



June 5, 2020

VIA ELECTRONIC SUBMISSION

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:

Democracy Forward Foundation respectfully requests that your office open an investigation into whether the U.S. Department of Housing and Urban Development (HUD) violated federal law in its administration of the Federal Housing Administration (FHA)¹ mortgage insurance program by imposing a new, nonpublic, and legally incorrect prohibition on issuing FHA loans to Deferred Action for Childhood Arrivals (DACA) recipients, by imposing this prohibition without the opportunity for public notice and comment, and by refusing to disclose the existence of this prohibition to the public and to Congress.

As discussed in more detail below and revealed in the attached records, many of which we obtained from a Freedom of Information Act (FOIA) request, HUD historically permitted DACA recipients to obtain FHA-backed loans to purchase homes. FHA loans, which are especially popular with low-to-moderate income first-time homebuyers, are often well suited to DACA recipients, many of whom have bought homes since receiving DACA.²

¹ The FHA is an entity within HUD, which provides mortgage insurance on loans made by FHA-approved lenders throughout the United States and its territories. FHA mortgage insurance provides lenders with protection against losses if a property owner defaults on a mortgage. The lenders bear less risk because FHA will pay a claim to the lender for the unpaid principal balance of a defaulted mortgage.

² Survey data shows that 14 percent of respondents purchased their first home after receiving DACA. Among respondents 25 years and older, this share increases to 20 percent. Tom K. Wong et al., *Amid Legal and Political Uncertainty, DACA Remains More Important Than Ever*, Center for Am. Progress (Aug. 15, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/08/15/454731/amid-legal-political-uncertainty-daca-remains-important-ever/>.

Following the Trump Administration’s attempted rescission of DACA in late 2017, questions arose within HUD and the lending industry about DACA recipients’ eligibility for FHA loans. In response, and despite HUD’s historical practice, HUD for the first time decided, as an internal matter, that it would interpret and apply its existing requirement that FHA loan applicants have “lawful residency” to exclude DACA recipients. In the summer and fall of 2018, HUD determined that lenders should review loan applicants’ work permits for a code associated with DACA and disallow FHA loans for such applicants. It formally instructed staff to implement this policy no later than a November 2018 meeting. HUD did not announce this new policy publicly, even when asked about it. Instead HUD conveyed the requirement to individual lenders orally and continued to deny publicly that there was any new policy at all.

Indeed, in late 2018 and into 2019, following news reports that HUD was informally excluding DACA recipients from FHA loans, HUD officials maintained to Congress that HUD had not changed any such policies. They failed to reveal the new interpretation of lawful residency and HUD’s internal instruction not to accept applicants with work permits revealing their DACA status. HUD was well aware of its lack of transparency, as one December 2018 internal HUD email exchange expressing frustration about HUD’s private communications to lenders reveals: the DACA policy “wouldn’t be private if [the FHA Deputy Assistant Secretary] would just post the freaking DACA FAQ.”³

Finally, in the summer of 2019, after being confronted by Representative Aguilar with a written statement from HUD to an individual lender about DACA recipient eligibility, HUD provided a formal response, in which it stated in writing for the first time that DACA recipients were not eligible for FHA loans. This response, issued nearly a year after the prohibition was introduced and implemented, stated incorrectly that HUD’s policy on DACA eligibility had not changed.

As set forth in detail below, this policy change violated basic requirements as to agency procedures. Its nonpublic, haphazard implementation broke norms of good government, harmed borrowers and lenders, and created uncertainty in the home mortgage market. And the failure of HUD officials to provide transparent information about agency policy to Congress and the public brings the agency’s credibility and veracity into question.

I. The DACA program.

The U.S. Department of Homeland Security (DHS) established the DACA program in June 2012 when it announced that it would not deport certain people without documentation who had come to the United States as children. As the Secretary of DHS concluded in making this decision, these young people, known as Dreamers, generally did not intend to violate the law when they were brought to the United States; in many cases, they know only this country as home; and they have contributed to the country in significant ways.⁴ This conclusion has been

³ See Att. 1, DFF IG Letter_00002.

⁴ See, e.g., *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 216 (D.D.C. 2018).

borne out in the years since DACA was enacted, as numerous surveys show that DACA recipients are able to pursue additional educational opportunities, participate more fully in the U.S. labor force, and do so at higher wages, with corresponding positive effects on the broader economy.⁵

Applicants for DACA must establish that they meet certain criteria (such as having lived in the United States continuously for five years and having been under the age of sixteen when brought here). If approved, they receive renewable two-year grants of “deferred action” on removal from the United States. DACA recipients are permitted to live and work lawfully in the United States, including receiving Social Security Numbers⁶ and work authorization.⁷

U.S. Customs and Immigration Services (USCIS) considers DACA recipients to be “lawfully present” in the United States; and explains that DACA recipients’ “period of stay is authorized by [DHS] while [the] deferred action is in effect. . . . Individuals granted deferred action are not precluded by federal law from establishing domicile in the United States.”⁸ At the same time, USCIS has opined that, while they are lawfully present, DACA recipients do not have “lawful status.” *Id.*

In September 2017, the then-Acting Secretary of DHS rescinded DACA. Following legal challenges, multiple courts ordered the Administration to maintain DACA to allow current recipients to renew their status, but did not require DHS to accept new DACA applicants. The Supreme Court is reviewing the lawsuits, and a decision is expected in the coming weeks.⁹ In the meantime, DACA continues in place for prior recipients.

⁵ Tom K. Wong et al., *Amid Legal and Political Uncertainty, DACA Remains More Important Than Ever*, Center for Am. Progress (Aug. 15, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/08/15/454731/amid-legal-political-uncertainty-daca-remains-important-ever/>.

⁶ *Social Security Number and Card—Deferred Action for Childhood Arrivals*, Soc. Sec. Admin., https://www.ssa.gov/pubs/deferred_action.pdf.

⁷ *Frequently Asked Questions*, USCIS, <https://www.uscis.gov/archive/frequently-asked-questions> (last visited May 5, 2020) (“[A]n individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate ‘an economic necessity for employment.’”).

⁸ *Id.* While these FAQs are archived, the current USCIS webpage on DACA explains that following the preliminary injunctions reinstating DACA, the archived DACA FAQs still apply. *See Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, USCIS, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

⁹ *See Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476 (9th Cir. 2018), *cert. granted sub nom. DHS v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019); *Batalla Vidal v. Nielsen*, 291 F.

II. FHA loan availability to non-citizens.

The FHA is the largest mortgage insurer in the world with an active insurance portfolio of over \$1.3 trillion. Designed for low-to-moderate income borrowers, FHA loans require lower minimum down payments and credit scores than many conventional loans. They are especially useful for young people who may not have great or well-established credit or who may be carrying debt. As HUD explains, “[e]ach year, FHA helps more than a million homebuyers achieve the dream of sustainable, affordable homeownership of single family homes.”¹⁰

While the FHA sets the eligibility criteria, approved FHA lenders interact directly with loan applicants, assess applicants’ eligibility, and provide mortgage-insurance applications to the FHA. If the FHA finds mistakes in the lender’s underwriting of the loan, the FHA may force lenders to indemnify the agency for any resulting mortgage insurance claims.

General FHA loan requirements are set forth by statute and regulation, as well as in the *Single Family Housing Policy Handbook* 4000.1 (“SF Handbook”), which FHA describes as a consolidated, consistent, and comprehensive source of FHA Single Family Housing policy.¹¹ As relevant here, non-citizens who are not lawful permanent residents (aka green card holders) are eligible for FHA loans if they meet the following criteria set forth in Section II.A.1.b.ii(A)(9) of the SF Handbook:

(b) Non-Permanent Resident Aliens

A Borrower who is a non-permanent resident alien may be eligible for FHA-insured financing provided:

- the Property will be the Borrower’s Principal Residence;
- the Borrower has a valid SSN, except for those employed by the World Bank, a foreign embassy, or equivalent employer identified by HUD;

Supp. 3d 260 (E.D.N.Y. 2018); *Nat’l Ass’n for the Advancement of Colored People*, 298 F. Supp. 3d 209.

If the Supreme Court’s ruling permits some or all DACA recipients to retain DACA status, the issues raised in this letter will be unchanged. Even if the Supreme Court were to permit the Administration to proceed with its attempted rescission of DACA, and the Administration did so, that result would not moot the importance of these issues. Not only would it remain necessary to correct HUD’s inadequate administrative procedures to prevent such unlawfulness from occurring in the future, but the DACA exclusion policy would continue to harm those lenders that issued loans to DACA recipients in good faith based on HUD’s prior policy and the lack of any public notice about the new policy, and now are denied mortgage insurance for any such loans that default.

¹⁰ *Federal Housing Administration*, HUD, https://www.hud.gov/federal_housing_administration.

¹¹ *See* SF Handbook, *available at* https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1.

- the Borrower is eligible to work in the United States, as evidenced by the Employment Authorization Document issued by the USCIS; and
- the Borrower satisfies the same requirements, terms and conditions as those for U.S. citizens.

The Employment Authorization Document is required to substantiate work status. If the Employment Authorization Document will expire within one year and a prior history of residency status renewals exists, the Mortgagee may assume that continuation will be granted. If there are no prior renewals, the Mortgagee must determine the likelihood of renewal based on information from the USCIS....

(c) Non-U.S. Citizens without Lawful Residency

Non-U.S. citizens without lawful residency in the U.S. are not eligible for FHA-insured Mortgages.¹²

HUD does not define or otherwise provide any guidance on the meaning of the term “lawful residency” in subsection (c).

III. DACA recipients have historically been able to obtain FHA loans.

Historically, HUD has not excluded DACA recipients from FHA loan eligibility.¹³ As discussed above, DACA recipients may obtain social security numbers and employment authorization enabling them to meet the requirements of subsection (b) of the SF Handbook, especially once they had established a history of DACA renewals.¹⁴ HUD did not interpret or

¹² SF Handbook 4000.1 § II.A.1.b.ii(A)(9)(b) & (c). An FHA FAQ in response to the question “Do borrowers have to be U.S. citizens to qualify for FHA financing?” provides essentially the same information. *Frequently Asked Questions*, FHA, <https://www.hud.gov/FHAFAQ> (Topic No.: KA-04111). Neither the authorizing statute, regulations, nor other agency guidance provide any additional relevant information regarding the eligibility of non-citizens who are not lawful permanent residents.

¹³ See Att. 2, DFF IG Letter_00007 (Letter from Rep. Aguilar stating “Under the Obama Administration, DACA recipients were eligible for FHA-backed loans.”); Att. 3, DFF IG Letter_00010 (HUD’s new informal DACA exclusion policy “means that DACA recipients who would otherwise qualify for an FHA-insured mortgage loan, are now being unjustly rejected.”).

¹⁴ In April 2018, FHA customer service advised a lender: “Your question was regarding DACA recipients. FHA will insure loans to DACA recipients as long as they meet the following requirements” and identified the SF Handbook’s requirements of an SSN and EAD. Att. 4, DFF IG Letter_00014; see also e.g., Att. 5, DFF IG Letter_00017 (Internal HUD email asking “[i]n light of President Trump’s announcement that the DACA program is ending, *what is FHA stance on EAD cards with DACA codes & expiration dates w/in the year? Are we still able to use the history of previously renewals? Should this category be denied until there is a plan if there will be any renewals allowed?*”) (emphasis added).

apply the “lawful residency” requirement in subsection (c) to exclude DACA recipients. Nor was there any basis to do so, given that DACA recipients are lawfully present in the United States in the eyes of the immigration authorities.

Through the summer and fall of 2018, many lenders offered FHA loans to DACA recipients, which HUD accepted.¹⁵ While HUD did not formally announce a policy with respect to DACA recipients before June 2019, lenders’ responses to HUD’s elimination of DACA eligibility during 2018 and 2019 show that the agency had been routinely accepting DACA recipients for FHA loans. As one lender wrote to HUD in the summer of 2018, the lender’s largest competitors were offering FHA financing to DACA recipients. The lender had recently participated in an FHA roundtable where FHA Deputy Assistant Secretary Gisele Roget said that DACA recipients were not eligible (once the policy had begun to change), and, in response, complained to Ms. Roget: “everyone in the Mortgage Industry is at odds on this subject and your policy needs to be announced officially. ... *this is a huge change [in HUD policy]! Just about every lender representative at the roundtable had wide eyes & a puzzled look on their face when you stated it, knowing they had been closing FHA DACA loans for years.*”¹⁶

¹⁵ Nidhi Prakash, *The Trump Administration is Quietly Denying Housing Loans to DACA Recipients*, BuzzFeed News, Dec. 14, 2018, <https://www.buzzfeednews.com/article/nidhiprakash/daca-trump-denied-federal-housing-loans> (“One loan officer in Chicago, Jose Pepe Rincon, told BuzzFeed News that FHA and HUD officials have advised him in the past that DACA recipients are eligible for government-insured mortgages. He has had 42 FHA-backed loans approved for DACA recipients in recent years, about 10% of his total client base. But that changed around May [2018].”); *see also* Dani Hernandez, *Ask the Underwriter: Are DACA Recipients Eligible for FHA Loans?*, HousingWire, Apr. 26, 2018, <https://www.housingwire.com/articles/43208-ask-the-underwriter-are-daca-recipients-eligible-for-fha-loans/> (explaining that DACA recipients were eligible for FHA loans); Lew Sichelman, *Feds’ Dreamer Policy a Double Whammy for Housing Market*, Miami Herald, July 10, 2019, <https://www.miamiherald.com/news/business/real-estate-news/article232500322.html#storylink=cpy> (“The HUD ruling [in June 2019 explicitly excluding DACA recipients from FHA loans] reverses a longstanding ‘look-the-other-way’ position that Dreamers qualify for loans backed by the Federal Housing Administration under certain circumstances.”).

¹⁶ Att. 6, DFF IG Letter_00019 (emphasis added). Similarly, in July 2018, the Mortgage Bankers Association (MBA) formally requested guidance from FHA Commissioner Brian Montgomery on DACA recipients’ eligibility for FHA loans in a letter that strongly implied that lenders regularly offer FHA loans to DACA recipients. *See MBA Request for Additional Clarity and Guidance Related to the FHA Single Family Housing Policy Handbook* at 4 (July 19, 2018), available at <https://www.mba.org/advocacy-and-policy/all-letters-and-testimony>.

IV. HUD adopted its DACA exclusion policy by, for the first time, formally interpreting its lawful residency requirement for FHA loans to exclude DACA recipients and by prohibiting loans to applicants whose employment authorization documents included a code associated with DACA.

Following the Administration’s attempt to rescind DACA in late 2017, lenders and officials at HUD began questioning DACA recipients’ eligibility for FHA loans. For example, in April 2018, after getting inquiries about DACA recipient eligibility, Ms. Roget asked others working on FHA single family housing programs, “[c]an you provide guidance here? The FHA Handbook isn’t clear on this. Do we need to update the Handbook?”¹⁷ Ms. Roget later sent inquiries to various other agencies inquiring how they treated DACA recipients in their loan programs.¹⁸

In the spring and early summer of 2018, as it was in the process of formulating and implementing the DACA exclusion policy, HUD gave lenders inconsistent answers about DACA eligibility.¹⁹ For example, in a series of lender roundtables, HUD provided contradictory guidance about the application of the SF Handbook to DACA. Notes from a roundtable in June 2018 reveal that “FHA lenders have flagged that there is ambiguity concerning the eligibility of DACA recipients for FHA loans.”²⁰ HUD’s internal notes from a lender roundtable in Richmond in July 2018 reveal a discussion on “DACA and legal residency” in which HUD staff appear to have advised that a valid EAD card with a likelihood of renewal was sufficient to establish the legal residency requirement for an FHA loan.²¹ And in June 2018, a lender wrote FHA leadership and stated that at a roundtable that had occurred a few weeks before, lenders were advised that DACA recipients were eligible for loans so long as the non-permanent resident alien

¹⁷ Att. 7, DFF IG Letter_00023.

¹⁸ See Att. 8, DFF IG Letter_00026 (“Does VA have a policy on mortgage eligibility for DACA recipients.”); Att. 9, DFF IG Letter_00029 (“Does RHS [USDA Rural Housing Service] have a policy on mortgage eligibility for DACA recipients.”); Att. 10, DFF IG Letter_00032 (seeking information “about whether FHFA allows DACA loans”).

¹⁹ One lender challenged a HUD finding that a loan was unacceptable because it was issued to a DACA recipient, explaining that a HUD regional office had advised “on a number of occasions” that “if the borrower has an Employment Authorization card and meets the other guidelines outlined in the Non-Permanent Resident Alien Section we should proceed.” See Att. 11, DFF IG Letter_00034-35. Similarly, another lender told HUD that it had had calls that were escalated through the HUD resource center, “where they indicate that as long as we meet all the bullet points in (b) Non-Permanent Resident Aliens, then they are eligible. DACA borrowers usually meet all the requirements in part (b) Non-Permanent Resident Aliens.” See Att. 12, DFF IG Letter_00038-39.

²⁰ See Att. 13, DFF IG Letter_00043.

²¹ See Att. 14, DFF IG Letter_00054.

guidelines were followed.²² And, as mentioned above, in May 2018, Ms. Roget advised lenders at a roundtable that DACA recipients were not eligible, although according to internal documents she later denied doing so when asked about it by FHA Administrator Montgomery.²³

During this time, a consensus began to develop within HUD to equate the “lawful residency” requirement in the SF Handbook with lawful status, which led to the conclusion that DACA recipients were not eligible for FHA loans.²⁴ The documents we have reviewed reveal no analysis of the difference between those two terms, nor consideration of the fact that while USCIS viewed DACA recipients as lacking “lawful status”, it had also determined that they are “lawfully present.”²⁵ Staff in the Office of General Counsel (OGC) at one point provided an opinion that DACA recipients were not eligible for FHA loans, but later the Office appears to have reversed that opinion and opined that “HUD does not decide what programs or policies of USCIS convey lawful residency because we have no authority to make that call.”²⁶

²² See Att. 15, DFF IG Letter_00059-61. While internal HUD emails dispute the lender’s characterization, they reveal that at a minimum, HUD leadership was aware of a widely held view amongst lenders that DACA recipients could be eligible for FHA loans based on their EAD card. *See id.*

²³ According to HUD records, following public reporting of Ms. Roget’s statement, Secretary Carson called Administrator Montgomery about the issue, after which Ms. Roget told Mr. Montgomery that she did not make the statement. Att. 1, DFF IG Letter_00001-4.

²⁴ See, e.g., Att. 7, DFF IG Letter_00021-24.

²⁵ As one email chain reveals, HUD staff were instructed to determine what types of immigration status provide “lawful residency” based on “whether or not USCIS stated on the website that the status indicated ‘lawful residency.’” But once they realized that USCIS did not use the term “lawful residency” to describe immigration status, they relied on the USCIS description of DACA that “Deferred action does not provide lawful status” and explained that “Jack/Kevin ... feel this is sufficient to support the lawful residency requirement for an FHA loan.” Att. 16, DFF IG Letter_00063-65.

²⁶ OGC prepared a memo on DACA eligibility for Ms. Roget in June 2018. *See* Att. 17, DFF IG Letter_00070-71. While that memo was redacted, earlier documents reveal that OGC staff had previously advised Office of Housing program staff that “we agree” DACA recipients are “not eligible” for FHA loans. Att. 18, DFF IG Letter_00073.

In March 2019, however, in preparing Secretary Carson’s Congressional testimony, HUD’s Associate General Counsel for Insured Housing requested a bullet point on DACA stating “we defer to USCIS as to whether DACA recipients are considered lawful residents. There are competing interpretations of this and we need to be clear that HUD does not decide what programs or policies of USCIS convey lawful residency because we have no authority to make that call. Only USCIS can decide what their policies and programs do. Also, there will be a question – no doubt – as to why someone from HUD would have told people DACA recipients are not eligible. And we need to have a response that ties back to the policy and USCIS without

HUD decisionmakers then implemented the DACA exclusion policy through guidance to staff to review, for the first time, a code on loan recipients' employment authorization documents, and to exclude only those with the DACA category code (C33). Specifically, in August 2018, during an internal credit policy conference call, staff were provided with guidance "to ensure that borrowers with Employment Authorization Documents (EAD Cards) also meet FHA's lawful residency eligibility requirements."²⁷ Staff received "instructions ... to cross-reference the category code appearing on the EAD card with a list distributed by HMID containing immigration category codes that would also indicate lawful residency status." *Id.* Ultimately however, HUD instructed staff to exclude only loan applicants with the DACA code, not others with deferred status.²⁸ This policy change was further codified via internal guidance issued through HUD's Escalation Review Committee on November 27, 2018, "confirming that DACA recipients do not meet FHA's lawful residency requirements."²⁹

Other documents confirm that adopting a requirement to cross-reference the category codes on EAD cards, and excluding only DACA recipients on that basis, was a new practice by HUD.³⁰ As one November 2018 internal email explained: "Although our policy has always been

getting bogged down in the question of why someone would have said that." Att. 19, DFF IG Letter_00076.

²⁷ See Att. 20, DFF IG Letter_00081.

²⁸ HUD's Quality Assurance Division: "attempted to locate clearly defined lawful residency designations for each category code on the USCIS website. After significant research by HQ QAD, it was determined that there were too many variables and/or parameters for most category codes to make a definite determination for lawful residency not practicable. However, since the USCIS website clearly states that persons with a Deferred Action Childhood Arrival (DACA) designation, category code C33, do not have lawful residency status [sic], HQ QAD proposes that [redacted as deliberative privilege]." *Id.* (The USCIS website opines that DACA recipients are lawfully present but do not have lawful status; contrary to the statement in the email, it does not opine at all with respect to lawful residency).

²⁹ See Att. 21, DFF IG Letter_00085.

³⁰ See Att. 22, DFF IG Letter_00089 (identifying a "decision point[]" (the content of which is redacted) regarding using EAD card category codes to determine lawful residency); Att. 23, DFF IG Letter_00092-94 (series of messages stating that "DACA [lending] violations" were being "cit[ed]" based on "a decision documented through ERC."); Att. 24, DFF IG Letter_00096 ("What happened is that lenders asked the specific question – are DACA recipients eligible for FHA loans – and we needed to determine a specific answer grounded in existing policy. That answer is no."); Att. 25, DFF IG Letter_00098 (In response to question about what the Quality Assurance Division was doing about DACA, "[w]e're citing it as an incurable finding and the HOCs are supposed to be requesting indemnification every time. They got that direction during a SFPD monthly call and we reinforced it through ERC discussion/minutes."); Att. 26, DFF IG Letter_00102 (OGC email regarding DACA eligibility: "Is that where FHA landed on this or is it still up in the air?"). Some lenders report having received informal advice that DACA recipients were not eligible for FHA loans earlier, but the documents we reviewed strongly suggest that

that they must have lawful residency to qualify for an FHA mortgage, we never used the category codes on the EAD card to determine this and I think everyone just assumed that they had lawful status if they had an EAD card [W]e are now enforcing using the category code.”³¹

V. HUD did not reveal this policy change to the public, hurting borrowers and lenders.

By the fall of 2018, through its new interpretation of “lawful residency” and its new enforcement policy to check the category code on applicants’ EAD cards, HUD had a formal internal policy that required the exclusion of DACA recipients from FHA loans for the first time and instruction to staff to carry out the same.³² But HUD did not tell the public about this decision until nearly a year later. Instead, HUD only verbally communicated to some lenders on an ad hoc basis that DACA borrowers were ineligible, but refused to put the policy in writing.³³

HUD understood that its failure to state its view on eligibility explicitly and publicly caused confusion. While HUD staff had drafted an FAQ for the public explaining its new view on DACA eligibility, which OGC had approved at least by early May 2018, it was never published, apparently because Ms. Roget decided against doing so.³⁴ As mentioned above, HUD

internal guidance provided in the August 2018 call and the November 2018 ERC minutes were the first widely distributed internal agency directives on the new policy.

³¹ Att. 27, DFF IG Letter_00104.

³² For example, the FHA Office of Single Family Housing prepared an “internal and confidential” briefing book for a Mortgage Bankers Association convention in October 2018, which included a “hot topics” list including DACA eligibility. This internal handbook advised explicitly that DACA recipients were not eligible for FHA loans. Att. 28, DFF IG Letter_00110. HUD did not provide a similarly explicit statement in writing that was publicly available until the following June.

³³ Dani Hernandez, *Ask the Underwriter: Why Is HUD Privately Discouraging Lenders From Making FHA Loans to DACA Borrowers?*, HousingWire, Sept. 20, 2018, <https://www.housingwire.com/articles/46885-ask-the-underwriter-why-is-hud-privately-discouraging-lenders-from-making-fha-loans-to-daca-borrowers/>.

³⁴ See Att. 29, DFF IG Letter_00112 (referring to the question of DACA recipients’ eligibility for FHA loans, “We are actually drafting an FAQ on that. OGC signed off on it and it will go to the Resource Center.”); Att. 30, DFF IG Letter_00114 (“We reviewed a FAQ for Housing to publish regarding DACA, however Gisele decided that it should not be published.”). See also Att. 31, DFF IG Letter_00116-17 (the FAQ was submitted to Ms. Roget on May 10, 2018, and was still awaiting review and approval in December 2018).

The FOIA production also revealed the language of the draft FAQ:

“Are non-permanent resident aliens that have been granted deferred action under DACA eligible for an FHA mortgage? FHA’s longstanding policy has been that Non-U.S. citizens without

staff were frustrated that the failure to publish the FAQ resulted in a “private” policy.³⁵ Similarly, in the spring of 2019, internal HUD emails ask whether “the DACA questions start[ed] again?” and respond, “[n]o, but they are going to. Trying to get ahead of it. Know what we are working with. Gisele [Roget] is in spin mode.”³⁶

HUD’s decision to exclude DACA recipients and to do so non-publicly hurt borrowers and lenders. Borrowers who anticipated being able to use accessible financing to buy a house were denied, often after spending significant time and effort proceeding through the loan application process.³⁷ And lenders, which had operated based on the reasonable and good faith understanding that DACA recipients were eligible for FHA loans, based on HUD’s prior actions, were forced to execute indemnification agreements for loans that defaulted.³⁸ It also created significant confusion in the lending market, including concern by lenders that refusing to lend to

lawful residency in the U.S. are not eligible for FHA insured mortgage. According to the USCIS, the [DACA] program is an administrative program that grants deferred prosecutorial action against persons who came to the United States as juveniles meeting certain conditions. DACA recipients are not granted lawful residency status, although they are given work authorization for a 2 year period and therefore are not eligible for FHA financing.” Att. 32, DFF IG Letter_00121.

The FAQ accurately quotes the SF Handbook requirement regarding lawful residency, but does not acknowledge that this requirement was not previously enforced via work permit authorization codes or that HUD had not previously equated its lawful residency requirement with USCIS’s determinations as to lawful status.

³⁵ See Att. 1, DFF IG Letter_00001-4.

³⁶ See Att. 33, DFF IG Letter_00123.

³⁷ For example, in December 2018, Senator Van Hollen sent a letter to HUD describing the experience of a constituent and asking for an explanation about HUD’s new DACA policy. As the prospective borrower explained, she was sent to the United States as a child. As an adult, she worked in a restaurant for years, saving money and trying to increase her credit score. Eventually, she was approved for a home loan and found a house she could afford. As she wrote, her family was “so excited about this house we [gave] up Christmas, and I pawned all my jewelry ... Because the lender said everything looked good, I gave my landlord notice.” At that point, her lender told her that she no longer qualified for the loan solely on account of her DACA status. Without the FHA loan, she could not afford to purchase the home she had found for her family. Att. 34, DFF IG Letter_00125-28.

³⁸ See Att. 35, DFF IG Letter_00130-31; Att. 25, DFF IG Letter_00098 (In response to question about what the Quality Assurance Division was doing about DACA, “[w]e’re citing it as an incurable finding and the HOCs are supposed to be requesting indemnification every time. They got that direction during a SFPD monthly call and we reinforced it through ERC discussion/minutes.”).

DACA recipients without a formal policy on which to rely could open them to fair lending liability.³⁹

VI. HUD did not reveal the policy change to Congress, despite direct questioning.

Alarmed by reporting in the fall of 2018 that DACA recipients were being denied FHA loans, several Senators and Representatives sought to determine what HUD's policy was. HUD repeatedly failed to reveal that it had adopted a new interpretation of its SF Handbook—that DACA recipients were not “lawful residents”—and that it was enforcing this determination with a new requirement to verify the category codes on loan applicants' EAD cards.⁴⁰

For example, on December 21, 2018, in response to an inquiry from Senators Menendez, Cortez Masto, and Booker, Len Wolfson, the 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.”⁴¹ The letter set forth the requirements of the SF Handbook, including the policy that non-citizens without lawful residency are not eligible for FHA loans, but it did not explain how HUD had interpreted the residency status of DACA recipients, did not reveal the initiation of the EAD code policy, and did not reveal HUD's categorical conclusion that DACA recipients were ineligible for FHA loans. *Id.* At least one trade publication covering the issue interpreted the statement that there had been no formal or informal policy changes, to be clarification - given HUD's historical practice - that HUD was *not* denying FHA loans for DACA recipients.⁴²

Later, on February 12, 2019, FHA Administrator Montgomery testified before the House Appropriations Subcommittee on Transportation, Housing and Urban Development, regarding DACA eligibility. In response to the question from Representative Aguilar, “[t]o your knowledge, has HUD issued any type of policy surrounding DACA recipients' eligibility for FHA-backed home loans?”, Mr. Montgomery stated the “policy has been unchanged for many

³⁹ The Director of the Philadelphia Homeownership Center encouraged Ms. Roget to approve the DACA FAQ multiple times because “we have received complaints from lenders that some lenders are not originating DACA loans and some of our lenders are originating the loans. Lenders want clarification so they are on an equal playing field.” Att. 36, DFF IG Letter_00134.

⁴⁰ Representative Aguilar details several communications in 2019 in which HUD officials communicated that HUD had not changed its policy allowing DACA recipients to access FHA-backed loans in a May 8, 2019 letter. Att. 2, DFF IG Letter_00005-8.

⁴¹ *See* Att. 15, DFF IG Letter_00060-61 (emphasis added). HUD sent a similar letter to Representative Maxine Waters at the same time. Att. 37, DFF IG Letter_00135-37.

⁴² Ben Lane, *HUD to Lenders: We Are Not Denying Mortgages to DACA Dreamers*, HousingWire, Mar. 7, 2019, <https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers/>.

years” and is “exactly what we are following today.”⁴³ When asked if it would surprise him if HUD staff were advising lenders not to work with DACA recipients, he answered “I am not aware of—I have heard some accusations of that, sir, it hasn’t come from me. ... I can’t speak for all of my staff, but I do know we haven’t changed that policy dating back 15 years or so.” *Id.*

Contrary to this testimony, however, internal HUD documents reveal that, in July 2018, Ms. Roget forwarded an email to Mr. Montgomery regarding DACA eligibility, which reached the conclusion that based on the SF Handbook’s requirement of “lawful residency,” DACA recipients were not eligible.⁴⁴ Additionally, by September 2018, Mr. Montgomery was aware that HUD had told lenders that DACA recipients were not eligible for FHA loans because they were “not considered to have legal residency status” and that he asked for a meeting on the issue because “it comes up all the time.”⁴⁵ And in December 2018, Ms. Roget forwarded Mr. Montgomery the draft FAQ explaining why DACA recipients were allegedly not eligible.⁴⁶ Mr. Montgomery did not reveal any of this information when testifying.⁴⁷

On April 3, 2019, Secretary Carson testified before the same Subcommittee, and again failed to reveal HUD’s new interpretation of its SF Handbook and enforcement policy. In response to the question from Rep. Aguilar, “[t]o your knowledge, are DACA recipients eligible for FHA-backed loans and has HUD made any changes to existing policy or interpretations?” Secretary Carson responded, “[y]eah, when I read that report [that DACA recipients were being denied loans], 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.”⁴⁸ Contrary to what his staff had been instructed to do for several months, Carson further said it would “surprise” him if DACA recipients were being turned down for FHA loans.⁴⁹ Secretary Carson made these statements

⁴³ Hearings Before the H. Appropriations Subcomm. on Transp., Hous., and Urban Dev., 116th Cong. (2019), *available at* <https://www.govinfo.gov/content/pkg/CHRG-116hhrg37628/html/CHRG-116hhrg37628.htm>.

⁴⁴ Att. 38, DFF IG Letter_00139-41.

⁴⁵ Att. 39 DFF IG Letter_00143.

⁴⁶ Att. 40, DFF IG Letter_00147.

⁴⁷ The following month, staff from Representative Aguilar’s office had a phone call with HUD’s congressional liaison office as a follow up to this testimony, and again “[s]taff confirmed that HUD’s policy has not changed and that the agency’s interpretation of the policy has not changed.” Att. 2, DFF IG Letter_00006.

⁴⁸ Ben Lane, *Carson Neglects to Answer Congress on Whether FHA Is Backing DACA Mortgages*, HousingWire, Apr. 3, 2019, <https://www.housingwire.com/articles/48712-carson-neglects-to-answer-congress-on-whether-fha-is-backing-daca-mortgages/>. Secretary Carson appears to be referring to a story in BuzzFeed News. *See supra* note 15.

⁴⁹ Nidhi Prakash, *Ben Carson Said He Doesn’t Know Why DACA Recipients Are Being Denied Housing Loans His Department Oversees*, BuzzFeed News, Apr. 3, 2019,

despite the fact that internal HUD records suggest that he spoke with Administrator Montgomery in the fall of 2018 about HUD's instructions to lenders that DACA recipients were not eligible, although the documents we have reviewed do not reveal how much information he had about the policy.⁵⁰

VII. HUD finally revealed its policy in June 2019.

On June 11, 2019, HUD responded to an oversight letter from Representative Aguilar with a letter from Mr. Wolfson. HUD's letter reiterated "HUD has been 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 DACA recipients. This letter confirms that fact." For the first time, however, and ending the widespread uncertainty it had caused, HUD stated its position on DACA eligibility explicitly: "Determination of citizenship and immigration status is not the responsibility of HUD and the Department relies on other government agencies for this information. Accordingly, because DACA does not confer lawful status, DACA recipients remain ineligible for FHA loans."⁵¹ HUD has not taken any formal steps to codify this position as its policy.

VIII. Potential Legal Violations.

It is likely that HUD violated federal law governing agency procedure in the enactment and implementation of its DACA exclusion policy. Your office has the authority to review such potential violations and has done so in the past.⁵² We respectfully request that you do so in this case.

<https://www.buzzfeednews.com/article/nidhiprakash/ben-carson-daca-recipients-denied-federal-housing-loans>.

⁵⁰ Att. 1, DFF IG Letter_00001-4. When preparing for his testimony, however, it appears that HUD staff prepared a draft Q&A document for him that advised that: "FHA's longstanding policy is that Non-U.S. citizens without lawful residency in the U.S. are not eligible for FHA insured mortgages HUD defers to the US Citizenship and Immigration Services as to the status conveyed to individuals granted Deferred Action for Childhood Arrivals (DACA)." Att. 41, DFF IG Letter_00153.

⁵¹ Letter from Len Wolfson, Assistant Sec'y for Cong. and Intergov. Relations, HUD, to Rep. Pet Aguilar, U.S. H.R. (June 11, 2019), *available at* <https://www.documentcloud.org/documents/6152203-Aguilar-DACA-FHA-Final-Response-Letter-2.html>.

⁵² 5 U.S.C. app. 3 § 4. For example, HUD's Office of the Inspector General issued an Audit Report concluding that HUD had not conducted rulemaking procedures required by the APA in administering its single-family notes sales program in 2017. *See* Distressed Asset Stabilization Program (Audit Rep. No. 2017-KC-0006), Off. of Inspector Gen., HUD (July 14, 2017), <https://www.hudoig.gov/sites/default/files/documents/2017-KC-0006.pdf>.

To begin, while HUD has asserted it has not changed its DACA eligibility policy, the HUD documents we have reviewed show otherwise. As set forth above, up to and through the Administration’s attempt to rescind DACA, HUD permitted DACA recipients to obtain FHA loans, and in some cases affirmatively advised lenders that doing so was acceptable. It is not clear from the documents we reviewed whether this practice resulted from a considered view within HUD that the “lawful residency” requirement did not exclude DACA recipients⁵³ or whether HUD had simply determined not to enforce the lawful residency requirement.⁵⁴ Whatever the cause, however, HUD’s acceptance of DACA recipients who received FHA loans and its prior statements to lenders established a settled course of behavior as to DACA eligibility, changes to which required acknowledgement and explanation.⁵⁵

HUD changed this prior practice through the DACA exclusion policy—its legal interpretation that the SF Handbook’s lawful residency requirement excluded individuals without “lawful status” and the associated enforcement policy to check for the DACA category code on EADs. HUD acknowledged this interpretation publicly in writing for the first time in June 2019. But as discussed above, it appears that the policy was imposed internally much earlier, via an August 2018 FHA policy phone call and a November 2018 meeting, in which HUD staff were instructed to apply the lawful residency requirement by reviewing loan applicant EAD cards and excluding any with the DACA category code.

⁵³ If this were the case, then HUD’s changed interpretation of “lawful residency” to *per se* exclude a category of applicants, who had not, themselves, changed in any meaningful way, is the type of “substantive legal addition” to the SF Handbook’s requirements that requires adequate explanation and analysis, as well as notice and comment under the APA. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000). Similarly, the mandatory exclusion of DACA recipients is the kind of “legal consequence” that is indicative of an agency policy change subject to the requirements of the APA. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016).

⁵⁴ If this were the case, eliminating a non-enforcement policy based on a new legal interpretation is the type of agency action subject to the requirements of the APA. As Judge Bates explained, coincidentally in a case reviewing the legal basis for rescinding DACA, while many enforcement decisions are presumptively unreviewable, that presumption does not apply if: “(1) it is expressed as a general enforcement policy; and (2) it relies solely on the agency’s view of what the law requires”, precisely the case here. *Nat’l Ass’n for the Advancement of Colored People*, 298 F. Supp. 3d at 234.

⁵⁵ *Pub. Citizen Health Res. Grp. v. Tyson*, 796 F.2d 1479, 1505 n.17 (D.C. Cir. 1986) (“an agency must give a reasonable justification for a decision to deviate from ... a settled course of agency behavior”). For example, when an agency had consistently granted waivers of certain limits on the use of grant funds upon request, even though no explicit policy to that effect existed, the agency’s imposition of a prohibition on such waivers was a policy change requiring acknowledgement and explanation under the APA. *Meriden Cmty. Action Agency v. Shalala*, 880 F. Supp. 882, 886 (D.D.C. 1995), *aff’d*, 80 F.3d 524 (D.C. Cir. 1996); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 924 (D.C. Cir. 2017) (relying in part on agency’s historical practice as to disputed territory to reject agency’s argument that its policy had not changed).

This new policy is a rule within the meaning of the APA. In this context, a rule is “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.”⁵⁶ The DACA exclusion policy has general applicability; it interprets HUD policy (namely the meaning of “lawful residency”), and in so doing prescribes eligibility requirements by definitively excluding all DACA recipients from FHA loans; and it implements agency policy by requiring for the first time that EAD category codes be reviewed as a basis for FHA’s enforcement of its loan requirements.⁵⁷ As this office has observed, the APA requires that agencies follow an open public process when they issue rules.⁵⁸ HUD failed entirely to do so in this case.

First, HUD’s failure to provide fair notice of the DACA exclusion policy violated the statutory requirement that agencies publish in the Federal Register, *inter alia*: “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.”⁵⁹ This provision is meant to prohibit agency development of “secret law” and may be enforced if it “adversely affects” a person (such as, here, borrowers and lenders) dealing with an agency.⁶⁰ As discussed, the DACA exclusion policy easily meets this standard and should have been publicized formally via Federal Register notice.⁶¹

⁵⁶ 5 U.S.C. § 551(4).

⁵⁷ Such binding instructions to staff evidence a formal policy change. “If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’” *Appalachian Power Co.*, 208 F.3d at 1021.

⁵⁸ 5 U.S.C. §§ 551, *et seq.* See also Distressed Asset Stabilization Program at 4 (Audit Rep. No. 2017-KC-0006), Off. of Inspector Gen., HUD (July 14, 2017), <https://www.hudoig.gov/sites/default/files/documents/2017-KC-0006.pdf> (setting forth your office’s view of APA rulemaking requirements).

⁵⁹ 5 U.S.C. § 552(a)(1)(D).

⁶⁰ See *Barbosa v. DHS*, 916 F.3d 1068, 1073-74 (D.C. Cir. 2019); see also *Campaign for Acct. v. U.S. Dep’t of Justice*, 278 F. Supp. 3d 303, 307 (D.D.C. 2017) (citing *U.S. Dep’t of Justice v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989)) (the statute’s “primary objective is the elimination of ‘secret law’; that is, these requirements prevent an agency from subjecting members of the public to a rule that the agency has not publicly announced.”).

⁶¹ Cf. *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (an agency “through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting [agency] rules. Otherwise the practice of administrative law would come to resemble

Second, the DACA exclusion policy is contrary to law. HUD’s justification for the policy (both internally and when it was finally made public) is that DACA recipients do not meet the “lawful residency” requirement of the SF Handbook. HUD reached this conclusion by equating DACA recipients’ lack of “lawful status,” per the USCIS, with lacking “lawful residence.”⁶² This conclusion is incorrect. Status and residence have distinctly different meanings, especially in the context of immigration law. The Immigration and Nationality Act (INA), which sets forth much of the United States’ immigration law, defines “residency” as “the place of general abode ... [a person’s] principal, actual dwelling in place in fact, without regard to intent” 8 U.S.C. § 1101(a)(33). In contrast, as used throughout the INA, status refers to the legal basis for admission into the United States. *See id.* § 1101. Rather than equate these two dissimilar terms, HUD should have instead considered USCIS’s conclusion that DACA recipients have a “lawful presence” in the United States. The term lawful residency is akin to lawful presence, both of which refer to physically being in a particular location, a conclusion that is reinforced by USCIS’s explicit guidance that not only do DACA recipients have lawful presence, but also they may establish a domicile here.⁶³ Accordingly, the DACA exclusion policy relies on an incorrect interpretation of the SF Handbook, making it contrary to law.

Third, even if HUD’s interpretation of the SF Handbook were permissible, its promulgation violated the requirement that an agency provide notice and seek comment on certain rules.⁶⁴ HUD provided no public notice of its policy change and no opportunity to comment, even though the exclusion policy was a legislative rule that effected “a substantive change in existing law or policy.”⁶⁵ The *per se* DACA exclusion requirement was a categorical change to eligibility rules, impacting loan applicants’ and lenders’ rights and obligations, making it the type of rule subject to notice and comment rulemaking.⁶⁶

‘Russian Roulette.’ The agency’s interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party’s right, it must give full notice of its interpretation.”).

⁶² As an initial matter, HUD should receive no deference in interpreting either the lawful residency portion of its SF Handbook or the immigration status of DACA recipients, because, as it admits, both are within the expertise of USCIS.

⁶³ *Frequently Asked Questions*, USCIS, <https://www.uscis.gov/archive/frequently-asked-questions> (last visited May 5, 2020).

⁶⁴ 5 U.S.C. § 553; 24 C.F.R. § 10.1.

⁶⁵ *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citations omitted).

⁶⁶ *Mendoza v. Perez*, 754 F.3d at 1024 (agency documents at issue “do not merely describe how the Department will evaluate [certain visa] applications, but they set the bar for what employers must do to obtain approval. In doing so, they substantially affect the rights and interests of both herders and employers.”); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987) (manual’s enforcement plan for Medicare providers was not legislative rule, but had HHS “inserted a new standard of review” or a “presumption of invalidity” applicable to certain operations, “its measures would surely require notice and comment”).

Fourth, the DACA exclusion policy was not the product of reasoned decision making, making it arbitrary and capricious.⁶⁷ HUD’s ongoing refusal to acknowledge that its policy has, in fact, changed, violates the most basic reasoned decision making standard under the APA that an agency “display awareness that it *is* changing position” and not “depart from a prior policy *sub silentio*.”⁶⁸ Nor did HUD “articulate a satisfactory explanation” for the DACA exclusion policy, display any consideration of DACA recipients’ lawful presence and domicile in the United States, or analyze the impact of its policy change on loan applicants, lenders, or the domestic housing market.⁶⁹ The DACA exclusion policy is therefore likely arbitrary and capricious in violation of the APA.

Finally, to the extent that HUD is requiring lenders to agree to indemnify defaulted loans issued to DACA recipients *before* HUD made the DACA exclusion policy public in June 2019, HUD has imposed an impermissibly retroactive rule. New legal interpretations by an agency may be impermissibly retroactive if they “change the legal landscape.”⁷⁰ That is the case if the new interpretation “is ‘substantively inconsistent’ with a prior agency practice and attaches new legal consequences to events completed before its enactment.” *Id.* The DACA exclusion policy appears to meet this standard by depriving lenders of mortgage insurance to which they believed they were entitled as the result of a policy change adopted and made public only after the loans were issued.

IX. Request for Investigation.

As detailed above, and in the attached records, HUD’s conduct in secretly excluding DACA recipients from FHA loan eligibility and refusing to disclose this policy change to the public and to Congress is deeply troubling. It raises serious questions about the fairness and transparency with which HUD administers the FHA loan program, and equally serious questions about HUD’s material omissions when providing information about this program to Congress and the public. The lack of transparency caused real harm. It hurt borrowers who were denied credit to purchase homes; and it hurt lenders that extended FHA loans to DACA recipients, acting in good faith based on HUD’s public statements, and were later denied access to the mortgage insurance they believed they had obtained.

⁶⁷ 5 U.S.C. § 706(2).

⁶⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁶⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷⁰ *Kirwa v. U.S. Dep’t of Def.*, 285 F. Supp. 3d 257, 271 (D.D.C. 2018) (quoting *Arkema, Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010)).

Accordingly, we respectfully request that your office open a formal investigation into these matters. Please do not hesitate to contact us at rthurston@democracyforward.org if we may provide anything further. Thank you for your time and consideration.

Sincerely,

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward Foundation

/s/ Robin Thurston

Robin Thurston
Senior Counsel
Democracy Forward Foundation