



ALAN WILSON
ATTORNEY GENERAL

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General Council
South Carolina State Housing Finance and Development Authority
300-C Outlet Pointe Blvd.
Columbia, South Carolina 29210

Dear Ms. Easton:

We received your request for an opinion on behalf of the South Carolina State Housing Finance and Development Authority ("SC Housing"). According to your letter, SC Housing

is establishing a program that will offer homeowner and rental assistance to South Carolinians who have been financially affected by COVID-19. The funds for the program are provided by the United States Department of Housing and Urban Development ("HUD") through the Community Development Block Grant related to the coronavirus ("CDBG-CV") program established by the CARES Act. The South Carolina Department of Commerce is the recipient and grantee of the funds and SC Housing is a sub-recipient.

SC Housing plans to provide financial assistance to eligible recipients in the form of payments made directly to landlords or mortgage servicers. While there are non-profit processing agencies involved, SC Housing will be the payor. Recipients must have income at or below 80% of the county median income adjusted by family size (i.e. recipients must be at or below moderate income).

Based on this information, you ask "whether SC Code §8-29-10 is applicable to this program?"

Law/Analysis

Section 8-29-10 of the South Carolina Code (2019) is contained in the South Carolina Illegal Immigration Reform Act and provides in pertinent part:

(A) Except as provided in subsection (C) of this section or where exempted by federal law, on or after July 1, 2008, every agency or political subdivision of this State shall verify the lawful presence in the United States of any alien

eighteen years of age or older who has applied for state or local public benefits, as defined in 8 USC Section 1621, or for federal public benefits, as defined in 8 USC Section 1611, that are administered by an agency or a political subdivision of this State.

....

Before we address the application of section 8-29-10 to the program you describe (the “Program”), we find it pertinent to note this provision was enacted in 2008 and based off of the federal requirements set forth under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”). PRWORA prohibits nonqualified aliens from receiving state or local public benefits and federal public benefits, both defined under PRWORA. Section 8-29-10 appears to go one step further and requires state agencies and political subdivisions to verify the lawful presence of anyone applying for state, local, or federal public benefits.

According to section 8-29-10(A), we must first consider whether the Program is a state or local public benefit as defined in section 1621 of title 8 of the United States Code or a federal public benefit as defined in section 1611 of title 8 of the United States Code. We first consider whether the Program is a federal public benefit pursuant to section 1611. Section 1611(c)(1) defines “federal public benefit” as

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(emphasis added).

Because section 1611 is a federal statute, we look to the federal rules of statutory construction to interpret whether the Program is considered a “federal public benefit.” According to the United States Supreme Court, it “normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.” Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1738, 207 L. Ed. 2d 218 (2020).

You informed us that the United State Department of Housing and Urban Development (“HUD”) provides funding for the Program through a Community Development Block Grant (“CDBG”) program established by the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. Thus, even though SC Housing and the South Carolina Department of Commerce administer the Program, the Program utilizes funds appropriated by the United States. See Pimentel v. Dreyfus, 670 F.3d 1096, 1099 n.4 (9th Cir. 2012) (stating “a federally funded benefit is still considered a ‘federal public benefit’ even if administered by a state or local agency.”). Section 1611(c)(1)(B) also specifies “public or assisted housing” is included in the definition of federal public benefits. Furthermore, while the Program, as you describe it, does not make payments to individuals, households, or families, it does provide assistance to individuals, households, and families by way of rent and mortgage assistance. Therefore, based on a plain reading of section 1611 and our understanding of the Program, we believe a court would find the Program is a federal public benefit as prescribed by section 1611(c)(1)(B) making it applicable to both the PRWORA and section 8-29-10 of the South Carolina Code.

Based on our belief that the Program is a federal public benefit, we must next consider whether it qualifies for an exemption. Section 8-29-10 states the verification requirements are applicable “[e]xcept as provided in subsection (C) of this section or where exempt by federal law” Section 8-29-10(C) includes the following exemptions:

- (1) a purpose for which lawful presence in the United States is not required by law, ordinance, or regulation;
- (2) assistance for health care items and services that are necessary for the treatment of an emergency medical condition, as defined in the Social Security Act (42 USC 1396, et seq.) of the person involved and are not related to an organ transplant procedure;
- (3) short-term, noncash, in-kind emergency disaster relief;
- (4) public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
- (5) programs, services, or assistance including soup kitchens, crisis counseling and intervention, and short-term shelter specified by the United States Attorney General, in the United States Attorney General’s sole discretion after consultation with appropriate federal agencies and departments, which:
 - (a) deliver in-kind services at the community level, including through public or private nonprofit agencies;

(b) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and

(c) are necessary for the protection of life or safety;

(6) prenatal care;

(7) postsecondary education, whereby the Department of Education shall set forth, or cause to be set forth, policies regarding postsecondary benefits that comply with all federal law including, but not limited to, public benefits as described in 8 USC Section 1611, 1621, or 1623;

(8) benefits, programs, services, or any other assistance provided to victims of domestic violence, irrespective of their immigration status, under the Violence Against Women Act of 2000, Public Law Number 106-386, or the Illegal Immigration Reform and Immigrant Responsibility Act, Public Law Number 104-208; or

(9) benefits and refunds lawfully due from the South Carolina Retirement Systems pursuant to Title 9 of the South Carolina Code of Laws to members of the Retirement Systems and their beneficiaries.

S.C. Code Ann. § 8-29-10(C).

In addition, section 1611(b) provides a list of exemptions. After reviewing both the exemptions listed in section 8-29-10(C) and section 1611(b), we do not believe most of the exemptions listed in either section 8-29-10(C) or section 1611(b) apply to the Program. However, a recent United States District Court decision addressing the application of PRWORA to a similar rent assistance program funded with CARES Act funds found the exemption for “[s]hort-term, non-cash, in-kind emergency disaster relief,” which is listed in both section 8-29-10(C) and 1611(b), applied. S.C. Code Ann. 8-29-10(C)(3); 8 U.S.C.A. § 1611(b)(1)(B). In Poder in Action v. City of Phoenix, No. 20-01429, 2020 WL 7245072 (D. Ariz. Dec. 9, 2020), the United States District Court for the District of Arizona considered whether a rent assistance program administered by the City of Phoenix was a “short-term, non-cash, in-kind emergency disaster relief” exempting it from PRWORA. Similar to the Program, the City of Phoenix allocated money it received under the CARES Act to create a COVID-19 Emergency Utility Rent and Mortgage Assistance Program under which its residents can apply for assistance with utility bills, rent, and mortgage payments. Id. Initially, the Court determined the Phoenix program is federal public benefit as it is federally funded. Id. However, the Court went on to find the Phoenix program was exempt under section 1611(b)(1)(B) because it constituted a “short-term, non-cash, in-kind, emergency disaster relief.” Id. The Court noted: “There is no dispute that the Program delivers benefits that are ‘short-term’ in duration. Nor is there any dispute that the Program qualifies as ‘emergency disaster relief.’ The

dispute centers on the remaining two elements: whether the benefits available under the Program are ‘non-cash’ and/or ‘in-kind.’” Id. The Court summarily determined the benefits are non-cash as cash benefits are not paid directly to the applicants. Id. Next, the Court addressed whether the benefits are “in-kind,” stating

it is notable that housing voucher and assistance programs have long been characterized, by courts and agencies alike, as “in-kind” benefits. See, e.g., City & County of San Francisco, 944 F.3d at 783, 799, 800; Young v. Schweiker, 680 F.2d 680, 682 (9th Cir. 1982); 20 C.F.R. § 416.1102. See also City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., — F.3d —, —, — — —, 2020 WL 7052286, *5, 8-9 (9th Cir. 2020) (again referring to the Section 8 voucher program as an “in-kind” and “non-cash” benefit). This is at least some evidence that Congress intended for the term “in-kind,” as it appears in Section 1611(b)(1)(B), to potentially encompass housing assistance programs. Cf. Neder v. United States, 527 U.S. 1, 21, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (“It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”) (cleaned up).

Id. Accordingly, the Court found the Phoenix program exempt from PRWORA. Id.

The Program appears to be very similar to the program implemented by the City of Phoenix as they both provide rental and mortgage assistance using CARES Act funds. Both programs also do not make direct payments to applicants, but rather make payments to landlords and mortgage services. Therefore, following reasoning of Ponder, a court may very well find the Program is exempt from PRWORA as short-term, non-cash, in-kind emergency disaster relief. However, Ponder does not provide precedent for how another federal court may interpret the Program or how a South Carolina Court may interpret section 8-29-10. Accordingly, we must also consider how our courts may interpret this exemption under both section 1611(b)(1)(B) and section 8-29-10(C)(3).

As the United States Supreme Court stated in Commissioner v. Clark, 489 U.S. 726, 739, 109 S. Ct. 1455, 1463, 103 L. Ed. 2d 753 (1989), when construing federal law “in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.” In addition, it is important to note that “the general rule where one claims the benefits of an exception to the prohibition of a statute” they carry the burden of proof. United States v. First City Nat. Bank of Houston, 386 U.S. 361, 366, 87 S. Ct. 1088, 1092, 18 L. Ed. 2d 151 (1967). With these principals in mind, we review the text of the exemption.

Initially, we note because assistance under the Program last only up to six months, it is likely that a court would find it to be “short-term.” Furthermore, we believe a court would similarly find the

Covid-19 pandemic amounts to a disaster as it was declared as such by the President of the United States at the request of the Governor of South Carolina on March 27, 2020. Preliminary Damage Assessment Report, South Carolina-COVID-19, FEMA-4492-DR (Mar. 27, 2020) (*available at https://www.fema.gov/sites/default/files/documents/PDAReport_FEMA4492DR-SC.pdf*). Thus, like in Ponder, the dispute centers on whether the assistance provided under the Program is “non-cash” and/or “in-kind.”

In our research, we found very little guidance outside of Ponder interpreting the “short-term, non-cash, in-kind emergency disaster relief” exception. In fact, HUD noticeably provided very little guidance at all in regard to the application of the PRWORA to its programs.¹ While HUD commented on another exception to PRWORA’s requirements², we found no federal guidance on this particular exemption. Additionally, other than Ponder, we did not find any cases interpreting this exemption. In Ponder, the Arizona District Court determined that because money is not given directly to applicants, it is a non-cash, in-kind benefit. However, we are apprehensive that another court might interpret such benefits differently.

First, while the Program’s applicants are not given cash, cash is being distributed on their behalf to landlords and mortgage servicers. As such, a court could find the benefit is in cash, but it is just not being received by the applicant. Second, while neither section 1611 nor section 8-29-10 give us guidance as to what “in-kind” means, according to Black’s Law Dictionary, “in-kind” means “In goods or services rather than money.” IN KIND, Black’s Law Dictionary (11th ed. 2019). We do not believe a court would find rent and mortgage assistance are goods as they are not tangible. Moreover, we are unsure as to whether a court would view such assistance as “services.” Therefore, construing the exception to the general denial of federal public benefits to unqualified aliens under section 1611 narrowly, we are concerned another court reviewing these benefits may find they do not meet the “short-term, non-cash, in-kind” requirements. Thus, we recommend seeking clarification from HUD as to the application of this exemption to the Program or possibly asking a court to interpret whether this exemption applies to the Program.

Conclusion

As explained above, the determination of whether the Program, which provides rent and mortgage assistance to South Carolinians using CARES Act funds, requires SC Housing to verify the

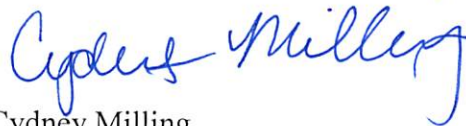
¹ See Congressional Research Service, Immigration: Noncitizen Eligibility for Needs-Based Housing Programs (Dec. 8, 2015) *available at <https://fas.org/sgp/crs/homesec/RL31753.pdf>* (noting “HUD has not published guidance as to which of its programs are considered as providing federal public benefits” and “HUD has not issued guidance as to how participating entities should implement the PRWORA restrictions.”).

² See Department of Housing and Urban Development, Department of Health and Human Services, and Department of Justice, Joint Letter Regarding Immigrant Access to Housing and Services (Aug. 5, 2016) *available at <https://files.hudexchange.info/resources/documents/HUD-HHS-DOJ-Letter-Regarding-Immigrant-Access-to-Housing-and-Services.pdf>*; Department of Housing and Urban Development, Fact Sheet: The Personal Responsibility and Work Opportunity Act of 1996 and HUD’s Homeless Assistance Programs (Aug. 16, 2016) *available at <https://www.hudexchange.info/resource/5126/prwora-and-huds-homeless-assistance-programs-fact-sheet>* (both addressing the exemption from PRWORA under section 1611(b)(1)(D)).

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applicants lawful presence in the United States under section 8-29-10 involves both the interpretation of state and federal law. While we believe the Program is a federal public benefit as defined under section 1611(c) of title 8 of the United States Code, we also recognize both section 8-29-10 and section 1611 allow for exemptions including an exemption for "short-term, non-cash, in-kind emergency disaster relief." Because of the mandates provided in both PRWORA and the South Carolina Illegal Immigration Reform Act, we believe any exceptions to these provisions should be narrowly construed. However, given the uncertainty in the law as to the application of this exception, we advise you to seek guidance from HUD or possibly from a state or federal court as to the proper interpretation of this exemption and its application to the Program.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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