that results from losing housing; 5) lost school funding resulting from missing attendance due the displacement of so many families; 6) increased costs to social welfare and child and family services agencies resulting from family separations; 7) administrative costs to housing authorities and landlords resulting from the Proposed Rule's new document collection requirements; 8) economic impacts to the greater economy should HUD refer immigration status findings to ICE for deportation; and 9) the economic costs resulting from unsafe and unhealthy conditions in the workplace and at home for displaced residents who recede into the shadows for fear of being deported.

The homeless population in the City exists at record levels, having grown 16 percent in just the past year. The Proposed Rule will have the practical effect of displacing up to 11,517 residents of Los Angeles, 5,500 of whom are children who are either U.S. citizens or immigrants with lawful immigration status. Currently, 36,300 homeless individuals reside in the City limits, and the City's limited shelter supply means that every night, 27,221 of those individuals lack access to a roof over their head. In addition, nine percent of the City's homeless population – a total of 3,368 – are children. In the worst case scenario, HUD's forced displacement could result in the overall homeless population increasing by nearly 33% and the population of homeless children increasing by as much as 163%. Therefore, properly considering all of the Proposed Rule's costs to Los Angeles is critical as the proposed plan would exacerbate the current homeless crisis in Los Angeles.

III. CONCLUSION

The Proposed Rule can result in the displacement of up to 108,000 people en masse, 11,517 of whom live in the City of Los Angeles. In the best case scenario using HUD's own data, the Proposed Rule will trigger a net displacement of 25,000 U.S. citizens and immigrants with lawful immigration status from their safe and secure housing on a national level. In Los Angeles, that would result in approximately 2,500 fewer lawfully eligible residents being housed than there are today, in express contradiction to HUD's own stated goals. Such an outcome is

intolerable and provides reason enough to reject the Proposed Rule. In addition, the Department has failed to recognize the Proposed Rule's departure from the express language and underlying purpose of the Housing and Community Development Act of 1980, as amended. Similarly, HUD's Regulatory Impact Analysis fails to address many of the costs likely to result from implementation of the rule, rendering the Proposed Rule arbitrary and capricious in violation of the APA. For all of these reasons, the City of Los Angeles urges the Department to withdraw the Proposed Rule.

Sincerely,

Michael N. Feuer
City Attorney of the City of Los Angeles