

**Congress of the United States**  
Washington, DC 20510

June 8, 2020

The Honorable Rae Oliver Davis  
Inspector General  
U.S. Department of Housing and Urban Development  
451 7th Street Southwest  
Washington, DC 20410

Dear Inspector General Oliver Davis:

We write to request that your office open an investigation into whether the U.S. Department of Housing and Urban Development (HUD) violated the Administrative Procedure Act (APA) in its administration of the Federal Housing Administration (FHA) mortgage insurance program. Specifically we are concerned that HUD imposed a new, nonpublic, and legally erroneous policy prohibiting the issuance of FHA-insured loans to Deferred Action for Childhood Arrivals (DACA) recipients and knowingly misrepresented to Congress the implementation and enforcement of this new policy.

As you know, the DACA program, first announced in June 2012, provides deferred action on removal, renewable work authorization, and lawful presence for certain individuals who came to the United States as children.<sup>1</sup> In September 2017, the Trump Administration announced the termination of the DACA program.<sup>2</sup> That announcement prompted a series of questions surrounding the continued eligibility of DACA recipients to access FHA-insured mortgages, which HUD has historically permitted.

On December 14, 2018, *BuzzFeed News* first reported that HUD was quietly denying FHA-insured mortgages to DACA recipients.<sup>3</sup> Specifically, “DACA recipients, loan officers, realtors, and industry associations told *BuzzFeed News* that they have noticed the change, which has never been announced as a formal policy.”<sup>4</sup> Even more troubling was the finding that “[l]enders say FHA and HUD officials are not putting in writing their recent advice not to issue FHA-backed loans to DACA recipients. But at conferences and on hotline calls, lenders are now being told not to approve FHA-backed loans for homebuyers who are on DACA.”<sup>5</sup> *Buzzfeed News* interviewed one loan officer, who told the news outlet, “FHA and HUD officials have advised him in the past that DACA recipients are eligible for government-insured mortgages.”<sup>6</sup> In fact, that loan officer “had 42 FHA-backed loans approved for DACA recipients in recent years, about 10% of his total client base.”<sup>7</sup> On August 28, 2018, a lender who was present at a Lender Roundtable in Santa Anna with HUD officials wrote to the agency after hearing HUD officials state that DACA recipients were ineligible for FHA-insured loans at the roundtable. The lender wrote “your policy

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<sup>1</sup> <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>

<sup>2</sup> <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act>

<sup>3</sup> <https://www.buzzfeednews.com/article/nidhiprakash/daca-trump-denied-federal-housing-loans>

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

needs to be announced officially” expressing that this was a “huge change” because lenders at the roundtable “had been closing FHA DACA loans for years.”<sup>8</sup>

A week after the *Buzzfeed News* story, in a December 21, 2018 letter response to Senator Menendez, Cortez Masto and Booker’s December 18, 2018 letter to Secretary Carson,<sup>9</sup> Len Wolfson, Assistant Secretary for Congressional and Intergovernmental Relations wrote, “[t]he Department wants to be very clear that it has not implemented any policy changes during the current Administration, either formal or informal, with respect to FHA eligibility requirements for Deferred Action for Childhood Arrivals (DACA) recipients. HUD has longstanding policy regarding eligibility for non-U.S. citizens without lawful residency. Those policies have not been altered.”<sup>10</sup> The letter failed to clarify whether DACA recipients were in fact still eligible for FHA-insured loans and HUD’s internal change in policy.

As an internal matter, HUD decided to exclude DACA recipients from FHA loans. In the summer and fall of 2018, several internal communications reflect that HUD’s existing requirement that FHA loan applicants have “lawful residency” was being reinterpreted to exclude DACA recipients. The Single Family Housing Policy Handbook 4000.1 (SF Handbook) requires certain criteria for FHA loan eligibility for non-U.S. citizens and HUD does not define “lawful residency” in the SF Handbook.<sup>11</sup> HUD emails reflect the SF Handbook was not clear on DACA eligibility, and HUD began reinterpreting “lawful residency” interchangeably with “legal status” and began to craft an FAQ to reflect this internal change.<sup>12</sup> An FAQ had been approved by Single Family Program Development and Associate General Counsel Amy Brown in May 2018 and was waiting on the approval of Deputy Assistant Secretary Gisele Roget.<sup>13</sup> In an e-mail to Ms. Roget requesting her review and approval of the FAQ, it was conveyed that some lenders were originating DACA loans and others were not and requested clarification.<sup>14</sup> In September 2018, an e-mail from a mortgage lender to HUD officials, including FHA Commissioner Brian Montgomery and Secretary Carson, asked for clarification and a written memo as a result of HUD’s communication that DACA individuals were not eligible for FHA-insured financing “because they are not considered to have legal residency status.”<sup>15</sup> The mortgage advisor challenged this interpretation and raised the fact that DACA recipients have “lawful presence.”<sup>16</sup> HUD’s internal change in policy was further reflected in a confidential Single Family Housing Briefing Book for an October 2018 Mortgage Bankers Association

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<sup>8</sup> Democracy Forward Attachment 6 [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

<sup>9</sup> <https://www.menendez.senate.gov/news-and-events/press/menendez-booker-cortez-masto-demand-answers-from-hud-on-reported-discriminatory-policy-denying-dreamers-access-to-home-loans>

<sup>10</sup> <https://www.housingwire.com/wp-content/uploads/media/files/Editorial/Documents/Menendez-DACA-Final.pdf>

<sup>11</sup> <https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh.pdf>

<sup>12</sup> Democracy Forward Attachment 7; [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

<sup>13</sup> Democracy Forward Attachment 36; [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

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

<sup>15</sup> Democracy Forward Attachment 39; [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

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

Conference<sup>17</sup> and a November 27, 2018 Escalation Review Committee document for internal FHA use.<sup>18</sup>

On February 22, 2019, HUD officials, including Amy Brown, Associate General Counsel, Elissa Saunders, Director of Single Family Program Development and Connor Dunn, Congressional Liaison, met with staff from the offices of Senators Menendez, Brown, Booker, and Cortez Masto. During the briefing, Ms. Brown and Ms. Saunders repeatedly asserted that there had been no policy changes during the Trump Administration, either formal or informal, with respect to FHA eligibility requirements for DACA recipients. Furthermore, Ms. Brown and Ms. Saunders told Senate staff that HUD does not make determinations on whether DACA recipients have “lawful residency” or the definition of “lawful residency.” Instead, HUD officials claimed that the department refers all inquiries relating to DACA status to the United States Citizenship and Immigration Services (USCIS) and acknowledged clarity was needed. In the meeting, Ms. Brown and Ms. Saunders were familiar with the eligibility requirements for DACA and that DACA recipients have “lawful presence.” Ultimately, HUD assured Senate staff that they had not implemented a new policy regarding DACA recipients’ eligibility and that USCIS was responsible for resolving any questions about lawful residency. As internal HUD documents reflect, Ms. Brown and Ms. Saunders were directly involved and had knowledge of the change in policy at HUD and blatantly misrepresented to Senate staff in asserting there had been no informal or formal change in policy regarding the eligibility of DACA recipients.

In March 2019, HUD told *Housing Wire* that HUD, the FHA, the Department of Agriculture, and Fannie Mae were not denying mortgages to DACA recipients.<sup>19</sup> On April 3, 2019, Secretary Carson appeared before the House Appropriations Committee’s Subcommittee on the Departments of Transportation, and Housing and Urban Development, and Related Agencies. At that hearing, Representative Aguilar asked Secretary Carson, “To your knowledge, are DACA recipients eligible for FHA-backed loans and has HUD made any changes to existing policy or interpretations?”<sup>20</sup> Secretary Carson responded, “Yeah, when I read [the *Buzzfeed News* article], I inquired of the appropriate people, including the FHA commissioner, and no one was aware of any changes that had been made to the policy whatsoever. I’m sure we have plenty of DACA recipients who have FHA mortgages.”<sup>21</sup> Additionally, on May 21<sup>st</sup>, at a hearing before the House Financial Services Committee and in response to Representative Vargas’s line of questioning, Secretary Carson further testified that, “[T]he same policy has been in place since 2003, which was reaffirmed in 2015 by the previous administration, and we have not made any changes to that whatsoever.”<sup>22</sup>

Yet, for the first time in a June 2019 letter to Representative Aguilar, HUD informed Congress that DACA recipients were in fact *ineligible* for FHA loans.<sup>23</sup> The letter stated,

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<sup>17</sup> Democracy Forward Attachment 28; [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

<sup>18</sup> Democracy Forward Attachment 20; [https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA\\_Combined-Attachments-06.05.20.pdf](https://democracyforward.org/wp-content/uploads/2020/06/HUD-DACA_Combined-Attachments-06.05.20.pdf)

<sup>19</sup> <https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers/>

<sup>20</sup> <https://www.housingwire.com/articles/48712-carson-neglects-to-answer-congress-on-whether-fha-is-backing-daca-mortgages/>

<sup>21</sup> *Id.*

<sup>22</sup> <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403654#Wbcast03222017>

<sup>23</sup> <https://www.documentcloud.org/documents/6152203-Aguilar-DACA-FHA-Final-Response-Letter-2.html>

“[d]etermination of citizenship and immigration status is not the responsibility of HUD and the Department relies on other government agencies for this information,” therefore, “because DACA does not confer lawful status, DACA recipients remain ineligible for FHA loans.”<sup>24</sup> Senators Menendez, Cortez Masto, Booker, and Brown again asked HUD for clarification in a June 21, 2019 letter, as did Representatives Vargas and Aguilar.<sup>25, 26</sup> HUD responded to both letters on July 3, 2019 with another opaque response. Mr. Wolfson wrote that HUD “has not implemented any policy changes during the current Administration with respect to FHA eligibility requirements for DACA recipients” and the assertion that the current Administration made a change to FHA’s DACA policy was “false.”<sup>27, 28</sup>

The above timeline and documents demonstrate what we believe was a change of policy without sound and unambiguous legal reasoning, without an opportunity for public input under Section 553 of the APA, and without communication to FHA-approved lenders and Congress. The Administrative Procedure Act defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>29</sup> For rules that affect the legal obligations of non-agency parties, an agency must go through the notice and comment procedures of the APA.<sup>30</sup> If an agency is to amend or repeal an existing rule, the agency must undertake a rulemaking.<sup>31</sup> Moreover, the APA requires each agency to “make available to the public [...] substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and each amendment, revision, or repeal of the foregoing.”<sup>32</sup>

We believe HUD failed to comply with the basic requirements of the APA when it changed its policy of issuing FHA-insured loans to DACA recipients. HUD also failed to disclose and misrepresented to Congress that a change in policy had occurred in Congressional hearings, letter responses, and briefings to Congressional staff. Accordingly, we respectfully request that your office open a formal investigation into this matter. Thank you in advance for your consideration.

Sincerely,

/s/ Robert Menendez

United States Senator

/s/ Sherrod Brown

United States Senator

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<sup>24</sup> *Id.*

<sup>25</sup> [https://www.banking.senate.gov/imo/media/doc/6.21%20HUD%20LTR%20DACA\\_signed.pdf](https://www.banking.senate.gov/imo/media/doc/6.21%20HUD%20LTR%20DACA_signed.pdf)

<sup>26</sup> <https://vargas.house.gov/media-center/press-releases/rep-juan-vargas-leads-letter-urging-hud-to-affirm-dreamers-eligibility>

<sup>27</sup> HUD response letter from Assistant Secretary for Congressional and Intergovernmental Affairs, Len Wolfson, to Senator Menendez, July 3, 2019

<sup>28</sup> HUD response letter from Assistant Secretary for Congressional and Intergovernmental Affairs, Len Wolfson, to Representative Vargas, July 3, 2019

<sup>29</sup> 5 U.S.C. § 551(4).

<sup>30</sup> *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) “[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties ... is a legislative rule,” while “[a]n agency action that merely explains how the agency will enforce a statute or regulation ... is a general statement of policy.”

<sup>31</sup> 5 U.S.C. § 551(5); 5 U.S.C. § 553

<sup>32</sup> 5 U.S.C. § 552(a)

/s/ Juan Vargas

Member of Congress

/s/ Pete Aguilar

Member of Congress

/s/ Catherine Cortez Masto

United States Senator

/s/ Cory A. Booker

United States Senator

/s/ Mazie K. Hirono

United States Senator

/s/ Kamala D. Harris

United States Senator

/s/ Chris Van Hollen

United States Senator

/s/ Kirsten Gillibrand

United States Senator

/s/ Bernard Sanders

United States Senator

/s/ Jeffrey A. Merkley

United States Senator

/s/ Elizabeth Warren

United States Senator

/s/ Jacky Rosen

United States Senator

/s/ Amy Klobuchar

United States Senator

/s/ Jesús G. “Chuy” García

Member of Congress

/s/ Sylvia R. Garcia

Member of Congress

/s/ Raúl M. Grijalva

Member of Congress

/s/ Alexandria Ocasio-Cortez

Member of Congress

/s/ Joaquín Castro

Member of Congress

/s/ Adriano Espaillat

Member of Congress

/s/ Bill Foster

Member of Congress

/s/ Vicente Gonzalez

Member of Congress

/s/ Julia Brownley

Member of Congress

/s/ Gilbert R. Cisneros, Jr.

Member of Congress

/s/ Carolyn B. Maloney

Member of Congress

/s/ Nydia M. Velázquez

Member of Congress

/s/ Gregory Meeks

Member of Congress

/s/ Grace F. Napolitano

Member of Congress

/s/ Ed Perlmutter

Member of Congress

/s/ Jim Costa

Member of Congress

/s/ Nanette Diaz Barragán

Member of Congress

/s/ Norma J. Torres

Member of Congress

/s/ Albio Sires

Member of Congress

/s/ Lucille Roybal-Allard

Member of Congress

/s/ Jimmy Gomez

Member of Congress

/s/ Ayanna Pressley

Member of Congress

/s/ Darren Soto

Member of Congress

/s/ Susan A. Davis

Member of Congress

/s/ Linda T. Sánchez

Member of Congress

/s/ José E. Serrano

Member of Congress

/s/ Jim Himes

Member of Congress

/s/ Barbara Lee

Member of Congress

/s/ Adam Smith

Member of Congress

/s/ Alma S. Adams, Ph.D.

Member of Congress

