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Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, S.W.
Room 10276
Washington, D.C. 20410-0001

RE: Housing and Community Development Act of 1980: Verification of Eligible Status, Proposed Rule, Docket No. FR-6124-P-01 (RIN 2501-AD89)

Dear Sir or Madam:

These comments are submitted on behalf of our clients, the Council for Affordable and Rural Housing ("CARH") and the National Leased Housing Association ("NLHA")(jointly, CARH and NLHA are referred to herein as the "Commenters"), in connection with the proposal of the U.S. Department of Housing and Urban Development ("HUD") to revise its rules concerning citizenship-related eligibility for certain "covered housing" pursuant to Section 214 of the Housing and Community Development Act of 1980, 42 U.S.C. §1436a (the "1980 Act").[1] Since 1980, CARH has served as the nation's premier association for participants in the affordable rural rental housing industry, including developers, owners, managers, public agencies and other housing professionals. NLHA is a national organization advocating for both public agencies and private organizations to promote affordable multifamily housing, and is an architects of the Section 8 project-based and tenant-based housing programs. Together, the Commenters represent thousands of entities that provide tens of thousands of units of affordable housing across the country that will, as explained below, be harshly impacted by HUD's recently published proposed rule dealing with housing so-called "mixed families." 84 Fed. Reg. 20589 (May 10, 2019) (the "Proposed Rule").

As announced by HUD, the Proposed Rule would dramatically alter the existing rules with respect to eligible residents, which allow mixed families – that is, families that include both US

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[1] "Covered housing" includes housing provided under certain HUD programs, including the Section 236 insured housing, Rent Supplement housing, public housing, and Section 8 housing assistance programs, and Rural Development's Section 521 direct loan program. 42 U.S.C. §1436a(b)(1).

citizens and eligible US residents and persons who are not documented residents – to occupy units in covered housing subject to proration of subsidies so that only eligible residents actually receive assistance. Long ago, HUD issued detailed regulations governing occupancy of such mixed families. 24 CFR §§ 5.500 et seq. The Proposed Rule proposes to change these regulations to drive mixed families out of such covered housing, potentially displacing 108,000 eligible residents, including almost 56,000 children. A fundamental theme of these comments is that HUD needs to clearly state a "reasoned explanation" for changing a rule that has worked well for more than two decades and is relied upon by residents, housing providers and managers alike. *Encino Motorcars, LLC v. Navarro*, __ U.S. ___, 136 S. Ct. 2117, 2125 (2016). That includes squarely addressing the human and financial impacts identified in HUD's own Regulatory Impact Analysis ("RIA") of the Proposed Rule that were essentially ignored in the Proposed Rule.[2] As explained in more detail below, the Commenters believe that the Proposed Rule will harshly affect existing residents, housing providers and managers, and in the absence of a "reasoned explanation" for the proposed changes it seeks, HUD should not change its current "mixed family" rule.

Background

When it adopted the 1980 Act, Congress included Section 214, which sought to limit assistance for certain "covered housing" to U.S. citizens and certain other groups of legal residents. See 42 U.S.C. § 1436a. In following years, HUD published several proposed rules intending to implement Section 214, which, for various reasons, never became final. See 53 Fed. Reg. 842 (Jan. 13, 1988)(discussing history of prior Section 214 rulemaking efforts). Finally, in 1995, HUD adopted the current Section 214 regulation, found at 24 CFR §§ 5.500 et seq. (the "Final Rule"), which took effect in June 1995. 60 Fed. Reg. 14816 (March 20, 1995) (the "Final Rule Preamble").

To implement Section 214, the Final Rule imposed numerous restrictions on assistance to noncitizens. First, it required persons seeking covered housing to verify their eligibility status. However, HUD allowed persons who do not have citizenship or eligible immigration status to elect not to contend that they have eligible status. See 24 CFR §5.508(a). As a result of "do not contend" elections made pursuant to the Final Rule, some resident families – referred to as "mixed families" – could contain members who meet HUD's citizenship/lawful resident eligibility standards and some who do not. The Final Rule allowed mixed families to continue to receive assistance, but prorated that assistance to reflect the proportion of eligible members in the household. Id., §5.520 (setting forth prorating procedures for covered housing programs).

The Proposed Rule identified several primary changes to the Final Rule:

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[2] The RIA is included in the docket for the Proposed Rule and is available at https://www.regulations.gov/document?D=HUD-2019-0044-0002.

1. It proposes to eliminate the option not to contend citizenship/lawful resident status. In other words, going forward, all occupants of covered housing would have to demonstrate eligible status.
2. Families that are unable to demonstrate that all members have eligible status would not continue to receive prorated assistance indefinitely. Instead, HUD proposes to temporarily defer termination of those families, "if necessary, to permit the family additional time for the orderly transition of those family members with ineligible status, and any other family members involved, to other affordable housing."[3] Proposed Rule, 84 Fed. Reg. at 20595 at proposed §5.18(b)(1). Unlike the Final Rule, which allowed families with ineligible members to continue receiving prorated assistance indefinitely, the Proposed Rule would allow a family with an ineligible member to remain in place pursuant to a "temporary deferral" for only six months, which could be extended for a maximum of eighteen months. Id., at proposed §5.518(b)(2). In other words, under the Proposed Rule, families with ineligible members will eventually lose their assistance and, according to HUD's RIA, in most cases their homes as well. See RIA at 7-10.
3. Going forward, persons who do not have eligible immigration status may not serve as the leaseholder, even in the case of mixed families receiving prorated assistance.

84 Fed. Reg. at 20589.

Prior to the publication of the Proposed Rule, HUD staff prepared the RIA to analyze the impacts of the Proposed Rule. The impacts described by the RIA are profound. First, the RIA estimates that there are approximately 25,000 "mixed families" in covered housing programs, with a total of 108,104 residents. RIA at 7. Of these, 76,141 residents (71%) are eligible to receive assistance, and of the eligible residents, 55,583 (73%) are children. Id. at 6. 70% of mixed families consist of eligible children and ineligible parents. Id. at 8. According to the RIA, although it is conceivable that some families will ask ineligible members to leave the household, "HUD expects that fear of the family being separated would lead to prompt evacuation by most mixed households." Id. at 7. This is in part because the annual per person subsidy received by mixed families is $1,900 per person, an amount that most mixed family will be unable to pay from other sources. Id. at 15-16. In other words, HUD estimates that about 76,000 eligible residents –including almost 56,000 eligible children – will lose their housing if the Proposed Rule is implemented. While HUD acknowledged it had prepared a "cost benefit" analysis of the Proposed Rule, the Proposed Rule did not discuss the human impacts identified in the RIA. Proposed Rule at 20591.

In addition to these human costs, the RIA also considered the financial costs of the Proposed Rule. The RIA recognized that most mixed families receive prorated assistance, and that if

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[3] According to HUD, "affordable housing" as used in proposed §5.18(b)(1) "refers to housing that is not substandard, that is of appropriate size for the family, and that can be rented for an amount not exceeding the amount that the family pays for rent, including utilities, plus 25%." Id. It is not clear what happens if a newly ineligible family is unable to locate a replacement unit that constitutes "affordable housing" under that definition.

those families are evicted or otherwise leave their current homes, they will be replaced by families that are fully eligible for assistance. As a result, the RIA estimates that the Proposed Rule will increase the cost of subsidies between $193 million to $237 million. Id. at 3. The RIA anticipates that Congress will not appropriate additional funds to cover these higher costs. If so, HUD will have to divert funds from other sources to pay these costs, meaning that the Proposed Rule will essentially result in a transfer of assistance from currently assisted households to the replacement households. Id. HUD also did not discuss these financial costs or the potential impacts on currently assisted families in the Proposed Rule.

Discussion

For more than twenty years, HUD's current mixed family rule has provided a stable, consistent and reliable tool that has assured that only US citizens and legal residents receive HUD-assisted or -insured housing benefits. In the absence of any change in the underlying statute, HUD proposes to alter the current rule, with the express goal of eliminating families that include members who are not US citizens or legal residents. For the reasons stated below, we believe that the Proposed Rule raises serious problems and is not an improvement over HUD's current and highly successful approach to housing mixed families:

1. **As part of providing a "reasoned explanation" of the Proposed Rule, HUD needs to expressly address the human and financial costs of the Proposed Rule identified in the RIA.** The Commenters are dedicated to providing affordable housing to vulnerable groups and are deeply troubled by the possibility of intentionally displacing almost 76,000 otherwise eligible residents, of which almost 56,000 are children, in the absence of a change in law or an exigent situation that requires such a harsh result. Mixed families will face a stark choice of breaking up their families to eliminate their members who are ineligible or, as the RIA predicts, deciding to leave their current residences in order to preserve their families. Additionally, because partially-assisted mixed families will be replaced by fully-assisted families, HUD's subsidy costs may rise by as much as $237 million, which, absent new funding, will require HUD to divert assistance from other currently assisted families. Reallocation of existing subsidy funds could have an extremely adverse impact on housing providers who presently receive project- and voucher-based assistance. Again, HUD should not adopt a final rule without explaining how the new rule would be funded, how it would impact the operations of housing providers and managers, and how it would impact currently assisted residents. HUD should expressly explain how the Proposed Rule will affect its current subsidy programs and any negative impacts on existing voucher holders and project-level subsidies. The Proposed Rule discusses neither the human or financial costs of changing its mixed family rule. Before moving forward, HUD needs to address the impacts identified in the RIA, including the possibility that mixed families who lose their homes will not be able to find affordable housing alternatives and may find themselves homeless. Additionally, rather than ask the public to propose alternatives to the Proposed Rule, HUD should candidly evaluate the less harmful alternatives discussed in its own RIA. See RIA at 17.

2. **HUD has not met the heavy burden to explain the basis for changing its long-standing interpretation of a statute.** An agency may not unilaterally and without explanation change its long-standing interpretation of a statute, especially where Congress has not significantly altered the underlying statute and where thousands of vulnerable people have relied on that current interpretation. As the U.S. Supreme Court recently explained, an agency can change a long-standing policy, but when it does so, it must clearly state the reasons for the change:

> [T]he agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." Ibid. (emphasis deleted). In explaining its changed position, an agency must also be cognizant that ***longstanding policies may have "engendered serious reliance interests that must be taken into account."*** "In such cases it is not that further justification is demanded by the mere fact of policy change; but that ***a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy***." It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice

Encino Motorcars LLC, 136 S. Ct. at 2126 (internal citations omitted; emphases added).

Previously, HUD contended that the terms of Section 214 left it little flexibility in drafting its implementing rules. Thus, when it proposed the rules in 1994, HUD said "[i]n many respects, ***Section 214 allows little discretion on the part of HUD to expand or reduce the statutory provisions by regulation***. . . Section 214 is . . . specific about the special assistance to be provided to certain families with members who have eligible status and those who have ineligible status." 59 Fed. Reg. 43900, 43902 (August 25, 1994) (emphasis added). At the time it adopted its current regulations concerning mixed families in 1995, HUD addressed comments urging that "ineligible persons should not be allowed to reside in an assisted unit." Squarely rejecting that position, HUD stated that "[t]he 'preservation of family' provisions [in its final rule] ***flow directly from the statute***." Final Rule Preamble, 84 Fed. Reg. at 14820-21 (emphasis added). In fact, Section 214(c) provides for continued assistance and temporary deferral to termination of assistance to mixed families. The Proposed Rule does not identify any intervening change in Section 214 itself that justifies the proposed changes to its mixed family rule. It is incongruous, therefore, that more than twenty years after announcing that Section 214 "allow[ed] little discretion" in drafting the current rule and in the absence of any significant controversy with respect to the scope and operation of that rule, HUD now concludes that its long-standing interpretation of Section 214 was mistaken and that Section 214 allows it to do exactly what HUD claimed it could not do when it adopted the Final Rule in 1995.

In support of its Proposed Rule, HUD cites a handful of grounds that "prompted [it] to reconsider" its current regulations, including Executive Order 13828, which generally directs federal agencies to adopt rules that ensure that only eligible persons receive federal benefits and that "aliens who are not otherwise qualified and eligible do not receive such benefits." 84 Fed. Reg. at 20590. In addition, HUD cites other unspecified regulatory initiatives to "reduce unnecessary burdens." Id. Additionally, at various points, HUD claims that its new interpretation more closely reflects the goals of Section 214. Neither references to general policy directions from the White House nor bare statements that it has changed its mind about the goals of Section 214, however, constitutes the "reasoned explanation" required to explain HUD's reversal from the positions it took more than 20 years ago.

Moreover, as the Supreme Court in *Encino* made clear, courts hold changes in regulations to higher scrutiny where stakeholders – individual persons, public agencies, and private firms alike – have relied upon long-standing statutory interpretations and regulations to order their lives and manage their business affairs. Because the Proposed Rule does not squarely address the impact of the rule on existing eligible residents or the impacts on housing providers and managers, discussed in more detail below, the Proposed Rule fails to satisfy consider the "serious reliance interests that must be taken into account" here. Id. at 2126.

3. CARH and NLHA are particularly concerned about the burdens that the Proposed Rule will place on residents, owners, and managers of covered housing:

    a. **Absent well-explained reasons to do so, HUD should not alter its mixed family rules that are familiar to and relied upon by owners, managers and residents alike.** As noted above, the current rules concerning mixed families has been in place for more than 20 years. According to HUD's own estimate, more than 25,000 families – including almost 56,000 children who are US citizens or lawful residents – have relied on this rule for their basic housing needs. Similarly, thousands of housing providers and managers have learned how to comply with the existing rule in the two decades since it was adopted. All of these stakeholders have come to rely on a well-settled and predictable policy with respect to housing mixed families. Rules that are well-understood and reliably applied should not be overturned for transient reasons. So far, the sole grounds advanced by HUD for the Proposed Rule – compliance with executive orders and regulatory initiatives that are not related to changes in the underlying statute – do not support the new interpretation proposed by HUD. HUD needs to carefully study the impact that the Proposed Rule has on residents, owners, and managers, and explain, in light of those impacts, why HUD's new interpretation is justified.

    b. **The Commenters are concerned that the Proposed Rule will turn housing providers and managers into agents of the US Government's immigration**

enforcement efforts and require them to accept additional costs and burdens that they did not bargain for. Housing providers and managers entered into Section 8 Housing Assistance Payments ("HAP) contracts and regulatory agreements with HUD that defined their duties and obligations under the respective programs applicable to their properties. For the last 20 years, HUD's mixed family rule has explained the responsibilities of housing providers and managers, including their duties to verify the eligibility status of those families. Under the Proposed Rule, owners and managers will – without additional compensation or legal protections – essentially become agents of the Federal government, carrying out its new immigration policies that reflect the current administration's immigration policies, rather than changes in the underlying statutes. Specifically, the Proposed Rule would require housing providers and managers to assume the following duties without additional compensation:

i. HUD's Proposed Rule will impose additional legal costs – including eviction costs – on housing providers and managers. Inevitably, the Proposed Rule will require eviction of large numbers of current eligible families, including almost 56,000 children. With few exceptions, evictions are not easy or cost-free. Especially where current mixed families are threatened with eviction solely because of a change in HUD policies, those eviction proceedings impose direct legal and administrative costs on housing providers and managers.

ii. Housing providers and managers will be responsible for additional immigration verification tasks. Housing providers and managers are generally familiar with verifying citizenship information but if the Proposed Rule is implemented, they will have to perform additional verification confirmation activities.

iii. The Proposed Rule will impose additional uncompensated costs on housing providers and managers. Replacing existing mixed families is not cost-free. On the contrary, housing providers will face additional costs if forced to remove existing mixed families. Among other things, when units are vacated, providers must spend money to update and renovate existing spaces, including new painting, carpets and other amenities. Such costs are admittedly part of the cost of running a multifamily housing business, but the Proposed Rule will both increase those costs and accelerated the rate those costs are incurred. HUD should not adopt a revise mixed family rule without establishing a mechanism for compensating housing providers and managers for the costs that the Proposed Rule will force them to bear.

c. **Mixed families have powerful incentives to avoid lease violations, including rent defaults, because they do not want to risk exposure to civil litigation**

and eviction proceedings that may lead to immigration enforcement. Mixed families are reliable residents who pay their rent on time. New York Times, "*Landlords Oppose Trump Plan To Evict Undocumented Immigrants*," available at https://www.nytimes.com/2019/06/17/us/politics/public-housing-immigrants.html?searchResultPosition=1 (June 17, 2019). While there may be multiple reasons for this phenomenon, most commentators concur that mixed families have an incentive to be "model" residents – they seek to avoid lease violations, including rent delinquencies, to minimize the possibility of legal processes that may expose them to immigration enforcement. While housing providers and managers will comply with whatever legitimate regulations apply to their obligations, it is clearly in their interest to rent units to families who have a strong interest in complying with their lease obligations, including their rental payment obligations. Before finalizing changes to its mixed family rule, HUD needs to address how evicting mixed families that now comply with their lease obligations would negatively affect property management for covered housing.

d. **The Proposed Rule will frustrate the goal of maximizing participation in the Section 8 voucher program**. The Proposed Rule will impose additional burdens on Section 8 owners, including owners participating in the Section 8 voucher program. HUD should be encouraging owners to participate in that program. The Proposed Rule will do the opposite – it will give already skeptical owners additional reasons to avoid the Section 8 voucher program. The Proposed Rule will frustrate HUD's goal of increasing participation in the Section 8 voucher program.

The Proposed Rule addresses important questions, but it adopts harsh alternatives to a system that has served residents, housing providers and managers well for more than 20 years. It is particularly distressing that HUD has proposed an approach that has its most severe impact on children that HUD itself acknowledges are eligible for housing assistance. Unless HUD can provide a "reasoned explanation" that assesses the human and financial cost of its proposal, explains in more detail the reasons for changing its long-standing interpretation of Section 214, addresses the legitimate concerns of housing providers and managers about the new burdens that the Proposed Rule would place on them, and candidly evaluates less drastic alternatives, HUD should not proceed to finalize the Proposed Rule.

Very truly yours,

Harry J. Kelly
Partner

HJK