

**Comments of Shawn Fremstad  
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**HUD Docket No. FR-6124-P-01, RIN 2501-AD89  
Proposed Rulemaking: Housing and Community Development Act of 1980:  
Verification of Eligible Status**

**Submitted on July 9, 2019 at [regulations.gov](https://www.regulations.gov)**

I am a Senior Fellow at the Center for Economic and Policy Research and an expert on family and immigration law. HUD is proposing to fundamentally rewrite a rule promulgated nearly a quarter of a century ago in a way that would:

- discriminate against U.S. citizens, lawful permanent residents (LPRs), and humanitarian immigrants solely on the basis of their family relationships with certain categories of non-citizens, including non-citizens who are lawfully residing in the United States;
- undermine and interfere with the family relationships of U.S. citizens, LPRs, and humanitarian immigrants, including by incentivizing and directly causing the dissolution of those relationships;
- increase regulatory burdens on U.S. citizens; and
- increase regulatory burdens on public housing agencies.

In these comments, I focus on how the rule would discriminate against U.S. citizens and LPRs on the basis of family structure, and undermine family relationships, including marriage, domestic partnerships, and parent-child relationships. Given the fundamental importance of these relationships, HUD should withdraw its proposed rule absent a compelling rationale. In addition to not providing such a rationale, HUD has failed to conduct a Family Policymaking Assessment of the proposed rule, as required by federal law.

Unlike the proposed rule, HUD's long-standing non-citizen rule strikes the proper balance between governmental interests and the family rights of U.S. citizens and LPRs who are eligible for HUD financial assistance. (Although not addressed in these comments, the long-standing rule is also much better aligned with the wording of Section 214 and the purposes of federal housing assistance than HUD's proposed rule.)

## **HUD Has Failed to Conduct the Family Policymaking Assessment Required by Federal Law**

Under section 654 of the Treasury and General Government Appropriations Act of 1999, HUD must assess, *inter alia*, whether its proposed action:

- “... strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;”
- “... strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;” and
- “... increases or decreases disposable income or poverty of families and children”.

Neither HUD’s proposed rule document nor the Regulatory Impact Analysis (RIA) included in the docket file includes any meaningful assessment of these questions. HUD should withdraw the proposed rule and conduct the required assessment.

### **The Proposed Rule Would Have a Negative Impact on Family Relationships**

As HUD acknowledges, most of the people directly impacted by the proposed rule are U.S. citizens or eligible non-citizens living in assisted or public housing. For these people, there is little question that the proposed rule would have a negative impact on all three of the family assessment factors noted above.

Specifically, HUD’s proposed rule would force all of the directly impacted U.S. citizens and eligible non-citizens living in assisted or public housing down one of the following three paths in response to the proposed rule.

- *Path 1: Maintain Family Structure and Do Not Move:* If a family continues residing together and does not move,<sup>1</sup> they will be deprived of the prorated housing assistance they are otherwise eligible for (HUD estimates on average, a loss of \$1,900 per household member annually). For many families, this loss of disposable income will increase family conflict and stress, and reduce long-term family stability.<sup>2</sup>

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<sup>1</sup> This option is only possible if they do not live in public housing.

<sup>2</sup> See, e.g., Paul R. Amato and others, *Alone Together: How Marriage in America is Changing* (Cambridge, MA: Harvard University Press, 2007) (finding that “lower levels of income, educational attainment, and occupational prestige were associated with higher rates of

- *Path 2: Maintain Family Structure and Move:* If the family maintains its structure and moves (either because they live in public housing or cannot afford unsubsidized rent at their current location), they will be deprived of the prorated housing assistance they are otherwise eligible for. The family will also incur moving costs, the loss of neighborhood amenities no longer available in their new location, potential family homelessness, and potential involvement with the child welfare system. Although families taking this path may maintain their disposable income, these other outcomes will increase family conflict and stress, and reduce family stability.
- *Path 3: Dissolve Family Structure and Do Not Move:* In order to remain at the current location and continue to receiving assistance, the family will need to dissolve. The family's housing assistance will no longer be prorated, so the remaining family members will receive a higher subsidy. The family member(s) who must now live apart from the rest of the family will potentially become homeless, end up in the shelter system, and/or move to a different state, city, or neighborhood. The first two results will impose costs on the public, and all three will impose costs on the remaining family members. The family members who do not move may be newly eligible for (or more likely to take up) other means-tested benefits, such as TANF, SNAP and SSI.

All three of these paths impose financial and non-financial costs that HUD must take into account as part of the required Family Policymaking Assessment. For

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marital problems, less marital happiness, and greater instability); Daniel Schneider, "Lessons Learned from Non-Marriage Experiments," *The Future of Children* 25 (2) (2015): 155-178 (men's and women's economic resources are associated with transitions to marriage); Anna Gassman-Pines and Hirokazu Yoshikawa, "Five-Year Effects of an Anti-Poverty Program on Marriage among Never-Married Mothers," *Journal of Policy Analysis and Management* 25 (1) (2006): 11-30 (finding "income and earnings among mothers in New Hope anti-poverty project were associated with higher probability of marriage and material hardship was associated with lower probability of marriage"). See also Lisa A. Gennetian and Cynthia Miller, "How Welfare Reform Can Affect Marriage: Evidence from an Experimental Study in Minnesota," *Review of Economics of the Household* 2 (3) (2004) : 275-301 (MFIP demonstration, which boosted family income and removed restrictions on two-parent families, lifted marriage rates among single parent long-term recipients and increased marital stability among two-parent recipient families); Lisa Gennetian, "The Long-Term Effects of the Minnesota Family Investment Program on Marriage and Divorce Among Two-Parent Families" (New York: MDRC, 2003); David Fein and others, *Welfare Reform and Family Formation: Assessing the Effects* (Bethesda, MD: Abt Associates, 2002).

example, all three will “erode the stability or safety of the family” and have the potential to “erode the authority and rights of parents in the education, nurture, and supervision of their children”.

Of the three paths open to families in response to the proposed rule, families would receive a financial incentive (an increased housing subsidy and likely increased eligibility for other means-tested benefits) if they took path 3 (dissolving their family structure). By contrast, if they took paths 1 and 2 (maintaining their family structure), they would be financially penalized.

This is an absurd result that it is hard to imagine Congress intended. Moreover, in 1996, the same year Congress amended Section 214 to allow unlimited proration, it established the Temporary Assistance (TANF) block grant. TANF’s core statutory purposes include “encourag[ing] the formation and maintenance of two-parent families”, promoting marriage, and “provid[ing] assistance to needy families so that children may be cared for in their own homes or in the homes of relatives”.<sup>3</sup> While TANF’s purposes do not apply directly to HUD’s rental housing assistance programs, the programs are closely related, and HUD should not pass a rule that works at cross-purposes to TANF absent a compelling rationale.

### **HUD’s Conclusion that Family Separation Would Be “Rare” Under the Proposal is Not Supported by the Evidence**

HUD opines that family separation would be “improbable” (page 9 of RIA) and “rare” (page 16 of RIA) under the proposal:

Expelling a parent, whether forced or voluntary, is improbable among households whose goal it is to maximize the welfare of the family. The economic benefit of children growing in a two-parent household outweighs the financial assistance from the housing subsidy. [footnote omitted] Even if a parent is willing to sacrifice him- or herself for the sake of the household’s continuing receipt of housing assistance, a household would probably suffer a worse outcome by trying to adapt to the new rules than by leaving together.

While HUD cites academic literature on the associations between family structure and child well-being, few, if any, impacted families are well-versed in this literature.

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<sup>3</sup> 42 U.S.C. §601.

In reality, families living in assisted and public housing face economic and other constraints that will make family dissolution the most likely response to the proposed rule in some significant number of cases. For example, if an ineligible parent or spouse can move out of the assisted housing and move in with extended family or friends, there is little question this would make the most immediate financial sense for the family overall.

Instead of speculating about outcomes, HUD should actually research and assess them before adopting a rule that “slic[es] deeply into the family itself.”<sup>4</sup> At a minimum, HUD should conduct a representative survey of potentially impacted residents that asks them how they would respond.

While the academic literature HUD cites says almost nothing about how real families will respond to the proposed rule, the same literature should lead HUD to withdraw its proposal. If HUD believes that “children in two-parent household (sic) fare better, on average, than those in single-parent households”,<sup>5</sup> then it should not adopt a rule that will reduce the number of children in two-parent households, absent a very compelling rationale.

### **HUD Should Not Adopt a Rule that Discriminates Against U.S. Citizens and LPRs Solely on the Basis of Family Structure**

The proposed regulation infringes upon the family rights of U.S. citizens and eligible LPRs. The U.S. citizens and LPRs directly impacted by this proposed rule will lose eligibility solely because they live with—and want to continue living with—non-citizen family members who are not themselves directly eligible. The affected family relationships include married couples, domestic partners, parents, children, siblings, grandparents and others.

The family rights and relationships at stake in this rulemaking action have been recognized in both statutory and constitutional law. Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court acknowledged the dignity inherent in choosing a life partner and in making autonomous decisions about family life. In this and other constitutional family law cases,<sup>6</sup> the opportunity for co-residence, mutual care and companionship, and the nurturing of children, have

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<sup>4</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977)

<sup>5</sup> Footnote 8 of RIA.

<sup>6</sup> See e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Troxel v. Granville*, 530 U.S. 57 (2000).

supported recognition of a constitutional interest in family relationships and living arrangements.<sup>7</sup> As the Supreme Court held in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the government should not “regulate the occupancy of its housing by slicing deeply into the family itself” as HUD does here.

If family and marriage is generally “a keystone of our social order,”<sup>8</sup> it is especially so for immigrants, who often rely on family for their integration into American society. Moreover, the possibility of long-term or even permanent separation poses a very real threat to family life, particularly in times of hardship and adversity. According to the Supreme Court, the co-residence of parents and children not only facilitates Americans’ exercise of their “rights of childrearing, procreation, and education,” but “safeguards children and families” who are especially vulnerable.<sup>9</sup>

By contrast, HUD has failed to give any weight to family rights and relationships in this rulemaking action. If it did, it could only conclude that its long-standing regulation allowing unlimited proration strikes a reasonable balance between the government’s interests and the interests and rights of U.S. citizens to live with their spouses, children, and other family members.

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<sup>7</sup> See also *USDA v. Moreno*, 413 U.S. 528 (1973) (denying SNAP benefits to a household that includes unrelated members was clearly irrelevant to the purposes of the Food Stamp Act and did not further a legitimate governmental interest).

<sup>8</sup> *Obergefell* at 2601.

<sup>9</sup> *Id.* at 2590.