July 2, 2019

U.S. Department of Housing and Urban Development
Via electronic submission

RE: Housing and Community Development Act of 1980: Verification of Eligible Status
Docket No. FR-6124-P-01

The City of New York ("the City") submits this comment in response to HUD Docket No. FR-6124-P-01 ("Proposed Rule"). The New York City Housing Authority (NYCHA), and the City's Department of Housing Preservation and Development (HPD), Department of Health and Mental Hygiene (DOHMH), Department of Social Services (DSS), and Mayor's Office of Immigrant Affairs (MOIA) contributed to this comment.

Introduction

The Proposed Rule published by the U.S. Department of Housing and Urban Development (HUD) changes, without a legitimate basis, regulations regarding the provision of housing assistance to United States citizens and certain categories of eligible noncitizens. Specifically, under the Proposed Rule, prorated assistance to mixed families – those containing one or more household member without eligible immigration status – would no longer be available indefinitely. Families applying to or currently in covered housing programs, including Public Housing and Section 8, would be required to document and verify the immigration status of every household member. Subsequent to that verification, households containing family members without eligible status would be required to move out, or the entire household's assistance would be terminated, with limited exceptions.

Fundamentally, the Proposed Rule would eliminate the ability of housing agencies to serve families with mixed immigration status under certain federal housing programs, denying eligible U.S. citizens and eligible non-citizens their right to access affordable and public housing resources. This is in direct conflict with HUD's mission of creating "strong, sustainable, inclusive communities and quality affordable homes for all."[1]

The City is home to the largest public housing agency, NYCHA, and the largest municipal housing agency, HPD, in the country. The Proposed Rule would impact major programs administered by these agencies, including public housing, and Section 8 tenant and

[1] https://www.hud.gov/about/mission

project based vouchers. The Proposed Rule would also impact additional programs administered by the state housing agency with developments located in the five boroughs, including Section 8 Project Based Rental Assistance.

The City finds the Proposed Rule particularly troubling in light of its disproportionate impact on our city and state. While the proposed changes would undoubtedly have detrimental impacts on thousands of families across the country, there would be a significantly disproportionate negative impact on the City. In the City alone, The Proposed Rule would subject approximately 2,800 mixed-immigration status households in the City's Public Housing and Section 8 programs to eviction and potential homelessness. These families include 11,400 persons, including those with elderly and disabled family members and 4,900 children.[2] Notably, many of these family members are U.S. citizens or have eligible immigration status, and are entitled to housing assistance.

Furthermore, the Proposed Rule is unlawful because it violates the Administrative Procedure Act (the "APA"), and other affirmative obligations of the rulemaking process, in several respects. First, the Proposed Rule violates the APA because it conflicts with the Congress's intent when it passed and expounded upon the Housing and Community Development Act of 1980 ("the Act") over three decades ago and is, therefore, not in accordance with law. Second, the Proposed Rule violates the APA because it is arbitrary and capricious, as it is not supported by—and runs counter to—any evidence or reasoned decision-making. In fact, the Proposed Rule would exacerbate rather than alleviate the Nation's affordable housing shortage and the associated homelessness problems, create an undue burden on states and localities to address problems created by the Proposed Rule, and burden private landlords with new unfunded mandates to enforce immigration rules that are not in their purview. Finally, HUD failed to adequately consider the economic impact the Proposed Rule would have on States and local governments, as well as on the well-being of families, as it is required to do under separate statutory and executive obligations.

Ultimately, the Proposed Rule is nothing more than a policy to rip families apart, as it explicitly rescinds a regulation that was promulgated to preserve family unity. It unfairly singles out a relatively small population of families receiving public and affordable housing benefits – mixed families – while failing to meaningfully alleviate the massive waiting lists for these programs or to improve the conditions of our country's public and affordable housing stock.[3] As a result, families will be forced to decide between losing their homes entirely and forcing family members to move out. Particularly cruel is the impact the Proposed Rule will have on U.S. citizen children. The Proposed Rule falsely positions noncitizens against U.S. citizens when in actuality the rule would displace thousands of U.S. citizens – particularly children – from their homes. For all of these reasons, the Proposed Rule should not be adopted.

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[2] This population does not include NYC households in impacted housing programs administered by the New York State housing agency.

[3] Regulatory Impact Analysis, Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980 Proposed Rule, Docket No: FR-6124-P-01 (April 15, 2019), at 3.

Overview and Proposed Rule Changes

Under the Act, Congress requires proration of the financial assistance offered to a family if the "eligibility . . . of at least one member of a family has been affirmatively established . . . and the ineligibility of one or more family members has not been affirmatively established."[4]

Under HUD's current regulations, families made up of one or more individuals with eligible immigration status and one or more individuals without eligible immigration status are treated as "mixed families."[5] Pursuant to the Act, rent for mixed families is prorated because ineligible individuals may not receive a federal housing subsidy.

In the Proposed Rule, HUD contends that the proration described in the Act was meant to be temporary – while the immigration status verification process occurs – rather than indefinite, as in current regulations.[6] HUD explains that "prorated assistance should be rarely applicable and then of short duration" in the digital age, when the SAVE system provides results so quickly.[7] And even for the short period in which prorated assistance is made available, the Proposed Rule further limits proration to families in which the eligible status of the head of household or spouse (holder of the lease) has already been verified and the public housing agency (PHA) is awaiting verification of other family members.

HUD asserts that because the 1988 amendments to the Act provided specific methods of "preservation assistance" to ineligible and mixed families who lived in public housing at the time the law changed – methods which currently include prorated assistance,[8] Congress did not intend to make "prorated assistance" available to families whose tenancies began after the 1988 amendments to the Act.[9]

The Proposed Rule Is Unlawful

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions that are, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] In addition, Executive Order 13132, the Treasury General Appropriations Act, 1999, Public Law 105-277, and Executive Order 12866 impose affirmative obligations on agencies before promulgating regulations that have substantial direct

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[4] 42 USC § 1486a(b)(2)
[5] 24 CFR § 5.506(b)(2)
[6] HUD believes that the Act prohibits housing assistance "to, or on behalf of, an individual if his or her eligible immigration status has not been verified, except for such time that it takes to verify eligible status . . . .HUD believes that an individual without eligible status living in a mixed household receiving long term prorated assistance is benefiting from HUD financial assistance in a way that is prohibited by [the Act]." Proposed Rule, p. 20591
[7] Proposed Rule, 20591
[8] 24 CFR 5.516(a)(iii)
[9] 42 U.S.C. § 1486a(c); though the statute cites February 5, 1988 as the applicable date, the Proposed Rule argues that the correct date is June 19, 1995
[10] 5 U.S.C. § 706(2)(A); *see also Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983).

effects on state and local governments or on family well-being, respectively. As explained below, the Proposed Rule should not be finalized because it is: (1) not in accordance with governing law; (2) arbitrary and capricious; and (3) does not comply with Executive Order 13132, the Treasury General Appropriations Act, 1999, Public Law 105-277, and Executive Order 12866.

I. THE PROPOSED RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT IS NOT IN ACCORDANCE WITH GOVERNING LAW.

An agency "does not have the power to adopt a policy that directly conflicts with its governing statute."[11] Thus, agency action is "not in accordance with law" where it "ignores the plain language of the statute," renders statutory language "superfluous," or "frustrate[s] the policy Congress sought to implement" in the statute.[12]

The Housing and Community Development Act of 1980

Congress included restrictions on assistance to certain categories of ineligible noncitizens in the original Act in 1980, expanding them over the next several years. HUD subsequently published proposed and final rules attempting to implement the statutory restrictions regarding ineligible noncitizens, but as of 1987 those restrictions had yet to be made effective.[13] HUD's April 1, 1986 final rule was challenged in a class-action lawsuit, and HUD later issued a notice deferring implementation due to upcoming Congressional actions.[14]

In substance, that 1986 final rule was quite similar to the Proposed Rule. It required that every family member submit evidence of citizenship or eligible status and required the PHA to terminate assistance (for Section 8 families) and tenancy (for Public Housing families) for those unable to submit documentation.[15] The preamble to the rule stated: "Unassisted occupancy of Public Housing is not allowed."[16]

Crucially, in 1987 Congress explicitly stated that it did not agree with HUD's interpretation of the Act or with how HUD planned to implement the restrictions on assistance to ineligible noncitizens. A House Report regarding what would become the 1988 amendments to the Act states the following:

> 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

[11] *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990); *see also United States v. Mead*, 533 U.S. 218, 228-29 (2001) (agency action cannot be "manifestly contrary to the statute"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (courts "must reject administrative constructions which are contrary to clear congressional intent").
[12] *Pacific Northwest Generating Coop v. Department of Energy*, 580 F.3d 792, 806 (9th Cir. 2009).
[13] Aliens; Withdrawal of Restrictions on the Use of Assisted Housing, 53 Fed. Reg. 842-01 (January 13, 1988)
[14] *Id.* at 842-843; Restriction on Use of Assisted Housing, 51 Fed. Reg. 42088-02 (November 21, 1986)
[15] 51 Fed. Reg. 11198-01 (April 1, 1986)
[16] *Id.* at 11204

> 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 the Department [of Housing and Urban Development] 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.[17] (emphasis added)

Congress thus made it extremely clear that its intent in enacting the 1988 amendments was to keep families together and to make federal housing subsidies available to families as long at least one member was eligible for assistance.

In 1996, Congress made further amendments to the Act.[18] Now, assistance to a "mixed family" would be prorated based on the ratio of eligible members to noneligible members.[19] While the 1996 amendments no longer permitted subsidies for ineligible noncitizens, Congress gave no indication that it intended to change the principles of family integrity and housing stability for vulnerable populations that framed the 1988 amendments.

Retroactivity of the Proposed Rule

The Proposed Rule applies not only to applicant families, but also to families currently living in public housing or currently receiving Section 8 assistance, thus working particular hardship and disruption on families in these programs. Existing tenants who have not previously submitted documentation of eligible immigration status would be required to do so at their first regular reexamination after the effective date of the final rule.[20] With very limited exceptions, PHAs would be required to proceed to terminate families that fail to submit verified evidence of eligible status.[21] In most cases, these are families who are stably housed and paying rent on time.

In this case, not only is there no express statutory grant for retroactive rulemaking, but rather there is legislative history explicitly stating that the "rules not be applied retroactively."[22] Moreover, through the Proposed Rule, HUD is reinterpreting its own regulations which have been in place for over 25 years absent any change in the underlying statute or any change to the priorities that Congress clearly expressed when it passed the 1988 amendments.

Congress plainly did not envision the human toll of the Proposed Rule, which would be particularly acute for currently assisted, newly-ineligible families in the City. According to the

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[17] H.R. No. 100-122(I), at 49-50 (1987)
[18] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 102-208, 110 Stat. 3009 (1996)
[19] *Id.* at § 571-77
[20] Proposed Rule, 20593
[21] Proposed Rule, 20594
[22] H.R. No. 100-122(I), at 50

2017 Housing and Vacancy Survey, the overall vacancy rate in the City is only 3.6 percent and the vacancy rates for rent-stabilized or subsidized units is even lower. It is, therefore, wholly unrealistic to expect that a mixed family will be able to locate a decent, safe, and affordable unit of the proper size in the city within the 18-month limit set forth in § 5.518 and in the Act, which was never intended to apply to these families in the first place. Families currently assisted can be expected to face a Hobson's choice of putting out household members who can no longer remain under the new rules, many of whom may be frail and elderly, or face the daunting prospect of locating other options. The unfairness of the Proposed Rule for the elderly or disabled, and for U.S. citizen children who are eligible for housing assistance, cannot be underestimated.

U.S. Constitution and Non-Discrimination Laws

The City is also concerned that the Proposed Rule will require that its housing agencies engage in practices that violate nondiscrimination laws and the Fifth and Fourteenth Amendments to the U.S. Constitution. In particular, HUD itself has previously cautioned that in the case of mixed families, "benefits providers must ensure that they do not engage in practices that deter eligible family members from accessing benefits based on their national origin."[23] Yet, the Proposed Rule will force the City's housing agencies to evict many U.S. citizen children based solely on the national origins of their parents.

For these reasons, the Proposed Rule is "not in accordance with law" as the APA requires.

II. THE PROPOSED RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT IS ARBITRARY AND CAPRICIOUS.

Under the "arbitrary and capricious" standard, HUD is required to examine relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made," based upon relevant factors.[24] An agency rule is arbitrary and capricious if the agency has: relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[25] Applying these standards demonstrates that, if finalized, the Proposed Rule would violate the APA.

A. HUD Failed to Consider Important Aspects of the Problem Underlying the Proposed Rule.

HUD readily admits that, as a result of the Proposed Rule, "the fear of the family being separated would lead to prompt evacuation by most mixed-immigration status households,

[23] U.S. Dep't of Justice, U.S. Dep't of Health and Human Services, and HUD Joint letter (Aug. 5, 2016), pp. 4-5 at https://www.justice.gov/ovw/file/883641/download.
[24] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).
[25] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43-44.

whether that fear is justified."[26] Nevertheless, HUD failed to consider that the family separations resulting from the Proposed Rule would erode the stability and safety of those families at significant cost to States and local governments. While HUD has provided an estimate of the costs mixed families and the Federal government would incur,[27] it has ignored its obligation to assess the significant costs that will be imposed on states and localities.

As explained below, the family separations and evictions mandated by the Proposed Rule would likely lead to housing instability, overcrowding, relocation to substandard housing, homelessness, and resulting negative health impacts in the City for 2,800 families consisting of 11,400 persons, including elderly, individuals with disabilities and 4,900 children. To address these potentially adverse circumstances, the City, in addition to countless other cities and states, will be forced to make significant expenditures to protect the health and well-being of its residents. Without additional funding from the federal government, states and cities would be forced to cope with these issues alone. At a time when the affordable housing shortage is impacting an increasing share of the American public, the Proposed Rule would further strain resources that could be used to help meet these needs. HUD's failure to consider these significant aspects of the problem underlying the Proposed Rule violates the APA.

1. HUD Failed To Account For The Substantial Costs Associated With Evicting Families and Creating Housing Instability, Homelessness, Overcrowding, and Relocation to Substandard Housing.

Forcing housing agencies and landlords to terminate federal housing assistance to mixed families would force families to either: separate if, for instance, a parent's immigration status is disparate from other household members and the parent leaves the setting so as not to disrupt the rental assistance available; or leave the public or affordable housing unit in favor of an unstable housing alternative or a homeless shelter, which will exacerbate the affordable housing crisis in states and localities nationwide.

In the City, HPD and NYCHA collectively administer over 1,000 Section 8 Housing Choice Vouchers with prorated assistance, including over 4,100 individuals and nearly 1,800 children under the age of 18. NYCHA houses approximately 170,700 families in public housing. Of those, there are over 1,800 mixed tenancy households in NYCHA public housing with prorated assistance. These households are composed of over 7,300 residents, including over 3,100 children under the age of 18.

Removing the ability to prorate assistance long-term means that the City's housing agencies would not be able to serve the eligible members of mixed families through the Public Housing or the Section 8 program. Furthermore, these changes would leave less funding for the Section 8 program overall because prorated assistance includes a lower subsidy per household, allowing the agencies to serve more families. Without additional funding for Section 8 to cover

[26] Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980 Proposed Rule, Docket No: FR-6124-P-01 (April 15, 2019), at 7.
[27] Regulatory Impact Analysis, Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980 Proposed Rule, Docket No: FR-6124-P-01 (April 15, 2019) at pp. 13-17.

increased costs, the City would be unable to serve even more families— in addition to the mixed families targeted by the Proposed Rule. This would lead to a shrinking Section 8 program.

Because HUD's housing assistance programs serve very low-income, vulnerable New Yorkers, terminating assistance for mixed families and not being able to provide public and affordable housing to other families will leave them with few housing options in high-cost markets with low vacancy rates. As a result, current mixed-immigration status residents in project-based programs and with vouchers would face significant rent increases or face eviction.

The result would be families moving to increasingly precarious housing situations, including overcrowded homes or those with substandard living conditions, households spending much more on rent at the expense of other necessities, and homelessness. Such results will inevitably shift costs to other City systems such as shelters and crisis services. Pursuant to legal mandates, once mixed families become homeless it will place a burden on the City to provide emergency shelter.[28]

Moreover, because at least 4,900 children in in the City will be impacted by the Proposed Rule, the City's child welfare agency will undoubtedly be forced to address the repercussions of family separations and inadequate housing conditions for children, which will also financially burden the City.

2. HUD Failed To Account For The Administrative Burdens and Eviction Costs on Cities and Private Landlords [29]

In addition to the human costs, the administrative burden of eliminating all the mixed families from City programs would be enormous, for both subsidy terminations and public housing evictions, and will likely result in expensive and lengthy litigation for the City.

Beyond small housing authorities, the Proposed Rule would also impose significant administrative burdens and costs on small property owners and private landlords with project based or tenant based assistance. Specifically, they would potentially be tasked with verifying the eligibility status of mixed families, and could face steep costs from uncollected rents and evictions. The eviction process is time consuming and costly for landlords, and the possibility of being required to bear this cost would have a chilling effect on private owner's and investor's willingness to participate in federally funded housing programs. This effect would have a far greater reach than just mixed families.

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[28] *See Callahan v. Carey,* Index No. 42582/79, N.Y. Sup. Ct., August 26, 1981; *Eldredge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (N.Y. Sup. Ct. 1983); *Boston v City of New York*, Index No. 402295/08 (Sup. Cy. N.Y. County, Dec 12, 2008); *McCain v. Koch*, 70 N.Y.2d 109 (N.Y. 1987)).

[29] Although HUD generally asserts that it "would bear costs for those households that require more rigorous enforcement of the proposed regulation through a formal eviction," *see* Regulatory Impact Statement at pp. 14-15, the City and private landlords would still be forced to administer the termination process. Furthermore, HUD provides no explanation regarding when, how, and to what extent the agency will pay formal eviction costs.

Affordable housing in America uses a proven, successful public-private partnership model. The strength of this system depends on the ability of private property owners, managers, and investors to trust the federal government to continue to fund housing programs and to provide consistent regulatory guidance related to tenancy. The Proposed Rule threatens to force evictions or dramatic rent increases on thousands of households, undercutting the trust necessary between private stakeholders and the government.

3. HUD Failed To Account For The Negative Impacts on Public Health.

Because the Proposed Rule would remove critical housing stability and wreak unnecessary havoc on families, mixed families will inevitably face negative health impacts. In fact, the health impacts of unstable and substandard housing are profound and well-documented, and the HUD Secretary has publicly acknowledged the same.[30]

Specifically, unequal access to stable, affordable and safe housing contributes to health disparities that persist in many low-income and immigrant communities.[31] Displacement often forces families to move out of their communities where their social support networks and medical providers are, which can negatively impact health outcomes among foreign-born communities, especially recent immigrants who struggle to identify and access resources and supportive services to address their needs. Adults living in unstable housing have higher rates of depression, anxiety and cardiovascular disease, and children are more likely to have behavioral problems compared with those with stable housing.[32] The homeless and unstably housed population has higher risk of mental and behavioral health issues, and complications from managing chronic diseases conditions such as diabetes and hypertension.[33]

Further, homelessness contributes to poor growth and development in children, and higher rates of costly hospitalization, emergency room utilization and institutionalization. In addition, unaffordable housing cost reduces financial resources available to cover other basic health necessities such as food and health care, increasing risk for chronic disease and related health complications.[34] High housing costs also force many to work long hours or multiple jobs,

[30] 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).
[31] Shaw, M. Housing and public health. Annu. Rev. Public Health, 2004;25:397-418.
[32] Gaumer E, Jacobawitz A, Brooks-Gunn J. (2016). Panel Paper: The Impact of Affordable Housing on Well-being of Low-Income Households: Early Findings from the NYC Housing and Neighborhood Study. 38th Annual Fall Research Conference: The Role of Research in Making Government More Effective.
[33] Alexandar B., Apgar W., Baker K., et al. Harvard University Joint Center for Housing Studies, The State of the Nation's Housing (2014).
[34] Maqbool N., Viveiros J., & Ault M. Center for Housing Policy, The Impacts of Affordable Housing on Health: A research summary (2015).

which increases stress, harms mental health, and reduces time for healthy activities such as exercise and physical activity.[35]

Finally, family separations resulting from the Proposed Rule could lead to significant mental health illnesses,[36] impaired social development, and increased stress for children.[37]

It is well-documented that immigrants are more likely to be uninsured than the U.S.-born population.[38] In the face of negative health impacts on the 11,400 persons who could face housing instability, substandard housing conditions, or homelessness, the City would incur uncompensated health care costs resulting from increased emergency room visits and the provision of other health care.

B. HUD's Explanations for the Proposed Rule Are Not Rational and Run Counter to Significant Evidence.

1. HUD's Explanation Is Not Rational.

The crux of the irrationality of the Proposed Rule lies in the composition of the impacted families. Nationwide, the Proposed Rule will impact 108,000 people, and about 70% of those who will be negatively impacted are U.S. citizens or legal residents who would still be eligible for public housing or federal subsidy irrespective of the Proposed Rule.[39] Even worse, three-quarters of those eligible U.S. citizens and legal residents— 55,000— are children.[40] Thus, although the Proposed Rule purportedly aims to ensure only eligible immigrants are residing in public and affordable housing, it would inevitably harm primarily and disproportionately adults and children who are U.S. citizens and legal residents eligible for such housing.

Moreover, HUD's contention that mixed families have been receiving housing benefits to which they are not entitled under the Act is not rational and defies all logic. In households with prorated assistance, HUD is not subsidizing the rent for every member of that household because not all household members were able to prove eligibility for the program or chose not to declare their eligibility. When a household's rental assistance is prorated, that household is likely to have

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[35] Keene DE, Geronimus AT. Weathering HOPE VI: The importance of evaluating the population health impact of public housing demolition and displacement. Journal of Urban Health, 2011;88(3):417-435.
[36] "A Population-Based Study of the Risk of Schizophrenia and Bipolar Disorder Associated with Parent–Child Separation During Development." Paksarian, D.; et al. *Psychological Medicine*, 2015. DOI: 10.1017/S0033291715000781; "Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice." Miller, Alexander; Hess, Julia Meredith; Bybee, Deborah; Goodkind, Jessica R. *American Journal of Orthopsychiatry*, 2018. DOI: 10.1037/ort0000272.
[37] Pesonen, A., & Räikkönen, K. (2011;2012;). *The lifespan consequences of early life stress. Physiology & Behavior*, 106(5), 722-727. doi:10.1016/j.physbeh.2011.10.030.
[38] Ku L, Matani S. Left out: immigrants' access to health care and insurance, Health Affairs 2001;20(1);247-256.
[39] Regulatory Impact Analysis, Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980 Proposed Rule, Docket No: FR-6124-P-01 (April 15, 2019) at p. 6.
[40] *See id.*

a higher rent burden than households with a full voucher or full public housing assistance. The income for the unassisted members of the household counts toward household income, but their portion of the rent is unpaid by HUD. Consequently, HUD ultimately provides mixed family households with a lower subsidy than other households, because they are not receiving housing benefits for ineligible household members.

HUD's illogical rationale for the Proposed Rule was recently highlighted during a Congressional Hearing. When confronted with the fact that housing subsidies provided to mixed families are prorated to ensure that ineligible family members do not receive housing benefits, the HUD Secretary responded only with the question: "how do you prorate a roof over someone's head?"[41] This response illustrates a fundamental misunderstanding of the Act and Congress's legislative intent, and the lack of a legitimate justification for the Proposed Rule. Indeed, as previously explained, Congress stated that the 1988 amendments to the Act were intended to clarify its intention that "***families in which at least one person is eligible are not disqualified***. [42] A decade later, Congress chose not to disqualify mixed families and, instead, prorated assistance to those households based on the ratio of eligible members to noneligible members.[43] *See, supra* at pp. 4-5.

2. HUD's Explanation Runs Counter to the Evidence.

HUD alleges that the agency is "putting America's most vulnerable first," by prioritizing the "hundreds of thousands of citizens [who have been] waiting for many years on wait lists to get housing assistance."[44] As an initial matter, HUD's explanation is belied by the fact that for the past two fiscal years, the agency has sought to eliminate public housing entirely by requesting zero dollars for the public housing budget.[45] In fact, HUD released its budget request for FY 2020 in March 2019 requesting zero dollars for public housing— a mere two months before HUD published the Proposed Rule. Thus, the assertion that HUD aims to provide housing to "hundreds of thousands of citizens" defies all logic and is plainly false, because it

[41] U.S. House Comm. on Financial Srvcs., Full Comm. Hearing, *Housing in America- Oversight of the U.S. Dep't. of Housing and Urban Development*, Oral Testimony of the Honorable Dr. Benjamin S. Carson (May, 21, 2019).
[42] H.R. No. 100-122(I), at 49-50 (1987) (emphasis added).
[43] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 102-208, 110 Stat. 3009 (1996)
[44] The New York Times, *HUD Says Its Proposed Limit on Public Housing Aid Could Displace 55,000 Children* (May 10, 2019) at https://www.nytimes.com/2019/05/10/us/politics/hud-public-housing-immigrants.html; *see also* 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).
[45] U.S. Dep't. of Housing and Urban Development *Fiscal Year 2020 Budget in Brief*, p. 9 at https://www.hud.gov/sites/dfiles/CFO/documents/HUD2020BudgetinBrief03072019Final.pdf; FY 2020 Congressional Justifications, Public Housing Capital Fund, at https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-PHCapitalFund.pdf; FY 2019 Congressional Justifications, Public Housing Capital Fund at https://www.hud.gov/sites/dfiles/CFO/documents/9%20-%20FY19CJ%20-%20PIH%20-%20Public%20Housing%20Capital%20Fund%20-%20Updated.pdf

seeks no funding to provide that housing, and specifically asked Congress to cease funding for public housing entirely.

Arguably, HUD may believe it does not need funding to pay for additional public housing for "hundreds of thousands of citizens" because the agency purportedly aims to evict all mixed families from public housing and provide those housing units to the U.S. citizens on waiting lists. Indeed, during a Congressional Hearing, the HUD Secretary explained that the Proposed Rule will reduce the size of waitlists by opening up apartments that are currently occupied by mixed families.[46]

In reality, however, the Proposed Rule will not increase public housing or rental assistance availability, because even if all mixed families were evicted from public and affordable housing there would still be far more than "hundreds of thousands of citizens" on the waiting list for public and affordable housing[47] In fact, as of 2012, there were approximately 4.4M families on waiting lists for such housing,[48] and HUD does not contend that the waiting lists for public housing nationwide are decreasing. Furthermore, in the City alone, households with prorated assistance represent less than one percent of City-administered Section 8 voucher programs and public housing, and the number of households on the Section 8 and Public Housing waitlists far exceed the number of units that may be vacated under the Proposed Rule. Specifically, the NYCHA Section 8 waitlist consists of approximately 138,000 applicant families, and the NYCHA public housing waitlist consists of 175,000 applicant families in various stages of the application process.

Thus, contrary to HUD's explanations, the evidence demonstrates that removing mixed families from these programs would not make a dent in the current need for public and affordable housing. In the end, HUD's own rationale for its Proposed Rule appears to be nothing more than pretext for further marginalizing immigrant families.

III. HUD HAS NOT COMPLIED WITH EXECUTIVE ORDER 13132, THE TREASURY GENERAL APPROPRIATIONS ACT, OR EXECUTIVE ORDER 12866.

Executive Order 13132

As explained above, HUD's failure to consider all aspects of the problem – specifically, the significant costs that the Proposed Rule would shift to state and local governments – violates the APA. *See supra* pp. 7-10. The requirement that HUD consider the costs to state and local

[46] U.S. Dep't. of Housing and Urban Development *Fiscal Year 2020 Budget in Brief*, p. 9 at https://www.hud.gov/sites/dfiles/CFO/documents/HUD2020BudgetinBrief03072019Final.pdf.
[47] Regulatory Impact Analysis, Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980 Proposed Rule, Docket No: FR-6124-P-01 (April 15, 2019), at 3.
[48] *See* Public and Affordable Housing Research Corporation (PAHRC) report, *Housing Agency Waiting Lists and the Demand for Housing Assistance* at https://nlihc.org/resource/millions-families-voucher-and-public-housing-waiting-lists (noting there are approximately 1.6 million families on Public Housing waiting lists and more than 2.8 million families on Housing Choice Voucher waiting lists).

governments associated with the Proposed Rule implicates not only the APA but also Section 6 of Executive Order 13132, which mandates that:

> no agency shall promulgate any regulation that imposes substantial direct compliance costs on State and local governments, . . . unless (1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (a) consulted with State and local officials early in the process of developing the proposed regulation; (b) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget (OMB) a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and (c) makes available to the [OMB] Director any written communications submitted to the agency by State and local officials.

Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999)

HUD notes this requirement, stating in conclusory fashion and without data, analysis or any other evidentiary support, that the Proposed Rule "does not have federalism implication and does not impose substantial direct compliance costs on State and local governments."[49] HUD is incorrect.

As explained above, the Proposed Rule would subject mixed families to housing instability, homelessness, and resulting negative health impacts— 108,000 persons nationwide and approximately 11,400 persons in City administered public and affordable housing program, alone. *See, supra,* at pp.7-10. This would force local and state governments to make significant expenditures to protect the health and well-being of their residents. *See id.* Accordingly, a federalism summary impact statement should be provided.

The Treasury General Appropriations Act of 1999

HUD does not address the affirmative obligations imposed on it by the Treasury General Appropriations Act of 1999. That Act provides that:

> before implementing policies and regulations that may affect family well-being, an agency shall assess whether the action — (1) strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions, or substitutes governmental activity for the function; (4) increases or decreases disposable income or poverty of families and children; (5) is warranted because

[49] Proposed Rule at p. 20592

> the proposed benefits justify the financial impact on the family; (6) may be carried out by State or local government or by the family; and (7) establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

Pub. L. No. 105–277, §654(c)(1-7), 112 Stat. 2681- 528-30 (1998).

Because HUD has not assessed the impact of the Proposed Rule on family well-being in any fashion, the Proposed Rule should not be finalized.

Executive Order 12866

Finally, HUD's assertion that the Proposed Rule is compliant with the Regulatory Flexibility Act is incorrect and incomplete. Contrary to HUD's analysis, implementation of the Proposed Rule would impose an administrative and financial burden on housing agencies. In addition, increased operational capacity would be needed for Public Housing Agencies to comply with new requirements when processing Public Housing and Section 8 annual re-certifications, including the necessary staff and resources to:

- *Identify all ineligible households and request documentation*
- *Verify this documentation through SAVE (A# is a prerequisite for this), it sometimes takes weeks to months to get a response*
- *Provide an alternate process for those who do not have an A# and address financial hardships for tenants who may need to pay additional fees to get documentation from USCIS because their information is incomplete*
- *Hold conferences for those who are not able to meet requirements*
- *Complete due process of requesting and responding to complete and incomplete documentation, which is burdensome, as is assisting families through the process of termination or family separation*
- *Support appeals related expenses*
- *Cover legal expenses and hardships stemming from eviction proceedings*

For all of the reasons above, the City urges HUD not to finalize the Proposed Rule, and avoid the damaging impacts on vulnerable families and substantial fiscal impacts on cities and states across the country.