

## **NEW OPTIONS TO INCREASE HOUSING CHOICE VOUCHER PAYMENT STANDARDS**

July 2022

**Problem:** Rents are rapidly escalating throughout the country, increasing the difficulty that many voucher families face in finding eligible units, especially in lower poverty neighborhoods. PHAs need the tools to respond to rising rents and specifically PHAs need to be able to quickly adjust payment standards higher than 110% of FMR and SAFMR when the market calls for it. This is especially important during the pandemic when housing access and security and homeless prevention is critical to the public health. A rent increase, for tenants, can mean the difference between maintaining housing and living on the street or in a shelter. For voucher recipients searching for affordable units, an adequate payment standard can expand the range of potentially eligible units, increasing the chances that the voucher can actually be used.”

**Solution:** HUD has a number of regulatory options available to PHAs to adjust their rents beyond 110% of the FMR and SAFMR. For example, HUD’s waiver notice, issued in December 2021<sup>1</sup> and renewed in April 2022<sup>2</sup> in response to the ongoing Covid pandemic, allows PHAs to easily go up to 120% FMR and SAFMR in their region. Also, HUD recently adapted existing rules on exception payment standards to permit rent caps, where justified, above 110% or 120% of the Small Area FMR in specific census tracts. PHAs have more flexibility than ever to increase payment standards and respond to spiraling rents.

But in order for tenants to see the advantages of this new flexibility, PHAs must act. Advocates can urge their local PHAs to adopt these new payment standard rules. If you are working with clients who cannot afford housing with their voucher because of high rents or are limited to higher poverty neighborhoods, or your clients are being displaced because of rent increases, it is critical to flag those cases for the PHA and demonstrate how a higher payment standard could help families. PHAs may argue that they don’t have sufficient funding to raise payment standards but that is a misguided argument. PHAs’ budgets can generally support higher payment standards. Advocacy strategies include:

- Write a letter to the PHA Director outlining the problems that voucher families face and suggest methods to increase payment standards.
- If local data supports it, include in a letter potential fair housing concerns if voucher families are barred from living in certain neighborhoods.
- Consider calling media contacts on behalf of families displaced to raise awareness about the issue.

**Background:** A voucher tenant receives a housing subsidy that is based on the tenant’s income and the PHA’s maximum subsidy (the “payment standard”), which may not fully cover the actual rent charged (including tenant-paid utilities as determined by utility allowances).<sup>3</sup> The ordinary tenant contribution is determined in the same manner as for the other income-based programs, where the tenant typically pays 30% of their income in rent. However, a voucher tenant may pay more than that amount. Voucher landlords may charge tenants any rent so long as it is “reasonable” in comparison with rents charged for

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<sup>1</sup> HUD Notice PIH 2021-34 (December 9, 2021).

<sup>2</sup> HUD Notice PIH 2022-09 (April 11, 2022).

<sup>3</sup> 42 U.S.C.A. § 1437f(o)(2) (West 2018); 24 C.F.R. § 982.1(a)(4)(ii).

comparable dwelling units in the private unassisted local market, as determined by the PHA. The tenant must make up any difference between the PHA's payment standard and any higher actual gross rent (including any utility allowance), in addition to the normal income-based rent share. Note, however, the tenant family cannot pay more than 40% of their income in rent upon initial lease-up.

*Payment Standard.* The "payment standard" is based on the FMR or SAFMR schedule annually published in the Federal Register.<sup>4</sup> The PHA may establish the payment standard at any level between 90% and 110% of the published FMR or SAFMR for each unit size (the "basic range"). The PHA must establish a single payment standard for each unit size (number of bedrooms) within a designated geographical area.<sup>5</sup>

A PHA's process for establishing and revising Voucher payment standards must be included in its Section 8 Administrative Plan.<sup>6</sup> The PHA's payment standard policies must also be included in the Public Housing Agency (PHA) Annual Plan and are subject to review and comment by members of the Resident Advisory Board and members of the public.<sup>7</sup> The voucher statute requires HUD to monitor rent burdens and review any PHA payment standard that results in a "significant percentage" of the families occupying units of any size paying more than 30% of adjusted income for rent.<sup>8</sup> HUD has defined "significant percentage" to be 40% or more of such families occupying units of that unit size.<sup>9</sup> HUD may require a PHA to modify its payment standards based on the results of this review, and to establish an increased payment standard within the basic range.<sup>10</sup> PHAs also have the discretion to increase payment standards above the basic range, as outlined below.

*Small Area Fair Markets Rents.* The 2016 Small Area Fair Market Rent (SAFMR) rule imposed mandatory SAFMRs for all zip codes in 32 metropolitan areas (based on the 40<sup>th</sup> percentile of recent rents in each zip code area). For other metropolitan areas, the rule permitted PHAs to adopt zip code-based Exception Payment Standards based on the annually published SAFMRs.

*Exceptions to the Basic Range.* Existing voucher regulations already allow PHAs to increase payment standards above 110% of FMR and SAFMR under the following circumstances:

- (1) A PHA may establish a higher payment standard for an individual family if required as a reasonable accommodation for a family that includes a person with disabilities.<sup>11</sup> Specifically, a PHA may establish an exception payment standard of up to 120% of the published FMR if required as a reasonable accommodation without HUD approval.<sup>12</sup>
- (2) Exception Payment Standard Amounts for an Exception Area above 110% FMR: Upon PHA request, HUD may approve an "exception" payment standard for a designated part of the FMR area, called an "exception area."<sup>13</sup> The total population of the HUD-approved exception areas in an FMR area may not include more than 50% of the population of the

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<sup>4</sup> 24 C.F.R. part 888.

<sup>5</sup> 24 C.F.R. § 982.503(a)(1).

<sup>6</sup> 24 C.F.R. § 982.54(d)(14).

<sup>7</sup> *Id.* at § 903.7(d). See also 42 U.S.C.A. § 1437c-1(d)(4) (West 2018).

<sup>8</sup> 42 U.S.C.A. § 1437f(o)(1)(E) (West 2018).

<sup>9</sup> 24 C.F.R. § 982.503(g).

<sup>10</sup> 42 U.S.C.A. § 1437f(o)(1)(E) (West 2018); 24 C.F.R. § 982.503(g).

<sup>11</sup> 24 C.F.R. § 982.505(d).

<sup>12</sup> Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, tit. I, § 102, 130 Stat. 782, 792 (to be codified at 42 U.S.C. § 1437f(o)(1)(D)) (2016) (effective upon passage without additional action by HUD).

<sup>13</sup> 24 C.F.R. § 982.503(c).

FMR area.<sup>14</sup> An exception payment standard can be for all units or for all units of a given unit size in the exception area, and any PHA with jurisdiction in the exception area may use the HUD-approved exception payment standard amount.<sup>15</sup>

- (3) Success Rate Payment Standard Amounts: A PHA with FMRs computed at the 40<sup>th</sup> percentile rent can request HUD approval to establish a higher “success rate” payment standard, defined as any amount between 90% and 110% of the 50<sup>th</sup> percentile rent.<sup>16</sup>
- (4) Payment Standard Protection for PHAs That Meet Deconcentration Objectives: If a PHA previously had its FMR set at the 50<sup>th</sup> percentile rent to provide a broad range of housing opportunities throughout a metropolitan area, but now has its FMR set at the 40<sup>th</sup> percentile rent, HUD may approve a payment standard amount based on the 50<sup>th</sup> percentile rent if the PHA scored the maximum number of points on the SEMAP deconcentration bonus indicator in the prior year, or in two of the last three years.<sup>17</sup>

This memo outlines additional ways that PHAs can set payment standards above 110% FMR or SAFMR. For more information about payment standard policies, see NHLP’s HUD Housing Programs Tenants’ Rights, 5<sup>th</sup> Edition, Section 4.2.4.3.

### **Options for PHAs to Increase Payment Standards Above the Basic Range**

In recognition of the ongoing impacts of the Covid pandemic, HUD issued multiple waivers to PHAs in order to meet the needs of tenants, including waivers related to payment standards. HUD published PIH 2021-34 (December 9, 2021) and PIH 2022-09 (April 11, 2022), “Streamlined Regulatory Waivers for the Housing Choice Voucher (including Mainstream and Mod Rehab) Program,” authorizing PHAs to seek up to 120% of the FMR and SAFMR through December 31, 2022, upon the submission of a relatively simple justification request.<sup>18</sup> The notice also allows PHAs to apply changes in payment standards immediately to participants, as opposed to applying the increase at their next annual recertification. This will protect *current* tenants experiencing sharp rent increases, above existing payment standards, and avoid eviction and/or displacement.<sup>19</sup> In addition, the SAFMR rule allows flexibilities to PHAs to increase their payment standards above the basic range. These policies, taken together, allow greater flexibilities for PHAs to quickly revise payment standards and apply new, higher payment standards immediately to existing HCV tenants. Here is how it can be done:

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<sup>14</sup> Id. at § 982.503(c)(5).

<sup>15</sup> Id. at § 982.503(c)(1).

<sup>16</sup> Id. at § 982.503(e).

<sup>17</sup> Id. at § 982.503(f). HUD can set FMRs at the 50<sup>th</sup> percentile rent to provide a broad range of housing opportunities. Id. at § 888.113(c). The deconcentration bonus is discussed in the SEMAP regulation, id. at § 985.3(h).

<sup>18</sup> A PHA can email HUD to submit a waiver request. The email need only contain basic information including justification of good cause for the request. The good cause justification must include (a) why a PHA needs the waiver; (b) the impact on PHA operations or applicants if the waiver is not provided; and (c) the proposed waiver duration. Notice PIH 2022-09 @ 3.

<sup>19</sup> Note that PHAs are also bound by the voucher statute to apply payment standard increases immediately to participants. The statute provides that when contract rent does not exceed the payment standard, the tenant pays up to 30% of his or her income in rent. Compare 42 U.S.C. § 1437f(o)(2)(A) with 24 C.F.R. 982.505(c)(4).

Scenario 1: PHAs that are currently at 110% of the metro FMR but want to increase their payment standards

- PHAs can go up to 120% of the FMR using waiver Notice PIH 2022-09 (through end of 2022):

*Using regulatory waiver authority provided in 5.110, HUD will allow for a waiver of 982.503(b)(1)(i) and will establish an alternative requirement to allow the PHA to establish a payment standard amount for a unit size at any level between 90 percent and 120 percent (as opposed to 110 percent) of the published FMR or Small Area Fair Market Rent (SAFMR) for that unit size.<sup>20</sup>*

- Alternatively, PHAs can implement SAFMR-based Exception Payment Standards (EPS) for zip codes, under the SAFMR rule. The SAFMR rule permitted PHAs to adopt zip code-based Exception Payment Standards based on the annually published SAFMRs. PHAs had the authority to go up to 110% of the SAFMR, but HUD did not specify the procedure where PHAs needed to go higher than 110% to meet the market (but see below).
- PHAs can also employ any of the four methods described above to increase payment standards above 110% FMR.

Scenario 2: PHAs that already adopted voluntary SAFMR Exception Payment Standards (EPS) at 110% SAFMR, but need to go higher

- PHAs can apply waiver notice PIH 2022-09 to allow for an EPS (applied to a zip code) up to 120% SAFMR (through December 31 2022 only):

*...HUD will...establish an alternative requirement to provide exception payment standards for a ZIP code area above the basic range for the metropolitan FMR based on the HUD published SAFMRs. The PHA may establish an exception payment standard up to 120 percent (as opposed to 110 percent) of the HUD published SAFMR for that ZIP code area.<sup>21</sup>*

- Once the waiver notice expires, or if the PHA wants to increase SAFMRs beyond 120% if they have been already approved for 120%, PHAs could also apply for an EPS using the median rent method for selected census tracts **within the zip code** based on use of the “median rent method” set out at 24 CFR 982.503(c) – see below for a description. Although the payment standard rules specify that requests of up to 120% can remain at the HUD Field Office level, because of the new nature of this procedure, we recommend that PHAs include both Field Office staff and HUD headquarters staff in these requests. One advantage of this procedure is that PHAs may now be able to adjust payment standards within a zip code, where for example one neighborhood of a high rent zip code has significantly lower rents than other neighborhoods.

Scenario 3: PHAs that are mandatory SAFMR areas and wish to go above 110% SAFMR for all or part of their area

- PHAs can go up to 120% of the SAFMR using waiver Notice PIH 2022-09 (through the end of 2022)

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<sup>20</sup> PIH 2022-09 @ p. 2.

<sup>21</sup> PIH 2022-09 @ p. 2.

*Using regulatory waiver authority provided in 5.110, HUD will allow for a waiver of 982.503(b)(1)(i) and will establish an alternative requirement to allow the PHA to establish a payment standard amount for a unit size at any level between 90 percent and 120 percent (as opposed to 110 percent) of the published FMR or Small Area Fair Market Rent (SAFMR) for that unit size.<sup>22</sup>*

- For mandatory Small Area FMR regions that wish to set payment standards above 110% SAFMR up to 120% of the SAFMR as an Exception Payment Standard, PHAs can submit a waiver request per 24 CFR 982.503(b)(1)(iv):

*At the request of a PHA administering the HCV program under Small Area FMRs under § 888.113(c)(3), HUD may approve an exception payment standard for a Small Area FMR area above the 110 percent of the published FMR in accordance with conditions set forth by Notice in the FEDERAL REGISTER.*

Note that this method, unlike the waiver notice, does not have an expiration date and therefore can be employed to increase payment standards after the end of this year.

- These PHAs can also establish EPS above 120% SAFMR for specific census tracts. PHA may submit data justifying higher EPS for specific census tracts based on the standards for EPS set out in 24 CFR 982.503(c) (the “median rent method,” explained in more detail below).

Scenario 4: For PHAs with MTW status, higher payment standards are still permitted so long as they are included in the agency’s MTW plan

- Many MTW agencies have used their MTW flexibility to adopt localized payment standards up to and sometimes higher than 150% of the regional FMR.

### **Using the Median Rent Method to seek approval of higher EPS for Exception Areas**

PHAs can also request higher payment standards for exception areas (a designated part of the FMR or SAFMR area) using HUD’s “median rent method:”

*In the median rent method, HUD determines the exception payment standard amount by multiplying the FMR times a fraction of which the numerator is the median gross rent of the exception area and the denominator is the median gross rent of the entire FMR area. In this method, HUD uses median gross rent data from the most recent decennial United States census, and the exception area may be any geographic entity within the FMR area (or any combination of such entities) for which median gross rent data is provided in decennial census products.<sup>23</sup>*

HUD is now accepting requests for payment standards higher than 120% of the FMR, using the median rent method, and using American Community Survey (ACS) data.

Here is an example of how this might work for a census tract in the Baltimore area:

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<sup>22</sup> PIH 2022-09 @ p. 3.

<sup>23</sup> 24 CFR § 982.503(c).

The two-bedroom 2019 FMR for the Baltimore-Columbia-Towson MSA is \$1,342. Census tract 4907.01 in the Towson neighborhood of Baltimore County is located within zip code 21204, where the SAFMR is set at 127% of the regional FMR (\$1,704).

To request a higher payment standard for this census tract (4907.01) using the median rent method and using 2019 5-year American Community Survey (ACS) data, we find that the 2BR median gross rent for this tract is \$1,941, and that the 2BR median gross rent for the metro area is \$1,329. (Note that “median gross rent” differs from the FMR, which is based on 40<sup>th</sup> percentile rents, unless the PHA is using 50<sup>th</sup> percentile rents as explained above for success rate payment standards or deconcentration objectives.)

The first step of the method is to divide the median gross rent for the tract (exception area) by the median gross rent for the metro area:  $\$1,941/\$1,329 = 1.46$ . This means that the 40<sup>th</sup> percentile rent for this census tract is 146% of the regional FMR. Thus, the metro-level FMR is multiplied by the rent ratio to obtain the exception payment standard for the tract:  $\$1,342 \times 1.46 =$  a requested payment standard of **\$1,959**.

Note that the language of 24 CFR 982.503(c)(2)(i) mentions the need to use decennial census data, but it does not appear that the 2010 census includes median gross rent data. This analysis uses ACS data.

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