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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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July 9, 2019

Office of General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh St. SW
Room 10276
Washington DC, 20410-0001

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Docket No. FR-6124-P-01

Dear Counsel:

The Immigration Reform Law Institute ("IRLI") submits the following public comments in response to the Department's notice of proposed rulemaking ("NPRM") published in the Federal Register: *Housing and Community Development Act of 1980: Verification of Eligible Status*, 84 Fed. Reg. 20589 (May 10, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI strongly supports the reforms proposed in the NPRM to the Code of Federal Regulations Vol. 5, Part 5, Subpart E (Restrictions on Assistance to Noncitizens). President Trump has directed federal agencies to "adopt policies to ensure that only eligible persons receive benefits and enforce all relevant laws providing that aliens who are not otherwise qualified and eligible may not receive benefits." NPRM, 84 Fed. Reg. at 20590, citing Executive Order 13828, *Reducing Poverty in America by Promoting Opportunity and Economic Mobility* (Apr. 10, 2019).

The NPRM states that HUD has completed a "comprehensive regulatory review" of the effectiveness of its regulations and their "conformity … with statutory mandates" that will "bring HUD regulations in greater statutory conformity with … Section 214 and make the administrative process for verification uniform." 84 Fed. Reg. at 20590. The NPRM's Regulatory Impact Analysis ("RIA") further explains that "the proposed rule is intended to bring HUD's regulations into greater alignment with the wording and purpose of Section 214." RIA at 1.

Verification of eligibility of applicants and tenants for public and assisted housing benefits is mandated by a long-established statutory scheme.

"Restrictions on providing housing assistance to noncitizens with ineligible immigration status have been embodied in statute since 1980." HUD, *Restrictions on assistance to noncitizens*, 60 Fed. Reg. 14816, 14817 (Mar. 20, 1995). For more than thirty years, the Housing and Community Development Act of 1980 ("Section 214") has barred the Secretary of HUD from providing financial assistance under a covered program to any non-citizen until documentation of eligible immigration status has been both "presented and verified." 42 U.S.C. §§ 1436a(b)(1), (d)(2). The bar is, however, not absolute. Section 214 also provides (1) exemption from immigration status verification for persons aged 62 or older; (2) preservation assistance, on a prorated basis, to certain families already receiving assistance as of February 2, 1988, based on the percentage of [eligible family] members; and (3) temporary deferral of termination of assistance for families who were receiving assistance as of February 5, 1988 but ineligible for continued prorated assistance. The statutory objective of these three exceptions to the general ban is "to permit orderly transition of the individual and any family members involved to other affordable housing." 42 U.S.C. §§ 1436a(c)(1) and (d)(2).

In 1996, Congress imposed additional statutory restrictions on eligibility for housing assistance under the Personal Responsibility and Work Opportunity Act of 1996 ("Welfare Reform Act"). First, "public or assisted housing" was designated—with certain exceptions not relevant to Section 214 covered programs—as a "Federal public benefit." 8 U.S.C. § 1611(c)(1)(B). Second, any alien who was not a "qualified alien" (a very similar parallel classification to the list of eligible resident alien classifications under Section 214) was made ineligible for such public benefits. 8 U.S.C. § 1611(a).

Third, the Welfare Reform Act made even qualified aliens ineligible "for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry into the United States with a status within the meaning of the term 'qualified alien.'" 8 U.S.C. § 1613(a). Congress listed specific Federal means-tested public benefits that were to be excluded from the 5-year limitation. 8 U.S.C. § 1613(c). Notably, no public or assisted housing benefits were excluded.

Fourth, "notwithstanding any other provision of law," the Secretary of HUD was required to furnish the INS (now DHS) with "the name and address of, and other identifying information on, any individual who the Secretary knows is not lawfully present in the United States," at three month intervals. 42 U.S.C. § 1437y. The same reporting requirement was imposed on each public housing agency that had executed a "contract for assistance under section 6 or 8 … with respect to any individual who the public housing agency knows is not lawfully present in the United States." *Id*.

IRLI supports HUD's proposed schedule for verification and reverification of eligibility in proposed 5 C.F.R. § 5.508.

IRLI agrees with the proposed deadlines for submission of evidence of eligible status for applicants, tenants, mortgagors, new occupants, and families changing their participation in a HUD covered program in proposed 5 C.F.R. § 5.508(f), as well as the thirty-day cap on grants of extensions of time to submit such evidence in proposed 5 C.F.R. § 5.508(f). IRLI would, however, recommend that HUD clarify that the one-time evidence submission requirement for families who have continuously occupied assisted housing (*see* proposed 5 C.F.R. § 5.508(g)) does not excuse noncompliance with the various reverification deadlines in § 5.508(f).

IRLI agrees with the requirements, at proposed 5 C.F.R. §§ 5.506(b)(1), 5.512(a), and 5.520 (a), that cumulatively exclude ineligible individuals from serving as head of household (and thus as leaseholders) for Section 214 covered programs. 84 Fed. Reg. 20591. Legally, the Secretary is entirely correct that the current "do not contend" practice, which allows an individual without verified eligibility status to reside in assisted housing as part of a mixed household, impermissibly enables prorated assistance of unlimited duration. At least since 1995, HUD has acknowledged that the text of Section 214(d) provides that only adult family members may execute housing assistance documents on behalf of children (*see* 60 Fed. Reg. at 14817), a restriction that would bar the use of leases in the name of eligible children from mixed households. Interestingly, the NPRM RIA explains that the requirement that individuals who are not in eligible immigration status may not serve as the leaseholder "will have no impact because it is preempted by the more restrictive provision that a household will not receive housing assistance unless every member residing in the assisted unit is of eligible immigration status." RIA at 2.

Use of the Systematic Alien Verification for Entitlements ("SAVE") program to verify the citizenship or immigration status of all Section 214 covered program applicants and tenants is mandated by statute.

IRLI believes the proposed requirement that all recipients of assistance under a covered Section 214 program have their status verified through SAVE is not only the policy that best conforms to the language of Section 214, but is mandated by statute. 84 Fed. Reg. 20594. *See* revised 5 C.F.R. §§ 5.506(b) and 5.512, "Congress contemplated that the restrictions on housing

assistance imposed by Section 214 would apply not only to applicants, but to tenants as well." 60 Fed. Reg. at 14817.

Congress authorized a system for verification of citizenship and immigration status of individuals seeking government benefits in the Immigration Reform and Control Act of 1986 ("IRCA"). *See* USCIS, *Privacy Act of 1974: Verification Information System (VIS) System of Records Notice,* 73 Fed. Reg. 10793 (Feb. 2, 2008). Congress progressively expanded that authority in the Welfare Reform Act and Title V of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), in particular, IIRIRA § 504 (Procedures for Requiring Proof of Citizenship for Federal Public Benefits), and all of Subtitle E, §§ 571-77 (Use of Assisted Housing by Aliens Act of 1996).

USCIS implemented these mandates through the Systematic Alien Verification for Entitlements ("SAVE") program. *Id*. The SAVE program provides government agencies with citizenship and immigration status information for use in determining an individual's eligibility for government benefits. 73 Fed. Reg. at 10794. No other federal program has been designated or implemented to verify immigration status for federal, state, or local public benefit eligibility.

To access SAVE, government agencies such as HUD input biographic information into the VIS for government benefit eligibility determinations. If VIS has a record pertaining to the individual, the government agency will receive limited biographic information on the citizenship and immigration status of the individual applying for a benefit. If VIS does not have a record pertaining to the individual, VIS automatically notifies a USCIS Immigration Status Verifier, who then conducts a manual search of other DHS databases to determine whether there is any other information pertaining to that individual that would provide citizenship and immigration status. If the USCIS Verifier finds additional relevant information, citizenship and immigration status data is provided to the requesting government agency user through VIS, and the appropriate record in the USCIS database is updated. *Id*. Given the minuscule error rates and "almost instantaneous" system response to HUD verification queries, IRLI agrees that universal SAVE verification minimizes the need for pro-rated assistance.

Before an agency is granted SAVE access, it must first be cleared through an online registration process, in which agencies are required to provide the legal authorities that allow them to administer benefits and verify citizenship or immigration status for those benefits. USCIS, *Privacy Impact Assessment for the Systematic Alien Verification for Entitlements (SAVE) Program*, DHS/USCIS/PIA-006, 3 (Aug. 28, 2011). USCIS legal counsel reviews each application before it is approved. Here, the required SAVE Memorandum of Understanding between HUD and USCIS has been in place for many years. NPRM RIA at 5.

HUD has inexplicably failed to promulgate or enforce directly relevant eligibility verification mandates in the Welfare Reform Act.

Current regulations implementing restrictions on Section 214 covered programs date back to March 1996, when HUD consolidated three earlier sets of "duplicative regulations" for assistance under Sections 8, 235, and 236. 61 Fed. Reg. 13614 (Mar. 27, 1996) (creating 24 C.F.R., Part 5, Subpart E). HUD exempted that 1996 subpart from public notice and comment on the ground that "the final rule does not affect or establish policy," but "merely consolidates HUD's noncitizen requirements." *Id*. However, the 1996 NPRM also included an assurance that the Secretary would "undertake whatever regulatory action may be required in accordance with any new immigration legislation"—referring to the Welfare Reform Act, which had been introduced but was not enacted until September 1996. 61 Fed. Reg. 13614.

In fact, HUD's actions implementing the Welfare Reform Act effectively nullified that statute's most directly applicable enforcement provisions. The Clinton administration and then-HUD Secretary Andrew Cuomo were highly sympathetic to the so-called "FIX 96" campaign by open borders and alien rights advocates to interpret every provision of the Welfare Reform Act and IIRIRA so as to minimize any adverse effect on non-qualified aliens, in particular, removable applicants for admission.

In particular, HUD issued two controversial policy notices that (1) excluded public housing benefits from the list of federal means-tested public benefits and (2) restricted the duty of public housing authorities to report the presence of "any individual who the Secretary knows is not lawfully present in the United States." Despite their significant effect on Section 214 covered program eligibility, neither action was deemed rulemaking, and thus, like the 1995 regulations, neither was submitted for public notice and comment.

IRLI believes these notices were arbitrary and capricious actions without a basis in law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and remain so despite the passage of time. The Congressional Research Service reported in 2015 that although the Welfare Reform Act "included public or assisted housing in the definition of federal public benefits, HUD has issued few regulations interpreting [the Act] or its impact on alien eligibility for the housing programs administered by HUD." CSR, *Immigration: Noncitizen Eligibility for Needs-Based Housing Programs*, RL 31753, 3 (2015). The agency is fully aware of the discrepancy: "HUD has not issued recent guidance or regulations implementing the [Welfare Reform Act] provisions." HUD Office of Inspector General, *HUD Needs to Clarify Whether Illegal-Undocumented Aliens are Eligible for Assistance under the Housing Opportunities for Persons with AIDS Programs*, No. 2017-CF-0801 (2017).

The final rule should re-designate public housing benefits as federal means-tested public benefits pursuant to the Welfare Reform Act.

Under the first notice, then-Secretary Cuomo justified the exclusion of Section 214 programs from the scope of "Federal means-tested benefits." HUD, *Eligibility Restrictions on Noncitizens: Inapplicability of Welfare Reform Act Restrictions on Federal Means-Tested Public Benefits*, 64 Fed. Reg. 49994 (Aug. 16, 2000). Secretary Cuomo explained that "following a thorough review of the legislative history," the term "refers not to discretionary spending programs but only to mandatory spending programs in which eligibility … or the amount of such benefits, or both, are determined on the basis of income, resources, financial need of the … household, or family unit." 65 Fed. Reg. 49994. The notice concluded that "no HUD programs falls within the [latter] category …." *Id*.

The only explanation the Secretary provided for this conclusion was that the Department of Health and Human Services ("HHS") had issued a similar notice, *Interpretation of "Federal Means-Tested Public Benefit*," 62 Fed. Reg. 45284 (Aug. 26, 1997). The HHS notice stated that (1) the Welfare Reform Act never defined the term, and (2) an earlier version of the Welfare Reform bill had contained an effectively identical definition, but it was struck by the Senate under the Byrd Rule, 2 U.S.C. § 644(b)(1)(D). The Byrd Rule is a generic budget measure that allows an individual senator to strike, on a point of order, "extraneous" language from a budget reconciliation bill, if the provision at issue "produces changes in outlays … which are merely incidental to the non-budgetary components." 62 Fed. Reg. at 45257.

HUD's exclusion of housing benefits from the Federal means-tested public benefit exemption is not justified by the statutory text or legislative history. "The Senate's intent [in deleting the definition from a budget reconciliation bill] was to prevent the denial of services in appropriated programs such as those that provide services to victims of domestic violence and child abuse, the maternal and child health block grant, social services block grant, community health centers and migrant health centers … ." Welfare Reform Act Conference Report, 142 Cong Rec S 9387, 9400 (statements of Sens. Graham and Kennedy) (Aug. 1, 1996). As enacted, the Welfare Reform Act listed all of these appropriated programs as Federal means-tested public benefits that were to be exempt from the 5-year eligibility bar for qualified aliens. 8 U.S.C. § 1613(c). Significantly, Section 214 public and assisted housing programs are not among the exempt appropriated programs designated in either the Conference Report or the Welfare Reform Act. Under accepted canons of statutory construction, the omission of public housing benefits from the statutory enumeration of exempted benefits strongly implies that Congress intended that they be included as Federal means-tested public benefits, and thus, subject to the 5-year eligibility bar. Indeed, "national policy with respect to welfare and immigration" is explicit: "It is *a compelling government interest* to enact new rules for eligibility … in order to ensure that aliens be self-reliant

… ," and "… to remove the incentive for illegal immigration represented by the availability of public benefits." 8 U.S.C. §§ 1601(5) and 1601(6) (emphasis added).

Perhaps uniquely among statutory Federal public benefits, "public and assisted housing" benefits are both means-tested and effectively rationed. Unlike other safety net programs, such as Social Security, Food Stamps, Medicaid, or Medicare, housing assistance has never been available to all eligible applicants. Getsinger, et al., *The Housing Affordability Gap for Extremely Low-Income Renters in 2014*, 3 Urban Institute (April 2017). Only 5.2 million out of 19 million eligible households receive assistance. Center for Budget Policy Priorities, *United States Federal Rental Assistance Fact Sheet* (May 14, 2019). Nationwide, in 2014, the housing market provided only 21 adequate, affordable, and available units for every 100 extremely low income renter households, that is, households with incomes at or below 30 percent of the area median income, with federal assistance adding another 24 such units. Getsinger, at 1. Without the support of federal rental assistance, not one county in the United States has enough affordable housing for all of its extremely low income renters. *Id*.

To offer adult, non-qualified aliens housing benefits that are so rationed as to be unavailable to literally millions of extremely low income citizens arbitrarily ignores compelling government interests designated by statute in § 1601, and sacrifices the needs of citizens. Yet HUD has inexplicably continued to interpret eligibility for prorated assistance and deferred termination of mixed families as if they *were* mandatory benefits. Under the 1995 regulations, "a mixed family participating in a HUD-supervised program who meets the statutory criteria *is guaranteed* either continued assistance or deferred termination. In either case, a mixed family who is not receiving either type of relief *must be offered* prorated assistance." *Yolano-Donnelly Tenant Ass'n v. Cisneros*, 1996 U.S. Dist. LEXIS 22778, *2 (E.D. Cal. 1996) (emphasis added).

The final rule should enforce the reporting requirement on unlawfully present aliens receiving public housing benefits.

HUD's second controversial policy notice determined—without engaging in rulemaking—that only when HUD has been formally notified that a tenant is subject to a final order of removal will the requirement under 42 U.S.C. § 1437y to report the alien to DHS be triggered. HUD, *Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States*, 65 Fed. Reg. 58301 (Sep. 28, 2000). HUD did not dispute that the public and assisted housing programs provided under the Housing Act of 1937, as well as public assistance contracts executed by a public housing agency under Title I, §§ 6 or 8, of the 1937 Act, are subject to the § 1437y reporting requirement. 65 Fed. Reg. at 58302 (citing 42 U.S.C. § 1437, et seq.) But HUD held that the agency only "knows" that an alien is not lawfully present if it has made a factual or legal determination to that effect "as part of a formal determination that is subject to administrative review on an alien's claim

… " for public housing benefits. *Id*. HUD further claimed that a determination must be "supported by a determination by the Service or the Executive Office of Immigration Review, such as a Final Order of Deportation." Specifically, HUD's official position remains that a SAVE "response showing no Service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present." *Id*.

HUD's position in its 2000 notice erred as matter of law by not acknowledging that "not lawfully present" is a broader immigration status than that of an alien subject to a final determination of removability, the criterion that HUD purported to be controlling. Any alien found within the United States who has not been lawfully admitted is, by default, an "applicant for admission." 8 U.S.C. § 1225(a)(1). The closely related immigration law term "unlawfully present" defines an alien with the immigration status of "present in the United States after expiration of the period of stay authorized by the [Department of Homeland Security] or is present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii). Neither statutory classification requires the existence—much less agency notice of—a final removal order. "Applicant for admission" is a default immigration status for aliens whose lawful presence cannot be verified by SAVE. That default status cannot be arbitrarily disregarded at the discretion of HUD officials, regardless of agency intent.

Whatever technical capability the SAVE system might have lacked before 2000, successive USCIS Privacy Act notices over the past twenty years clarify that, in 2019, the current VIS is fully capable of determining the correct citizenship or immigration status of public housing applicants and tenants. USCIS, *Privacy Impact Assessment for the Systematic Alien Verification for Entitlements (SAVE) Program*, DHS/USCIS/PIA-006 (Aug. 28, 2011). For example, "the REAL ID Act of 2005, Pub. L. No.109-13, 119 Stat. requires that any state seeking to be REAL ID compliant use the SAVE Program to verify the legal presence status of non-U.S. citizens requesting driver's licenses and state-issued identification cards." *Id*. at 5. "A customer agency conducting a federal background investigation on an individual may use SAVE to verify the immigration status of that individual's family members, cohabitants, and other affiliates. For example, if a federal government customer agency selected an individual for a government position that requires a security clearance, the Office of Personnel Management (OPM) may use SAVE to verify immigration status information on that individual and any family members, cohabitants, and other affiliates as part of the security clearance process." *Id*. And the United States Armed Forces "verifies status as part of its recruitment activities. Similarly, U.S. nuclear power plants may verify immigration status for security badges." *Id*.

Accordingly, it is inexplicably arbitrary that the NPRM omits a rule that public and assisted housing applicants and occupants whose citizenship or lawful presence is not confirmed by SAVE, after opportunity for correction, are to be reported to DHS.

HUD's selective failure to bring public and assisted housing eligibility standards and procedures into full compliance with both Section 214 *and* the Welfare Reform Act raises the concern that a court might find HUD's justification for the NPRM to be pretextual.

To be clear, IRLI fully supports the policy basis for the NPRM—as far as it goes. However, given that HUD has completed a "comprehensive regulatory review" for "conformity … with statutory mandates," 84 Fed. Reg. at 20590, IRLI is concerned that the NPRM does not convincingly explain why the agency has chosen to tighten some public housing eligibility verification standards and procedures while leaving others unenforced.

HUD states that a primary financial benefit of the rule "is to target housing assistance to the eligible households as required by law …" so that the rule will "transfer subsidies from ineligible households (mixed families), which contain some ineligible individuals, to eligible households (non-mixed families) which contain no ineligible individuals." RIA at 2.

The NPRM RIA estimates the population of mixed households with at least one ineligible member at 25,000. RIA at 10. Only 6% of mixed households consist of ineligible children and eligible parents. RIA at 8. Mixed households are also heavily concentrated (72 %) in the three large states—California, Texas, and New York—that also have the highest numbers of eligible, extremely low income, all-citizen households that receive no public housing assistance due to shortages of housing inventory. *Id.*

The NPRM will neither grow nor expand the number of available public housing units, but instead will in almost all (that is, an estimated 94% of) cases displace households headed by illegal aliens, or other ineligible individuals. HUD projects the households that replace current mixed families will, on average, be poorer (lower income) and thus, receive higher per household subsidies. RIA at 3. The reasonableness of the NPRM is thus not based primarily on cost-effectiveness or savings. Given the absolute shortage of low-income housing of any kind, it is likely that ineligible family units that leave or are evicted from assisted housing programs will become homeless, either moving in with relatives or staying in public or private homeless facilities--unless they are placed in removal proceedings.

Neither Section 214 nor the Welfare Reform Act contemplates a rulemaking outcome where illegal alien adults, with or without citizen children, are in effect dumped on the streets, where their indigence will almost immediately reclassify them as removable public charges under pending regulations, *absent any effort to remove them from the United States*. Since HUD is fully aware that it is intentionally not enforcing statutes that would materially advance the compelling national interest in removing indigent unlawfully present aliens, its formal justification for the NPRM—that it is merely the fruit of a "comprehensive regulatory review"—falls flat.

IRLI is concerned that however well-intentioned the underlying policy, without a clear showing that the rulemaking will increase the likelihood of removal from the United States of the displaced ineligible aliens, HUD will be needlessly exposed to an APA challenge that could nullify or effect an extended delay in implementation of the final regulation. We note that the Supreme Court has regrettably expanded the circumstances under which rulemaking can be challenged as inexplicably "pretextual." *See Dept. of Commerce v. State of New York*, 588 U.S. ___ (2019) (remanding agency action where record evidence justified the Secretary's decision but the proffered rationale seemed pretextual).

IRLI respectfully urges HUD to reinforce its stated rationale for this NPRM by including in the final rule new regulations implementing the verification and enforcement requirements of 8 U.S.C. § 1611 and 42 U.S.C. § 1437y. This more holistic approach will make the administration of eligibility verification procedures more transparent, more uniform, more effective, and less subject to a debilitating judicial challenge.

Respectfully submitted,

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