

OUTLINE OF SUBSTANTIVE COMMENTS

Housing and Community Development Act of 1980: Verification of Eligible Status
Docket No. FR-6124-P-01
Proposed Rule
Comments Due: July 9, 2019

I. Legal Arguments

- HUD fails to articulate valid legal justifications for the significant changes in policy and interpretation contained in the Proposed Rule. Instead, HUD asserts that such proposals are grounded on what HUD “believes” or because HUD “no longer agrees” with certain long-held policies, or else HUD asserts without evidence that its proposals are “more in keeping with” or “better reflects” the provisions of Section 214 of the Housing and Community Development Act (the “HCD Act”). Without a valid legal justification, HUD’s assertions are merely unsubstantiated claims and do not carry the force of law.
- HUD’s justifications for the Proposed Rule are based on Executive Order 13828, “Reducing Poverty in America by Promoting Opportunity and Economic Mobility” and a Presidential Memorandum of March 6, 2017, “Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits...” both of which provide that they “shall be implemented consistent with applicable law...” Given that Section 214 of the HCD Act directly conflicts with numerous provisions of the Proposed Rule, HUD lacks the legal grounds to implement the proposed changes.
- The requirement under the Proposed Rule that all household members declare and verify status regardless of whether financial assistance is actually or will be received ignores current law. Under the HCD Act, declaration of immigration status and subsequent verification is only required for individuals who either receive or are applying for financial assistance. *See* 42 USC § 1436a(d). Therefore, persons who do not contend their immigration status and who do not receive financial assistance do not have a statutory obligation to provide declarations or submit documentation for verification.
- The requirement under the Proposed Rule that persons aged 62 years and older to submit at least one document for evaluation via SAVE exceeds statutory obligations. The HCD Act provides that persons aged 62 years and older who receive financial assistance are subject to a different verification process than younger persons. Specifically, persons aged 62+ need only verify their eligible status by submitting certain documentation to HUD for HUD review only. *See* 42 USC § 1436a(d)(1)(A).

- In cases where financial assistance to an individual is to be terminated (following completion of the applicable hearing process), Section 214 authorizes continued assistance to avoid “division of the family” provided the head of household or spouse has eligible immigration status. *See* 42 USC § 1436a(c)(1)(A). Under current law, “family” means the head of household, any spouse, any parents of the household head or the spouse, and also any children of the household head or spouse. The Proposed Rule, which would eliminate all mixed families and which would otherwise break up families unless that family was receiving assistance under Section 214 on June 19, 1995, therefore directly contradicts existing law. Restricting leaseholder status to only verified individuals who may serve as the head of household or spouse via the Proposed Rule also directly conflicts with existing law that has no such restriction and specifically recognizes that a child of the head of household or spouse constitutes a family unit that is eligible for financial assistance.
- The Proposed Rule cannot be applied retroactively. There is a long-standing presumption against rules with retroactive effect, particularly with regard to legislative rules that implement statutory provisions. The underlying statute does not provide for retroactive application and when HUD implemented the original regulations in 1995, it did so prospectively. Therefore, the Proposed Rule provisions should be implemented prospectively, if at all. Furthermore, it took HUD 7 years to implement the original Section 214 regulations. The preamble to the final rule states that HUD determined Section 214 was “too complex ... to be self-implementing as of the date of enactment of the 1987 Act.” After 32 years of only prospective application of Section 214, it is incongruous for HUD to now insist on retroactive application via the Proposed Rule.
- The use of immigration records under the Proposed Rule arguably violates privacy interests. Applicants and current program participants consent to the use of their immigration status information for eligibility verification purposes. Under 42 U.S.C. § 1436a(d)(3)(B), when such immigration status information is provided, the individual’s privacy shall be protected “to the maximum degree possible.” The Proposed Rule, however, contemplates the further use of such immigration information beyond eligibility verification. The preamble to the Proposed Rule explains that limiting tenancy to only those with verified eligible immigration status “would better facilitate locating such person and bringing any necessary administrative or legal actions.” Further, the proposed revisions to Section 5.508(d) specifically disclaims any responsibility “for the further use or transmission of the evidence” of eligible immigration status. This conflicts with the underlying statute’s requirement that the individual’s privacy be protected, potentially exposing PHAs and private landlords to liability for violating those privacy rights.

II. Public Policy Arguments

- Section 214 prohibits HUD from making “financial assistance” (not just “assistance” as HUD claims) available to ineligible non-citizens, and affirmatively provides for proration of financial assistance in mixed families. *See* 42 USC §§ 1436a(b) & (i)(1). Given that during the statute’s 39 years of existence it has been amended 8 times (most recently in 2016) and protections for mixed families persist, Congress clearly intends for mixed families to continue to receive prorated assistance.

- The Proposed Rule directly conflicts with HUD’s mission to provide decent, safe, and affordable housing to those communities in most need of such housing by imposing significant administrative and financial burdens on PHAs, thereby further taxing their already limited administrative and financial resources.

HUD claims, without proof, that the Proposed Rule would have a “minimal impact” on small owners, mortgagees, and PHAs and will not “impose significant additional costs on responsible entities. To the contrary, the Proposed Rule will have significant impact on PHAs. This is particularly true for the first year of implementation, when PHAs will need to develop policies and procedures for the new verification process as well as the related exemption/waiver processes. Additionally, as the Proposed Rule requires that all members of current households living in Section 214 housing who have not previously provided immigration status information do so at the first regular reexamination after the rule goes into effect, the first year of implementation is expected to have the most terminations and evictions based on ineligible immigration status. Increased terminations and evictions, in turn, will further burden PHAs in the form of additional administrative work in processing such terminations, legal fees and court costs associated with the eviction process, and the additional administrative and financial burden of readying the now vacant units for re-letting.

HUD correctly concludes that the Proposed Rule is a “significant regulatory action”, however it inexplicably claims it is not economically significant. The projected impact on communities should not be underestimated, including the cost of increasing numbers of homeless individuals who will stress communities. HUD’s own economic impact analysis, which tends to understate the costs and impacts, admits that costs associated with homelessness range from \$20,000 to \$50,000 per person per year. HUD also estimates that elimination of mixed families will cost the Federal government an additional \$179-210 million per year, which would require a significant increase in HUD’s budget by \$193-227 million to provide subsidies to the replacement households. HUD also admits that its ability to obtain higher budget amounts for these needs is likely limited, leading to decreases in the number of households able to be served, or an overall decrease in the quality of housing across the board. Finally, HUD also acknowledges that certain states with higher concentrations of non-citizens (New York, California and Texas) are likely to bear the brunt of the costs of these policies, and HUD has made no allowances for the disproportionate regional impacts.