IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPEN COMMUNITIES ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civil Action No. 17-cv-2192-BAH Chief Judge Beryl A. Howell

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Avi Zevin
(D.C. Bar No. 102031)
Richard L. Revesz
(N.Y. Bar No. 2044725)
Jack Lienke
(N.Y. Bar No. 5066386)
Institute for Policy Integrity
New York University School of Law
139 MacDougal, 3rd Floor
New York, NY 10012
T: 212-992-8932
E*:* avi.zevin@nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this brief as *amicus curiae* in support of plaintiffs Open Communities Alliance, Crystal Carter, and Tiara Moore's ("Plaintiffs") motion for a preliminary injunction requiring the United States Department of Housing and Urban Development ("HUD" or "the agency") to rescind notices stating that the agency will not enforce the Small Area Fair Market Rent Rule ("Small Area FMR Rule" or "the Rule"), 81 Fed. Reg. 80,567 (Nov. 16, 2016), and to take all other necessary steps to implement the Rule immediately.[2]

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.[3]

An area of special concern for Policy Integrity is the appropriate use of cost-benefit analysis in the promulgation of federal regulations. Policy Integrity has expertise in the proper scope and estimation of costs and benefits and the application of economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published more than fifty articles and books

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[1] This brief does not purport to represent the views of New York University School of Law, if any.

[2] Policy Integrity thanks Ben Lazarus and Alan Masinter, students in the New York University School of Law Regulatory Policy Clinic, for assistance preparing this brief.

[3] No publicly held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public. Additionally, no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.

Policy Integrity has submitted several *amicus* briefs and comment letters regarding agencies' failure to follow proper procedures and conduct appropriate cost-benefit analyses when suspending duly promulgated regulations. *See, e.g.,* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Bauer v. DeVos,* No. 17-cv-1330-RDM (D.D.C. Oct. 30, 2017); Br. for Institute for Policy Integrity as *Amicus Curiae, California v. BLM*, No. 17-cv-3804-EDL (N.D. Cal. Oct. 4, 2017); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. EPA,* No. 17-cv-817-KBJ (D.D.C. June 27, 2017).[4]

Policy Integrity's expertise in administrative law and regulatory cost-benefit analysis gives it a unique perspective from which to evaluate plaintiffs' claim that HUD's delay of compliance obligations under the Small Area FMR Rule violated the Administrative Procedure Act ("APA").

QUESTION PRESENTED

Are Plaintiffs likely to succeed on the merits of their claims that HUD's delay of compliance obligations under the Small Area FMR Rule violated the APA?

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[4] *See also* Policy Integrity Comments on Dep't of Labor's Proposed Extension of Transition Period and Delay of Applicability Dates for the Fiduciary Rule (Sept. 15, 2017), *available at* http://policyintegrity.org/documents/Labor_Fiduciary_Rule_Delay_Comments_9-15-17.pdf; Policy Integrity Comments on EPA's Proposed Postponement of Certain Compliance Dates for the Effluent Rule (July 6, 2017), *available at* http://policyintegrity.org/documents/2017-07-06_Policy_Integrity_Comments_on_the_Second_Stay_of_the_Effluent_Rule.pdf.

SUMMARY OF ARGUMENT

HUD issued the Small Area FMR Rule to give participants in the Housing Choice Voucher program access to affordable housing in a broader range of neighborhoods. 81 Fed. Reg. at 80,567. The Rule requires public housing agencies ("PHAs") in metropolitan areas meeting certain criteria to calculate the value of housing vouchers based on a fair market rent for each zip code instead of the metropolitan area as a whole. *Id.* at 80,568. By shifting to this small-area approach, PHAs will increase vouchers' purchasing power in higher-rent neighborhoods. *See id.* at 80,567-68.

Covered PHAs were originally expected to update their voucher payment standards by January 1, 2018. *Id.* at 80,569. But on August 11, 2017, HUD sent an identical letter to each PHA that was required to adopt small area fair market rents under the Rule.[5] Declaration of Sasha Samberg-Champion, ECF No. 16, Exhibit A ("Suspension Letter"). In this Suspension Letter, HUD informed the PHAs that it was suspending, until January 2020, their designations as areas subject to the Rule. *Id.* ¶ 3. By suspending the compliance obligations of every PHA that would have had to change its payment standards as a result of the Small Area FMR Rule, the Suspension Letter effectively suspended the Rule itself.

Plaintiffs subsequently sued HUD for violating the APA and now move for a preliminary injunction requiring the agency to rescind the Suspension Letter and take all other steps necessary to implement the Small Area FMR Rule immediately. This brief focuses on the likelihood that Plaintiffs will succeed on the merits of their claims. Specifically, we argue that HUD did, in fact, violate the APA by (1) failing to provide a reasoned explanation for disregarding its prior

[5] PHAs in the Dallas-Plano-Irving metropolitan area were the only PHAs covered by the Small Area FMR Rule that did not receive the Suspension Letter. But those PHAs already use small area fair market rents pursuant to an earlier litigation settlement. Mem. Law Supp. Pls. Mot. Prelim. Inj., ECF No. 15-1, at 17 ("Pls. Mem.").

assessment of the Small Area FMR Rule's economic impacts and (2) failing to provide notice and an opportunity for comment before suspending the Rule's implementation. Indeed, HUD's issuance of the Suspension Letter is part of a broad pattern of illegal regulatory delays issued by agencies across the Trump Administration over the past several months. At least three of these delays have already been vacated by courts due to procedural and analytical shortcomings similar to those raised by Plaintiffs in this case. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6-7, 14 (D.C. Cir. 2017); *Becerra v. Interior*, No. 17-cv-02376-EDL, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017); *California v. BLM*, No. 17-cv-03804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017). [6]

ARGUMENT

A. The Suspension Letter Is Arbitrary and Capricious

This court must hold unlawful and set aside any final HUD action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10, 15 (D.C. Cir. 2000). Under the arbitrary and capricious standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Additionally, when amending, suspending, or repealing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television*

[6] For a comprehensive review of regulatory delays undertaken by the Trump Administration using a variety of methods, and the legal problems with these approaches, *see* Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, HARV. L. & POLICY REV. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049004.

Stations, Inc., 556 U.S. 502, 516 (2009); *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (stating that agencies must "cogently explain" a suspension ((quoting *State Farm*, 463 U.S. at 48). But when HUD suspended all designations under the Small Area FMR Rule—effectively halting implementation of the Rule itself—the agency disregarded its previous assessment of the Rule's economic impacts, without providing any rational explanation for doing so. Accordingly, the Suspension Letter is arbitrary and capricious and must be rescinded.

1. The Suspension Letter Is Reviewable Under the APA

The Suspension Letter is a final agency action subject to review under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). A final agency action under the APA has been defined as "the consummation of the agency's decision-making process . . . by which rights or obligations have been determined, or from which legal consequences will flow." *Clean Air Council*, 862 F.3d at 7 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). As the Suspension Letter forestalls compliance requirements for two years for all PHAs that were covered by the Small Area FMR Rule, the letter has such "legal consequences" and is reviewable. *See id.* at 6-7, 14 (reviewing agency's three-month administrative stay of a Clean Air Act rule as a final action); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 614-15 (D.C. Cir. 1987) (reviewing agency's grant of a temporary exemption from a mine safety standard as a final action).[7]

[7] Notably, even if the Court were to find that the Suspension Letter was not substantive rulemaking for which the agency had to provide notice and an opportunity for comment, *see infra* pp. 13-15, the Suspension Letter would still be a final agency action subject to arbitrary and capricious review under the APA. *See, e.g.*, *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 193 (D.C. Cir. 1991) ("Even if HUD may permissibly read section 111 as allowing termination of Kansas City's UDAG agreement without notice and hearing, the agency termination action remains subject to the independent arbitrary and capricious standard of review").

2. HUD Does Not Provide a Reasoned Explanation for Disregarding Its Prior Finding that the Small Area FMR Rule Would Better Serve the Goals of the Housing Choice Voucher Program than Existing Regulations

When it issued the Small Area FMR Rule, HUD found that the rule would "establish[] a more effective means for [voucher recipients] to move into areas of higher opportunity and lower poverty." 81 Fed. Reg. at 80,567. In a Regulatory Impact Analysis accompanying the Rule, HUD assessed a wide range of costs, benefits, and transfers (among PHAs, voucher households, and other households) that could result from the shift to small area fair market rents. *See generally* HUD, Regulatory Impact Analysis: Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs (Nov. 16, 2016) ("Regulatory Impact Analysis").[8] Overall, the agency concluded that the Small Area FMR Rule would "make the [Housing Choice Voucher] program more cost effective and facilitate a more lasting geographic dispersion of voucher households." *Id.* at 11. The Regulatory Impact Analysis also considered the economic impacts of alternatives to the Small Area FMR Rule, including the alternative of retaining metropolitan area fair market rents. *Id.* at 35-36. HUD determined that, relative to the agency's other options, the Small Area FMR Rule represented a "judicious trade-off between the mobility gains of voucher holders and administrative costs of PHAs." *Id.* at 36.

In the Suspension Letter, HUD provides no justification for ignoring these prior findings on the economic impacts of the Small Area FMR Rule. *Fox*, 556 U.S. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank

[8] *Available at* https://www.regulations.gov/document?D=HUD-2016-0063-0117.

slate."). The Suspension Letter claims that the results of an interim evaluation of small area fair market rent demonstration projects "suggest the need for further analysis of the benefits and costs of [small area fair market rents], particularly with respect to the impact on rent burdens on participating families and the availability of units in the metropolitan area." Suspension Letter ¶ 5; *see also* HUD, Small Area Fair Market Rent Demonstration Evaluation, Interim Report ("Interim Evaluation").[9] But HUD does not explain *how* the Interim Evaluation's findings conflict with those in its Regulatory Impact Analysis for the Small Area FMR Rule. Nor does HUD address whether these alleged conflicts between the Regulatory Impact Analysis and the Interim Evaluation are substantial enough to affect the agency's core determination that the Small Area FMR Rule would better serve the goals of the Housing Choice Voucher program than existing regulations.

In fact, the findings of the Interim Evaluation are consistent with those in the Regulatory Impact Analysis. With respect to "rent burdens on participating families," for example, the Interim Evaluation does find that average tenant contributions for PHAs in the demonstration areas increased relative to comparison PHAs. Interim Evaluation at x. But this does not constitute new information that, without further explanation, would form a reasoned basis for HUD's decision to suspend implementation of the Small Area FMR Rule. On the contrary, in the Regulatory Impact Analysis accompanying the Rule, the agency repeatedly acknowledged the possibility that some voucher households would end up paying more for their housing under the Rule; HUD nevertheless concluded that, on balance, the Rule would better serve the goals of the Housing Choice Voucher program than existing regulations. *See* Regulatory Impact Analysis at 13 ("[T]o the extent a voucher holder's preferences and needs place the physical quality of a rental building

[9] *Available at* https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim - Report.pdf.

. . . ahead of neighborhood opportunity, the voucher holder will be forced to pay more of the holder's own money or accept a less preferred or adequate unit as a result of the rule."); *id.* at 19 tbl.2 (listing the likely transfer effects of the rule, including that "[h]ouseholds facing a decreasing payment standard without a decrease in rent may increase out of pocket contributions to avoid moving"); *id*. at 40 (estimating that voucher holder payments to landlords would increase by between $92 and $133 million annually as "[v]oucher holders contribute more to maintain level of housing consumption or two move to a high-rent area").

Furthermore, the Small Area FMR Rule includes provisions expressly designed to limit Rule-related increases in tenants' rent burdens. 81 Fed. Reg. at 80,572. Such provisions were not included in the small area fair market rent demonstration projects that are the subject of the Interim Evaluation and on which the Suspension Letter relies. *Id.* (noting that "[n]o additional tenant protections were instituted for tenants serviced by PHAs" in the demonstration areas). Thus, any increases in average tenant contributions under the Rule would likely be smaller than those described in the Interim Evaluation. But HUD makes no mention of these differences between the demonstration projects and the Small Area FMR Rule, even as it relies on the Interim Evaluation of the demonstration projects as a justification for suspending implementation of the Rule. *See* Suspension Letter ¶ 5.

Similarly, with respect to "the availability of units in the metropolitan area," the Interim Evaluation does find a modest decrease in the total number of units available to voucher holders in the demonstration areas. Interim Evaluation at vii. But, as with the possibility of increased rent burdens, the possibility of decreased unit availability was expressly acknowledged in the Regulatory Impact Analysis for the Small Area FMR Rule and thus factored into HUD's original determination that, on balance, the Rule would better fulfill the goals of the Housing Choice

Voucher program than existing regulations. Regulatory Impact Analysis at 15 (noting possibility that small area fair market rents might "not result in landlords making a proportionate number of units available in other neighborhoods" to offset losses in low-rent neighborhoods).

And, just as the Rule features provisions designed to reduce the likelihood and magnitude of increased rent burdens, it also includes provisions designed to reduce the likelihood and magnitude of unit losses. Because these provisions were not available to PHAs in the demonstration areas, any unit losses under the Small Area FMR Rule are likely to be smaller than those described in the Interim Evaluation.[10] But, once again, HUD fails to acknowledge these differences between the demonstration projects and the Small Area FMR Rule when citing the Interim Evaluation as a justification for delaying compliance obligations under the Rule.

Putting aside the specific issues of rent burdens and unit availability, the Interim Evaluation as a whole shows that small area fair market rents *work.* The demonstration areas achieved each of the core goals for the Small Area FMR Rule that HUD described in its original Regulatory Impact Analysis. First, the Regulatory Impact Analysis predicted that using small area fair market rents would "make more units available in higher rent neighborhoods." Regulatory Impact Analysis at 11. The Interim Evaluation finds that small area fair market rents *did* "increase the pool of units potentially available to [voucher] holders . . . in high-rent ZIP Codes." Interim

[10] Additionally, in the Interim Evaluation, changes in unit availability varied substantially across metropolitan areas. Indeed, two of seven demonstration areas saw net *increases* in available housing overall. Interim Evaluation at 33, ex. 4-5. The Interim Evaluation explains that changes in housing availability depend "on how rental units are distributed across low, moderate, and high-rent ZIP Codes." *Id.* at 34. Thus, even assuming *arguendo* that the decreases in housing availability observed in the Interim Evaluation could justify suspension of the Small Area FMR Rule in *some* metropolitan areas, they could not justify HUD's indiscriminate suspension *all* covered PHAs' compliance obligations.

Evaluation at vii. Second, the Regulatory Impact Analysis predicted that small area fair market rents would "reduc[e] the overpayment of rents by the program in lower rent neighborhoods." Regulatory Impact Analysis at 11. The Interim Evaluation finds that "the average payment standard decreased by 17 percent in low-rent ZIP Codes." Interim Evaluation at x. Finally, the Regulatory Impact Analysis predicted that small area fair market rents would "facilitate a more lasting geographic dispersion of voucher households." Regulatory Impact Analysis at 11. The Interim Evaluation finds that "[a]mong existing households that moved to new ZIP Codes, the share moving to high-rent ZIP codes increased" by ten percentage points between 2010 and 2015. Interim Evaluation at ix.[11]

If HUD no longer believes that the Small Area FMR Rule will be "more cost effective and facilitate a more lasting geographic dispersion of voucher households" than existing regulations, Regulatory Impact Analysis at 11, it must provide a reasoned explanation for its change of position. The agency's vague reference to the findings of the Interim Evaluation does not suffice, because nothing in the Interim Evaluation conflicts with HUD's original conclusions regarding the Small Area FMR Rule's likely economic impacts.

Nor can HUD justify suspending implementation simply to give itself time "to analyze the final findings of the demonstration," which will not be available until July 2018. Suspension Letter ¶ 5. HUD provides no reason to believe that its final findings regarding the demonstration projects are any more likely than those in its Interim Evaluation to conflict with the conclusions of the Regulatory Impact Analysis. And the mere *possibility* that future findings might prompt HUD to

[11] As HUD explained in the Regulatory Impact Analysis, some studies suggest that "voucher holders who move to higher opportunity neighborhoods . . . are more likely to succeed across a range of individual health and economic measures." Regulatory Impact Analysis at 14. These individual gains can, in turn, have positive spillover effects for the economy at large. *Id.* at 15.

reconsider some components of the Small Area FMR Rule cannot justify putting the Rule on hold now. *See Pub. Citizen*, 733 F.2d at 102 ("Without showing that the old policy is unreasonable, for [an agency] to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds").[12]

3. HUD's Other Justifications for Delaying Implementation of the Rule Are Not Rational

In addition to the Interim Evaluation, the Suspension Letter offers two other justifications for delaying implementation of the Small Area FMR Rule: (1) HUD's preliminary review of PHA comments submitted pursuant to an executive order on reducing regulatory burdens; and (2) HUD's need to develop guidance and technical assistance before the Rule goes into effect. Suspension Letter ¶¶ 6-7. Neither is a rational explanation for a two-year delay. *State Farm*, 463 U.S. at 43 (agencies must "articulate a rational connection between the facts found and the choice made").

a. Comments from Another Proceeding Do Not Justify Delaying Implementation of the Rule

In May 2017, pursuant to President Trump's February 2017 Executive Order on "Enforcing the Regulatory Reform Agenda," HUD solicited public comment "to assist in identifying existing regulations that may be outdated, ineffective, or excessively burdensome." 82 Fed. Reg. 22,344, 22,345 (May 15, 2017). Consistent with attempts to suspend, delay, and revoke Obama-era

[12] As Plaintiffs point out, when promulgating the Small Area FMR Rule, HUD twice considered and rejected the suggestion that it wait for full results from the demonstration projects before requiring the use of small area fair market rents. Pls. Mem. at 13 (citing 81 Fed. Reg. 39,218, 39,223 (Jun. 16, 2016) (proposed rule); 81 Fed. Reg. at 80,579).

regulations across agencies, HUD now cites "concerns" expressed by "several PHA industry groups" in comments to that proceeding as a justification for delaying compliance obligations under the Small Area FMR Rule. Suspension Letter ¶ 6; *see also* Heinzerling at 9. But the agency offers no details on the nature of these concerns and no explanation as to why they necessitate a complete halt on implementation of the Rule. On the contrary, it admits that it "has not yet completed its analysis of these comments." *Id.* In other words, because some comments that HUD has not even read yet—and which were filed in connection with an entirely separate regulatory proceeding—*might* contain some criticisms of the Small Area FMR Rule that *might* lead HUD to propose revisions to the Rule, HUD wants to immediately suspend all implementation of the Rule for two years. This reasoning simply does not pass muster under the APA. *Pub. Citizen*, 733 F.2d at 102.

b. HUD's Desire to Issue Additional Guidance Does Not Justify Delaying Implementation of the Rule

Finally, HUD attempts to justify delaying implementation of the Small Area FMR Rule by noting that it has not yet provided implementation–related guidance and technical assistance to the PHAs. Suspension Letter ¶ 7. But nothing in the text of the Small Area FMR Rule conditions its implementation on the issuance of guidance documents. Nor did the Regulatory Impact Analysis suggest that its projections regarding the costs, benefits, and transfers associated with the Rule were contingent upon the issuance of guidance documents. Furthermore, as Plaintiffs explain, HUD *chose* not to allocate resources to the creation of guidance. Pls. Mem. at 34. The agency's own, entirely voluntary failure to prepare for implementation of a rule cannot provide a

justification for suspending that rule. *See N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (agency cannot "excuse its violation of the APA by pointing to the problems created by its own delay").

B. The Suspension Letter Is Procedurally Defective

In addition to failing to provide a reasoned explanation for the Suspension Letter, HUD violated its own procedural regulation by delaying compliance obligations under the Small Area FMR Rule without providing notice in the Federal Register and an opportunity for public comment. Accordingly, the Suspension Letter must be set aside as procedurally defective. *See* 5 U.S.C. § 706(2)(D) (court shall set aside agency action found to be "without observance of procedure required by law").

HUD's "Rule on Rules" states that it is the agency's policy "to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts."[13] 24 C.F.R. § 10.1. This Court has explicitly and repeatedly interpreted the Rule on Rules to require HUD to provide notice and the opportunity to comment, consistent with the APA's notice and comment procedures, whenever it issues a substantive rule. *See, e.g. Patriot Inc. v. U.S. Dep't of Hous. & Urban Dev.,* 963 F.Supp.

[13] Section 553(a)(2) of the APA exempts rules relating to public property, loans, grants, benefits, or contracts from notice and comment rulemaking procedures. 5 U.S.C. § 553(a)(2). This provision is sometimes referred to as the "proprietary exemption." However, following a 1969 recommendation from the Administrative Conference of the United States, HUD waived the proprietary exception, which would have otherwise affected the substantial majority of its rulemaking. U.S. Dep't of Hous. and Urban Dev., "Rulemaking 101," a*vailable at* https://portal.hud.gov/hudportal/HUD?src=/program_offices/general_counsel/Rulemaking-101. As a result, HUD may not avoid notice and comment by citing the proprietary exemption. *Patriot Inc.*, 963 F.Supp. at 5 (rejecting HUD's "discredited" argument that its actions are "exempt from the APA's rulemaking requirement" due to the proprietary exemption).

1, 5 (D.D.C. 1997); *Housing Study Group v. Kemp*, 736 F.Supp. 321 (D.D.C.), *order clarified*, 739 F.Supp. 633 (D.D.C. 1990); *Housing Study Group v. Kemp*, 732 F.Supp. 180, 185 (D.D.C. 1990); *see also Pacific Molasses Co. v. F.T.C.*, 356 F.2d. 386, 389 (5th Cir. 1966) ("When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed").

A substantive rule includes any HUD action that (1) "affects the rights of broad classes of unspecified individuals" and (2) "is prospective, and has a definitive effect on individuals only after the rule subsequently is applied." *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994); *accord Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 893–94 (D.D.C. 1996). The Suspension Letter meets both requirements. First, it affects the rights of a broad class of individuals and entities, suspending the compliance obligations of *all* PHAs that would have had to change their voucher payment standards under the Small Area FMR Rule and, in turn, denying hundreds of thousands of tenants access to housing in high-rent neighborhoods. *See* Regulatory Impact Analysis at 2 (noting that Small Area FMR Rule would affect 367,000 voucher holders). Second, the Suspension Letter is prospective in that it determines future administration of the Housing Choice Voucher program and has no impact on past payments.

That the Suspension Letter *suspends* compliance requirements, rather than fully rescinding them, does not affect its status as a substantive rule subject to notice and comment requirements. As the D.C. Circuit recently reiterated, delaying a compliance deadline is "tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6; *see also Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA."); *Becerra*, 2017 WL 3891678, at

11 (rejecting suspension of a Department of Interior regulation under section 705 of the APA because the agency failed to provide notice and comment).

Nor does it matter, for notice and comment purposes, that HUD styled its action as a suspension of *designations* under the Small Area FMR Rule instead of a suspension of the Rule itself, or that the agency announced its decision in letters to affected PHAs instead of a Federal Register notice. When evaluating whether a HUD action qualifies as a substantive rule, "[t]he form of the proceeding is not dispositive; what counts is its effect." *Yesler Terrace*, 37 F.3d at 449; *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (holding that an agency could not avoid notice and comment procedures by characterizing its rulemaking as adjudication); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon [the action] by the [Federal Communications Commission] is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive"); *Patriot, Inc.*, 963 F.Supp. at 4-5 (vacating HUD action announced by "Mortgagee letter" for failure to provide notice and comment). Accordingly, agency actions that have the *effect* of delaying compliance with a regulation promulgated through notice and comment procedures are themselves substantive rules that require notice and comment. *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 814-17 (D.C. Cir. 1983) ("an agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements").

However the agency wishes to characterize its action, the Suspension Letter is indistinguishable in effect from a suspension of the Small Area FMR Rule. Just as staying the EPA rule in *Clean Air Council* "relieve[d] regulated parties of liability they would otherwise face," *Clean Air Council*, 862 F.3d at 7, the Suspension Letter altered the liabilities of all PHAs that faced new obligations under the Small Area FMR Rule and affected the rights of hundreds of thousands

of Americans. Accordingly, HUD was required to provide notice and an opportunity for comment before issuing the Suspension Letter. Because the agency failed to do so, the Suspension Letter must be rescinded. 5 U.S.C. § 706(2)(D); 24 C.F.R. § 10.1.

CONCLUSION

Because HUD failed to provide a reasoned explanation for delaying implementation of the Small Area FMR Rule and to provide notice and an opportunity for comment on that delay, Plaintiffs are likely to succeed on the merits of their APA claims.

November 13, 2017

Respectfully submitted,

_/s/ Avi Zevin_____
Avi Zevin
(D.C. Bar No. 102031)
Richard L. Revesz
(N.Y. Bar No. 2044725)
Jack Lienke
(N.Y. Bar No. 5066386)
Institute for Policy Integrity
New York University Law School
139 MacDougal, 3rd floor
New York, NY 10012
T: (212) 992-8932
E: avi.zevin@nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity