



Institute *for*  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

July 9, 2019

**VIA ELECTRONIC SUBMISSION**

Department of Housing and Urban Development

**Attn:** Office of the General Counsel, Rules Docket Clerk

**Re:** Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (proposed May 10, 2019)

**Docket ID:** HUD-2019-0044-0001

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> (“Policy Integrity”) respectfully submits the following comments to the Department of Housing and Urban Development (“HUD” or the “Department”) regarding proposed changes to the restrictions on housing assistance for certain categories of noncitizens (“Proposed Rule”).<sup>2</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through scholarship in the fields of administrative law, economics, and public policy.

Our comments focus on serious flaws in the Regulatory Impact Analysis (“RIA”) that accompanies the Proposed Rule.<sup>3</sup> Specifically, we note that HUD fails to:

- sufficiently analyze mixed families’ potential responses to the Proposed Rule;
- provide evidence or explanation to support its claims regarding the Proposed Rule’s benefits;
- accurately characterize the nature of the transfers that will result from the Proposed Rule;
- accurately estimate the moving and eviction costs that will result from the Proposed Rule;
- adequately assess housing-search, homelessness, and administrative costs that will result from the Proposed Rule;
- consider several other categories of costs that the Proposed Rule will impose on mixed families;
- adequately analyze regulatory alternatives; and
- properly classify the Proposed Rule as an “economically significant” action.

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<sup>1</sup> This document does not purport to present New York University School of Law’s views, if any.

<sup>2</sup> Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (proposed May 10, 2019) [hereinafter Proposed Rule].

<sup>3</sup> HUD, Regulatory Impact Analysis: Housing and Community Development Act of 1980: Verification of Eligible Status, Proposed Rule, Docket No. FR-6124-P-01 (2019) [hereinafter RIA].

## Comments on the Regulatory Impact Analysis for the Proposed Rule

Executive Order 12,866 requires agencies to assess the costs and benefits of any significant regulatory action.<sup>4</sup> This assessment must be based “on the best reasonably obtainable scientific, technical, economic, and other information,” and should include quantifiable measures “to the fullest extent that [they] can be usefully estimated.”<sup>5</sup> Long-standing guidance on regulatory analysis from the Office of Management and Budget (“OMB”) similarly advises that “[s]ound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions.”<sup>6</sup> Because some effects are “too difficult to quantify or monetize given current data and methods,” however, agencies must also “carry out a careful evaluation of non-quantified benefits and costs.”<sup>7</sup>

Separate from the requirements of Executive Order 12,866, courts have held that “when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.”<sup>8</sup> Here, HUD has “inconsistently and opportunistically framed” the economic impacts of the Proposed Rule.<sup>9</sup> Finalizing the Proposed Rule in reliance on this flawed cost-benefit analysis would be arbitrary and capricious.

### I. HUD Does Not Sufficiently Analyze Mixed Families’ Potential Responses to the Proposed Rule

HUD does not sufficiently analyze tenants’ potential responses to the Proposed Rule and, in turn, the costs and benefits that will flow from those responses. The RIA divides the 25,045 “mixed families”<sup>10</sup> currently living in assisted housing into three categories based on the makeup of the family and which family members are eligible to receive housing assistance. “Case 1” mixed families consist of parents and children, where the parents are eligible for assistance and at least one child is ineligible; “Case 2” mixed families consist of parents and children, where the children are eligible and at least one parent is ineligible; and “Case 3” mixed families consist of eligible immediate family members and at least one ineligible extended family member, e.g., an uncle or grandparent.<sup>11</sup> In projecting how the Proposed Rule will affect these different types of families, HUD unreasonably dismisses one potential response among Case 2 families (separating

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<sup>4</sup> Exec. Order No. 12,866 § 6(a)(3)(B), 58 Fed. Reg. 51,735 (Oct. 4, 1993). HUD has concluded that the Proposed Rule is a significant regulatory action for the purposes of Executive Order 12,866. 84 Fed. Reg. at 20,591.

<sup>5</sup> Exec. Order No. 12,866 §§ 1(a), (b)(7).

<sup>6</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis 26 [hereinafter Circular A-4].

<sup>7</sup> *Id.* at 26-27.

<sup>8</sup> *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Administrative Procedure Act requires agency to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation marks omitted)).

<sup>9</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

<sup>10</sup> A “mixed family” is a family that shares a unit of assisted housing and includes at least one member whose immigration status makes them ineligible for housing assistance.

<sup>11</sup> RIA at 8.

so that a portion of the family can remain in assisted housing) and fails to assess the likelihood of another potential response among both Case 2 and Case 3 families (remaining in assisted housing with undeclared tenants).

*HUD Fails to Support Its Claim that the Proposed Rule Will Not Lead to Separation of Immediate Families*

HUD unreasonably rejects the possibility that some Case 2 families will respond to the Proposed Rule by requesting that ineligible family members leave the household, allowing the eligible members to retain housing assistance. The Department cites studies showing benefits to children who grow up in two-parent households and argues that parents “whose goal it is to maximize the welfare of the family” will not choose to separate because “the economic benefit of children growing in a two-parent household outweighs the financial assistance from the housing subsidy.”<sup>12</sup> But this argument is premised on at least two unsupported assumptions.

First, HUD assumes that because, all else equal, children who grow up in two-parent households fare better than those who grow up in single-parent households, it will also be true that children who grow up in two-parent households *that vacate assisted housing* will fare better than those who grow up in single-parent households *that remain in assisted housing*. However, HUD does not take into account that costs associated with vacating assisted housing may outweigh the benefits of maintaining two-parent households. In other words, vacating assisted housing may not be the welfare-maximizing choice for every family.<sup>13</sup> This is especially likely in areas with a shortage of alternative affordable housing. Furthermore, even when families *do* choose to vacate assisted housing, this response may not result in preservation of a two-parent household if the family’s only option is to enter the shelter system, where family shelters often admit only women and children.<sup>14</sup>

Second, HUD assumes that families “whose goal it is to maximize the welfare of the family” will act in a way that is, in fact, welfare-maximizing. This will not necessarily be the case, however, as families might not have adequate information to make the welfare-maximizing decision.<sup>15</sup> That is, even if in cases where it is true that “the economic benefit of growing in a two-parent household outweighs the financial assistance from the housing subsidy,” the parents may not *know* this when deciding whether to vacate assisted housing or separate.

Courts have explained that, while “an agency’s predictive judgments about the likely economic effects of a rule are entitled to deference,” those judgments “must be based on some logic and evidence, not sheer speculation.” *Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C.

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<sup>12</sup> *Id.* at 8-9.

<sup>13</sup> A recent article discussing the Proposed Rule suggests that mixed families are in fact likely to separate in order to retain their housing assistance. Katy O’Donnell, *HUD Moves to Crack Down on Undocumented Immigrants in Public Housing*, Politico (Mar. 4, 2019), <https://politi.co/2UL5m7u>.

<sup>14</sup> See Marybeth Shinn, *Poverty, Homelessness, and Family Break-Up*, 94 Child Welfare 105 (2015) (finding that one quarter of surveyed parents living in family shelters were separated from one or more children).

<sup>15</sup> In fact, HUD published a study in 2013 calling into question the assumption that “housing outcomes are...the result of considered choices among a set of alternatives that are understood, at least implicitly, by the households in question.” Kimberly Skobba, *Mobility Decisions of Very Low-Income Households*, 15 Cityscape 155 (2013).

Cir. 2014) (citations and internal quotation marks omitted). Accordingly, HUD must provide evidence or reasoned explanation to support its assumptions regarding mixed families' responses to the Proposed Rule.

*HUD Unreasonably Fails to Assess the Likelihood that Some Ineligible Adults Will Remain in Assisted Households as Undeclared Tenants*

HUD discusses the possibility that some ineligible adults in Case 2 and 3 families may remain in their households as “undeclared” tenants, in violation of lease rules, and that in this scenario the household could receive a higher subsidy, as undeclared residents' incomes would no longer contribute to the calculation of the household's subsidy.<sup>16</sup> In this scenario, mixed families would receive *more*, rather than less, taxpayer money, contrary to the intent of the Proposed Rule. Nevertheless, HUD fails to assess the likelihood of this scenario or to provide an estimate of its potential impact on subsidies. This omission undermines the accuracy of HUD's estimates of transfers in Sections 6.1 and 6.2 of the RIA.<sup>17</sup>

## **II. HUD Fails to Provide Evidence or Explanation to Support Its Claims Regarding the Proposed Rule's Benefits**

HUD contends that the Proposed Rule will result in three types of benefits, but the Department fails to provide any explanation of *how* the Proposed Rule would generate these effects, much less actual evidence to support its claims.

First, HUD claims that the Proposed Rule will “reduce unnecessary regulatory burdens,” but it fails to specify these burdens.<sup>18</sup> Since the Proposed Rule *increases*, rather than reduces, the number of tenants required to undergo the verification process, it is unclear how it would reduce regulatory burdens for either tenants or local housing authorities.

Second, HUD claims that the Proposed Rule will “enhance[e] the effectiveness” of HUD's regulations.<sup>19</sup> A policy is “effective” if it “produc[es] a decided, decisive, or desired effect.”<sup>20</sup> But HUD does not explain exactly what effect the Proposed Rule will be more successful at producing than would existing regulations. Nor does it explain why that effect is ultimately more desirable than the effect that existing regulations would achieve.

Finally, HUD claims that the Proposed Rule will enhance the “rule of law,” by redistributing housing assistance from mixed households to “eligible individuals as required by law.”<sup>21</sup> However, the Proposed Rule will enhance the “rule of law” only if it is somehow more consistent with Section 214 of the Housing and Community Development Act of 1980 (as

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<sup>16</sup> RIA at 9-10.

<sup>17</sup> *Id.* at 11-13.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.*

<sup>20</sup> “Effective,” Merriam-Webster, [https://www.merriam-webster.com/dictionary/effective?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/effective?utm_campaign=sd&utm_medium=serp&utm_source=jsonld) (last visited July 9, 2019).

<sup>21</sup> RIA at 10.

amended) than existing regulations are, and HUD fails to explain why this is the case.<sup>22</sup> When HUD finalized the current regulations in 1995, it expressly disagreed with claims by commenters that the regulations' provisions on prorated assistance for mixed families were inconsistent with Section 214, concluding that "[p]roration of assistance is consistent with the preservation of families provisions of Section 214, which provide for continued assistance and temporary deferral of termination of assistance."<sup>23</sup> If HUD now seeks to change its position on this issue, the Administrative Procedure Act requires it to provide a "reasoned explanation" for doing so.<sup>24</sup>

### III. HUD Mischaracterizes the Nature of Transfers Caused by the Proposed Rule

HUD incorrectly claims that the Proposed Rule will create a transfer from ineligible individuals currently receiving housing assistance to eligible individuals.<sup>25</sup> HUD multiplies 32,000, the number of ineligible members of mixed families currently living in assisted housing, by \$1,900, the per-capita subsidy to mixed families, to arrive at an estimated \$60 million annual transfer from ineligible to eligible individuals.<sup>26</sup> HUD's claim that the Proposed Rule creates this transfer is flawed in two respects.

First, HUD's use of the \$1,900 value is problematic. HUD reaches this value by dividing the total number of members of mixed families by the total annual subsidy mixed families receive under the current regulations, arriving at an average annual subsidy of \$1,900 per family member.<sup>27</sup> As such, HUD implies that ineligible members receive a \$1,900 annual subsidy. Under the current regulations, however, assistance to mixed families is prorated according to the number of ineligible family members. Thus, the proration provision of the current regulations has the effect of *eliminating* subsidies to ineligible individuals. Any financial benefit that ineligible members receive by living in assisted housing under the current regulations is the result of eligible family members' private decisions to share their resources with ineligible members. In other words, the Proposed Rule will not in fact create any transfers from ineligible individuals currently living in households receiving prorated assistance to eligible individuals. Rather, the Proposed Rule will simply create a transfer from eligible tenants who have ineligible family members to *other* eligible tenants who do not have ineligible family members.

Second, HUD argues that, with regards to the transfer discussed in the above paragraph, a "qualitative benefit of the [Proposed] [R]ule is that the housing assistance is targeted to the eligible individuals as required by law."<sup>28</sup> In addition to referencing the purported rule of law benefit discussed above, HUD appears to be making an implicit argument that the Proposed Rule, by creating a transfer from ineligible to eligible tenants, will lead to a *fairer* distribution of housing resources than the status quo. But, as discussed above, the Proposed Rule will not

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<sup>22</sup> 42 U.S.C. § 1436(a).

<sup>23</sup> Restrictions on Assistance to Noncitizens, 16 Fed. Reg. 14,816, 14,822 (Mar. 20, 1995).

<sup>24</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

<sup>25</sup> HUD notes that a transfer is not an economic benefit but claims that the transfer is "illustrative" of the benefits the rule will achieve by "better target[ing] housing subsidies to the intended recipients." RIA at 10.

<sup>26</sup> HUD cites internal HUD databases for these data, explaining that "due to privacy concern[s]," the data are not public. *Id.* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 10.

actually redistribute subsidies from ineligible tenants to eligible tenants. Instead, it will unfairly deny subsidies to otherwise eligible tenants simply because they have ineligible family members.

#### **IV. HUD Underestimates Moving and Eviction Costs that Will Result from the Proposed Rule**

Although HUD quantifies moving and eviction costs associated with the Proposed Rule, its estimates are unreasonably low.

##### *Moving Costs*

HUD quantifies certain costs that will arise from mixed families moving out of assisted housing, namely labor, a “small truck rental,” and “related [moving] expenses.”<sup>29</sup> But the Department’s estimates are implausibly low. For example, HUD prices moving labor at only \$10 per hour.<sup>30</sup> HUD may be assuming that friends and family will provide volunteer labor; accordingly, HUD may be assigning \$10 per hour as the value of these individuals’ time. In any case, HUD should explain how it arrives at this value, taking into account the opportunity cost of moving labor.<sup>31</sup>

Additionally, HUD assumes, without explanation, that “all moves are local and completed without hiring a moving company.”<sup>32</sup> In reality, it is unlikely that mixed families residing in areas with tight housing markets will find replacement housing nearby. As OMB guidance on regulatory analysis explains, cost-benefit analysis should be “realistic,”<sup>33</sup> and agencies should deal with (inevitable) uncertainties by “assessing . . . the way in which benefit and cost estimates may be affected under *plausible* assumptions.”<sup>34</sup> Here, it is simply not plausible for HUD to assume that all moves prompted by the Proposed Rule will be local.

##### *Eviction Costs*

HUD also quantifies the costs of formal evictions proceedings prompted by the Proposed Rule.<sup>35</sup> However, the Department’s estimates are flawed in at least two respects. First, HUD contends that, because 24% of all evictions nationwide are estimated to be formal, at most 25% of mixed families will require formal eviction as a result of the Proposed Rule.<sup>36</sup> In other words, HUD assumes, without explanation, that mixed families living in assisted housing mirror the U.S.

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<sup>29</sup> *Id.* at 13-14.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> At least 49% of mixed families reside in states with minimum wages in excess of \$10 per hour. *Id.* at 6.

<sup>32</sup> *Id.* at 14.

<sup>33</sup> Circular A-4 at 39.

<sup>34</sup> *Id.* at 38 (emphasis added).

<sup>35</sup> RIA at 15. HUD estimates that formal eviction costs will total \$3.3 million to \$4.4 million, assuming costs of \$700 per household. However, the Department adds that in a “high-cost scenario” in which “major repairs are required and a lawyer must be engaged, eviction costs “could be as high as \$3,000 per household.” Inserting that \$3,000 value into HUD’s calculations yields a range of \$14.1 million to \$18.75 million.

<sup>36</sup> *Id.* at 14-15. HUD cites a statistic from Matthew Desmond’s *Evicted* that 24% of all evictions are formal evictions. Matthew Desmond, *Evicted* (2016) (exploring the causal relationship between eviction and poverty in the United States).

population at large. Second, HUD appears to underestimate formal eviction costs by considering only costs to public housing authorities (“PHAs”) in the form of “court fees, server charge, eviction services,” “legal fees,” and “new repairs,” leaving out any potential costs of formal eviction to tenants.<sup>37</sup> In fact, tenants may face substantial costs from formal evictions. Even in those cases in which tenants are eligible for legal aid and waivers of court fees, they may incur costs associated with traveling to and from appointments at court and a lawyer’s office, missing work, and hiring childcare. Eviction proceedings may also hamper tenants’ ability to secure future housing or employment.<sup>38</sup>

## **V. HUD Fails to Adequately Assess Housing-Search, Homelessness, and Administrative Costs that Will Result from the Proposed Rule**

HUD acknowledges that the Proposed Rule could result in housing-search, homelessness, and administrative costs, but it neither quantifies nor provides a sufficiently robust qualitative assessment of these negative effects.

### *Housing-Search Costs*

Although HUD concedes that “other [moving] costs could include search cost,” it seeks to minimize the significance of this expense by noting that “PHAs have expressed a willingness to assist households by providing them access to information.”<sup>39</sup> However, HUD fails to assess the likelihood that PHAs will actually provide such cost-mitigating assistance, as well as the portion of search costs such assistance would actually cover. Furthermore, if PHA’s *do* provide such assistance, this represents a cost to PHAs for which HUD’s analysis should account. Finally, HUD does not explain whether families living in voucher-assisted housing would have access to such assistance.

### *Homelessness Costs*

HUD notes that each member of a mixed household will need to replace the \$1,900 per-capita annual subsidy discussed above in order to obtain replacement housing, and that “temporary homelessness could arise for a household [that leaves assisted housing], if they are unable to find alternative housing, for example in tight housing markets.”<sup>40</sup> In addition, HUD notes that if an ineligible adult leaves assisted housing in order to allow the rest of the family to remain, “a potential impact of this outcome would be homelessness of the unsupported family member.”<sup>41</sup> This is not an adequate assessment of homelessness-related costs that might result from the Proposed Rule.

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<sup>37</sup> RIA at 15.

<sup>38</sup> See Matthew Desmond, *Housing and Employment Insecurity Among the Working Poor*, 63 *Social Problems* 46 (2016) (finding “the likelihood of being laid off to be between 11 and 22 percentage points higher for workers who experienced a preceding forced move, compared to observationally identical workers who did not”); see also Matthew Desmond, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 *Social Forces* 295 (2015) (finding that “[e]viction results in multiple and multidimensional negative consequences for mothers”).

<sup>39</sup> RIA at 14.

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.*

First, rather than simply acknowledging the *possibility* that the Proposed Rule will result in homelessness for some families, HUD should assess the *probability* of this outcome. Specifically, HUD should assess the likelihood that outgoing families or family members will be able to replace the \$1,900 per-capita annual subsidy, taking into account the fact that the actual replacement amount required, and hence the expected rate of homelessness, will depend on local housing markets.<sup>42</sup>

In addition to better assessing the extent to which the Proposed Rule will cause homelessness, HUD must better estimate the *costs* of such homelessness for affected families. HUD notes that “some studies have found that the costs associated with homelessness could range from \$20,000 to \$50,000 per person per year,” but the Department does not explain what costs this range includes. In particular, HUD does not explain whether this range includes indirect costs of homelessness, such as those associated with negative educational outcomes, lost productivity, and negative impacts on mental and physical health.

#### *Administrative Costs*

HUD also identifies three categories of administrative costs for PHAs that will arise from the Proposed Rule, but fails to give any indication of the magnitude of these costs. First, HUD notes that “turnover” between outgoing ineligible households and incoming eligible households will create administrative costs.<sup>43</sup> Second, HUD identifies administrative costs associated with revisions to Admissions and Continued Occupancy Policies (ACOP) that federal law requires housing authorities to maintain.<sup>44</sup> Third, HUD notes that “it is uncertain how the Proposed Rule would impact housing authorities in the Moving to Work (MTW) demonstration program.”<sup>45</sup> Without providing any indication of the size of these costs relative to the Proposed Rule’s other effects, HUD cannot claim to have adequately considered them as part of its rulemaking process.

## **VI. HUD Entirely Ignores Several Other Categories of Costs that the Proposed Rule Will Impose on Mixed Families**

In addition to underestimating or inadequately analyzing the costs discussed above, HUD completely disregards other types of costs that the Proposed Rule will impose. These ignored costs include moving costs for ineligible members of Case 3 families who vacate assisted housing, substantial indirect costs associated with family separation and/or relocation for both Case 2 and Case 3 families, and costs associated with verification requirements.

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<sup>42</sup> There is a body of literature documenting the causal relationship between eviction and homelessness. See National Law Center on Homelessness & Poverty, *Protect Tenants, Prevent Homelessness* (2017); see also United States Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities* (2014).

<sup>43</sup> RIA at 17. Such turnover could also result in costs to PHAs in the form of lost rent from vacant units.

<sup>44</sup> *Id.* (“The ACOP is the PHA’s written statement of policies used to carry out the housing program in accordance with federal law and regulations, and HUD requirements.”).

<sup>45</sup> *Id.* (“Established in 1996 by Congress to give HUD and designated PHAs the flexibility to design and test various ways to administer housing assistance to meet local housing needs and the program’s three goals: moving families to self-sufficiency, expanding housing options, and achieving cost savings.”).



### *Moving Costs for Vacating Members of Case 3 Families*

HUD ignores costs of the Proposed Rule that will arise from ineligible Case 3 family members leaving assisted housing.<sup>46</sup> The Department acknowledges that although there would be moving costs for those ineligible members leaving the unit in Case 3, “we have not included them in the calculation.”<sup>47</sup> HUD justifies this omission by noting that Case 3 *households* with departing “other adults” will not incur moving costs, because the remaining eligible family members will continue living in the assisted housing unit. But the mere fact that a cost does not affect an entire household is not a rational justification for excluding it from HUD’s analysis.

### *Indirect Costs of Family Separation*

HUD notes that some mixed families may ask ineligible members to vacate assisted housing so that the remaining household is eligible for housing assistance. HUD acknowledges that there “would be a cost to these formerly mixed households because they would no longer be in close proximity to the ineligible former members of their households,”<sup>48</sup> but it fails to provide any discussion of the serious nature of these costs, which could include significant harms to mental and physical health, as well as associated reductions in productivity and educational outcomes.<sup>49</sup> The fact that these harms are an indirect rather than a direct consequence of the Proposed Rule is no excuse for ignoring them. Executive Order 12,866 instructs agencies to consider not just “direct cost . . . in complying with the regulation,” but also “any adverse effects” the rule might have on “health, safety, and the natural environment.”<sup>50</sup> OMB guidance similarly directs agencies to “look beyond the direct benefits and direct costs of [their] rulemaking and consider any important ancillary [i.e., indirect] benefits and countervailing risks.” The Supreme Court, too, has made clear that “cost includes more than the expense of complying with regulations” and that “any disadvantage [caused by a regulation] could be termed a cost.”<sup>51</sup>

### *Indirect Costs of Relocation*

HUD ignores indirect costs for mixed families that will result from changing neighborhoods, cities, or states. These might include new transportation costs, the costs of changing schools and jobs, and the costs of unemployment.

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<sup>46</sup> Case 3 mixed families consist of eligible parents and children but ineligible “other adults,” e.g. cousins or grandparents. *Id.* at 8.

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> See Robert Ferrer, *The Family Contribution to Health Status: A Population-Level Estimate*, 3 *Annals of Family Medicine* 102 (2005) (finding that family separation has a “substantial” effect on family members’ mental and physical health).

<sup>50</sup> Exec. Order No. 12,866 § 6(a)(3)(C)(ii).

<sup>51</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (internal quotation marks omitted).

### *Impact of Verification Requirements on Eligible Tenants*

HUD ignores costs that will result from termination of assistance for eligible tenants who are nevertheless unable to produce the documentation required to verify their eligibility. Recipients of housing assistance are less likely than the general population to have easily accessible documentation of their eligible status, and so may not be able to meet the Proposed Rule's verification requirements.<sup>52</sup> As a result, the Proposed Rule may impact a significantly larger group of tenants than HUD predicts. However, the Department entirely ignores the costs associated with this larger impact, both for affected eligible tenants and for PHAs.

### *Immigration Consequences*

HUD ignores the costs of any negative immigration consequences for any tenants who undergo verification as a result of the Proposed Rule and are deemed ineligible.

## **VII. HUD Does Not Adequately Analyze Regulatory Alternatives**

Executive Order 12,866 requires agencies to perform cost-benefit analyses for “potentially effective and reasonably feasible alternatives” and explain “why the planned regulatory action is preferable to the identified potential alternatives.”<sup>53</sup> HUD briefly describes two alternatives to the Proposed Rule as “less costly alternatives that would achieve a similar objective” but offers no explanation as to why it has declined to pursue these options.<sup>54</sup>

The first alternative “would be to grandfather all of the existing mixed families and apply the provisions of this Proposed Rule to new admissions only.”<sup>55</sup> HUD explains that this would lead to a gradual replacement of mixed families with families made up of only eligible members, and that “[s]uch an option would fulfill the objectives of the rule but would limit the transition costs.”<sup>56</sup> A second alternative would be to “limit the denial of housing assistance to households for which the leaseholder is ineligible.”<sup>57</sup> According to HUD, this would lower the number of families affected by the Proposed Rule from 25,000 to 17,000 and would “likely limit the adverse impact of the transition on eligible children.”<sup>58</sup>

Given that, by its own admission, the identified alternatives would achieve a similar objective at a lower cost, HUD cannot rationally finalize the Proposed Rule without offering a satisfactory explanation for declining to pursue those alternatives.<sup>59</sup>

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<sup>52</sup> Alicia Mazzara, *Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance*, Center on Budget and Policy Priorities (July 1, 2019).

<sup>53</sup> Exec. Order No. 12,866 § 6(C)(iii).

<sup>54</sup> RIA at 17.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation marks omitted)).

## VIII. HUD Fails to Properly Classify the Proposed Rule as an “Economically Significant” Regulatory Action

According to HUD, OMB has classified the Proposed Rule as a “significant” action, but not an “economically significant” action.<sup>60</sup> It is clear from HUD’s RIA, however, that the Proposed Rule should be classified as an economically significant action and, as such, accompanied by a more rigorous cost-benefit analysis.

Under Executive Order 12,866, a regulation is “economically significant” if it is expected to “have an annual effect on the economy of \$100 million or more.”<sup>61</sup> As OMB has explained, this “\$100 million threshold applies to the impact of the proposed or final regulation in any one year, and it includes benefits, costs, or transfers.”<sup>62</sup> Here, HUD acknowledges that the Proposed Rule will cause an “annually recurring transfer” ranging from “\$179 million to \$210 million.”<sup>63</sup> On that basis alone, the Proposed Rule qualifies as economically significant.

Under Executive Order 12,866, agencies have a higher burden with respect to cost-benefit analysis of economically significant rules. An agency proposing an economically significant action must provide “an assessment, including the underlying analysis, of benefits anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those benefits.”<sup>64</sup> The agency must also prepare “an assessment, including the underlying analysis, of costs anticipated from the regulatory action . . . including, to the extent feasible, a quantification of those costs.”<sup>65</sup> (Costs in this context include but are not limited to “the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets . . . , health, safety, and the natural environment.”<sup>66</sup>) As shown above, the analysis accompanying the Proposed Rule does not satisfy these requirements.

With that said, HUD’s responsibility to correct the aforementioned flaws in its RIA is not contingent on the Proposed Rule’s classification as economically significant. The analysis provided by the Department is below the standards required even for a significant rule.

Respectfully,

Christopher Allen  
Jack Lienke

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<sup>60</sup> 84 Fed. Reg. at 20,591.

<sup>61</sup> Exec. Order No. 12,866 §3(f).

<sup>62</sup> OMB, Regulatory Impact Analysis: Frequently Asked Questions (2011), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/circulars/a004/a-4\\_FAQ.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf).

<sup>63</sup> RIA at 3.

<sup>64</sup> Exec. Order No. 12,866 § 6(C)(i).

<sup>65</sup> *Id.* § 6(C)(ii).

<sup>66</sup> *Id.*