

NHLP Analysis of Impact of Proposed Section 214 on RD Multi-Family Housing Programs

April 30, 2020

The National Housing Law Project and the National Low Income Housing Coalition request that the OMB Office of Information and Regulatory Affairs reject Rural Development's (RD) Regulatory Impact Analysis submitted in support of its proposed rulemaking implementing Section 214 of the Housing and Community Development Act of 1980. We make this request because the analysis conducted by the agency does not meet the requirements of Executive Order 12866 and OMB Circular A-4.

Specifically, the information made available by RD in support of its proposed regulation is not based on the best reasonably obtainable technical and economic information, does not disclose the sources and methods used to reach its conclusions in a manner that a qualified person can reproduce the analysis, and does not discuss effective reasonable feasible alternatives.

Instead, the Regulatory Impact Analysis uses unreliable data to reach exaggerated conclusions that could reasonably have been avoided had RD used readily available information from its 2019 Multi-Family Housing Annual Fair Housing Occupancy Report, released on December 5, 2019, and the HUD Regulatory Impact Analysis Regarding the Verification of Eligible Status of undocumented and mixed status households in the HUD multi-family housing programs, which was released on April 15, 2019. Docket No. FR-6124-P-01. A copy of both documents has been uploaded.

Background

RD operates three multi-family loan programs and one voucher program:

- Section 515 rural rental housing loan program (42 USC §1485)
- Section 514 farm labor housing loan program (42 USC §1484)
- Section 538 rural rental guaranteed loan program (42 U.S.C. § 1490p-2)
- Section 542 RD Voucher Program (42 U.S.C. § 1490r)

The number of households served by each program, respectively, 400,000, 17,000 , 61,402, and 10,000-12,000.

No undocumented persons or mixed status households reside in Section 514 or 538 housing because both programs already restrict occupancy to citizens and persons who are admitted for permanent residency. 7 C.F.R. §§ 3560.152 (footnote), 3565.202(b). The RD Voucher program is similarly restricted. *See* 82 Fed. Reg. 21,972 (May 11, 2017).

In addition, based on calls made to California owners and managers of Section 515 housing, the National Housing Law Project has concluded that a significant number of owners and managers of RD Section 515 housing already exclude mixed status households from Section 515 housing. This is because the footnote to 7 C.F.R. § 3560.152, which states that RD has deferred enforcement of the citizenship permanent resident status requirement applicable to the Section 515 program, does not appear in RD's widely distributed version of the regulations. *See* RD Handbook 1-3560, Appendix 1 (7 C.F.R. Part 3560) (available at <https://www.rd.usda.gov/sites/default/files/3560-1appendix01.pdf>). Thus, contrary to the RD's 2005 announcement, many owners and managers of Section 515 housing are already applying the citizenship requirement to all Section 515 admissions.

It is important to note that Section 214 of the Housing Act of 1980 only applies the citizenship and permanent status restriction to households that are recipients of Rental Assistance under Section 521a(a)(2) of the Housing Act of 1949 (42 USC 1490(a)(2)(A)) and to RD Voucher holders. 42 U.S.C. § 1436(b) (definition of financial assistance). It does not apply to any households occupying Section 538 rental housing or households in Section 515 housing that do not receive Rental Assistance unless those households receive other federal rental assistance that is subject to Section 214.

Section 515 Program Data as of September 30, 2019.

Total number of units 400,372; Occupied Units 371,236 (93.45%).

Households Receiving RD Rental Assistance – 256,935 (69% of occupied units).

Households receiving federal subsidies: HUD PB Sec. 8: 22,761; HUD HCV: 20,904.

Households receiving other subsidies: Pub. Asst. 5,256; Private Asst.: 321; other 840.

Elderly Households Receiving RA: 177,500

Non-Elderly Households Receiving RA: 79,435

Why the RD Regulatory Impact Analysis Is Inadequate

The only information that RD has made available publically is that the proposed rule is expected to save more than \$118 million in Rental Assistance expenditures and that the analysis was somehow based on a 2009 estimate by the Center on Immigration Studies and the Department of Homeland Security that undocumented persons are approximately 10.96 % of the U.S. population. No information has been made available as to how the data about undocumented persons was used to arrive at the projected savings. It is unclear whether the saving is annual or over a longer period of time and what data was used, or assumptions made, with respect to the number of persons or households that occupy Section 515 housing. Thus, the Regulatory Impact Analysis does not meet the transparency requirements of OMB Circular A-4. This makes it impossible for outsiders to reproduce the agency's analysis. Notwithstanding, there are two reasons why the agency's analysis is flawed.

First, as we will explain below, we dispute the fact that \$118 million of Rental Assistance is being spent on subsidizing households with one or more undocumented persons. But even if that were true, there will not be any savings in the expenditure of Rental Assistance once undocumented households are removed from Section 515 housing. This is because RD cannot terminate the Rental Assistance contracts that it has entered into with owners of Section 515 housing after the undocumented persons are forced to vacate their homes. Instead, owners will simply release the units to eligible persons and households that are very low income, (*see* 7 C.F.R. § 3560.154 (f)(5)(i)), and are likely to have similar needs for Rental Assistance subsidies. Thus, regardless of any assumptions that RD made with respect to Rental Assistance expenditures for undocumented persons or mixed households, there will be no savings in Rental Assistance expenditures by removing them from the housing.

Moreover, even if owners could be prevented from releasing the units, it is highly unlikely that Congress will cut the funding for the Rental Assistance program as a result. Congress has never knowingly cut the funding for the Rental Assistance program and on the one occasion when it was advised that there is a shortfall in program funding for FY 2015, it appropriated \$325 million in supplemental funding to ensure that no households are displaced. This is particularly true in light of the fact that that over 41,000 households in Section 515 housing are currently rent overburdened. Meeting the needs of these households will cost RD over \$200 million per year.

Second, the assumption that nearly 11% of the households in RD section 515 housing have undocumented persons as part of the household is totally unfounded. Eleven percent of 265,935 Rental Assistance households is 29,253 households. There simply is no evidence to support that such a number of undocumented households reside in Section 515 housing. Data cited by HUD in support of its Regulatory Impact Analysis in support of its Section 214 proposed rules suggests that the number of undocumented households living in RD housing is but a very small fraction of 29,235.

The two HUD programs that are most similar to the RD Section 515 program are the HUD Section 202 elderly housing program and the Section 236 family housing program. Both are deeply subsidized housing programs similar to the RD Section 515 program. In fact, the Section 515 program was first modeled after the HUD 202 program and continues to house mostly elderly households in age restricted developments. HUD's 2017 Regulatory Impact Analysis in support of its proposed revision of the section 214 regulations, discloses that of the 122,852 households living in the Section 202 program only one household had both documented and undocumented members. Similarly, of the 11,155 households living in the HUD Section 236 program, only 22 households were mixed status households. In other words, less than .02% of the households in both programs are mixed households. If this percentage were to be applied to the total rental assistance assisted units in the Section 515 program, only 51 Section 515 Rental Assistance households would be expected to be mixed status households. The cost of subsidizing that number of households would be about \$2.55 million, nowhere near the \$118 million impact estimated by RD. In fact, the number is likely to be even smaller because, as we have noted earlier, many owners and managers of RD Section 515 housing are already enforcing the

citizenship permanent residency requirement. Thus, fewer than 51 mixed status households are likely to be living in Section 515 rental units receiving Rental Assistance.

Clearly, RD regulatory impact analysis must be rejected because it is arbitrary and totally unsupported by readily available data. We, therefore, urge that RD be required to do a more detailed impact analysis before it is allowed to publish the proposed rule.