

To: Housing Justice Network Advocates
From: Deborah Thrope and Michaeljit Sandhu
Re: UPDATED Small Area FMRs
Date: January 31, 2018

The key features of the HCV program are housing choice and mobility. Voucher families, however, often find themselves limited to certain neighborhoods based on the subsidy amount provided by the local PHA. The amount of the subsidy (payment standard) is based on HUD's Fair Market Rents (FMRs). Traditionally, HUD sets one FMR for a large geographic region, resulting in a subsidy level that does not match the local rental market. Small Area FMRs, in contrast, calculate the value of a voucher based on zip codes and therefore capture more granular discrepancies in rents across neighborhoods. SAFMRs allow voucher families to move to lower poverty neighborhoods, giving voucher holders access to communities that are more likely to have quality jobs, reliable transportation, and high performing schools. Communities that voucher families would be unable to afford if the PHA applies traditional FMRs.

The final SAFMR rule went into effect on January 17, 2017. On August 10, 2017, HUD suspended for two years the designation for the mandatory use of SAFMRs in 23 metropolitan areas. On December 12, 2017, HUD issued a notice for solicitation of comment on the suspension (stating that it is not required to post the suspension for public comment because it is within HUD's authority to suspend part of the rule). On December 23, 2017, a D.C. Federal District Court blocked the suspension (based on the letter to Housing Authorities alone) in *Open Communities Alliance v. Carson*. HUD subsequently issued implementation guidance to Housing Authorities on January 17, 2018. The guidance states that PHAs must begin implementing SAFMRs as soon as possible but no later than April 1, 2018.

Implementation remains mandatory in 24 jurisdictions and all PHAs have the discretion to use SAFMRs. The following is an analysis of the Final Rule that highlights key issues most relevant to legal services attorneys working with voucher families. The memo also points out changes in the Final Rule made by HUD based on comments to the proposed rule.

The main points are:

- **HUD did not choose to implement a SAFMR policy that would hold all current tenants harmless**, as we suggested in our comments. But, HUD did take several measures that aim to protect tenants: (1) HUD revised the regulations to be consistent with HOTMA, giving PHAs the discretion to hold a current participating family harmless from a reduction in the payment standard during the term of a HAP contract (the reduction would normally be seen at the family's 2nd annual recertification). HJN and NHLP did not think this was sufficient to avoid a negative impact on voucher families, since it makes housing security a case-by-case decision made at the discretion of PHAs. (2) The new rule grants PHAs the discretion to set the payment standard at any amount between the current level and the new amount

after SAFMRs are adopted. (3) If the SAFMR payment standard is lower than the FMR payment standard, PHAs can phase in the reduced payment standard over time.

- HUD retained the selection criteria for mandatory adoption of SAFMRs, with two exceptions: **HUD added a vacancy rate exception** and revised how "voucher concentration" is defined under the SAFMR criteria. Given these revisions, the list of areas that meet HUD's standard has changed from the proposed rule (see the Appendix below for areas that would have been required to implement SAFMRs).
- **Exempts PBVs from the rule** (but allows use of SAFMRs for future PBV projects).
- The Final Rule was made effective January 17, 2017.¹ PHAs that meet HUD's criteria were expected to revise their payments standard (if necessary to fall within the basic range) no later than 3 months from the date of newly published FMRs.² Following the attempted suspension, HUD gave PHAs until April 1, 2018 to implement SAFMRs. All PHAs have the discretion to implement SAFMRs. You can currently find hypothetical SAFMR data on HUD's website.³

These requirements and others are discussed in more detail below. Please contact Deborah Thrope if you have additional questions (dthrope@nhlp.org or 415-546-7000 ext 3124).

I. Tenant Protection from Sudden Rent Increases

HUD implemented several policies in the Final Rule that should help avoid tenant displacement, although HUD fell short of requiring PHAs to hold all current tenants harmless. **First, HUD conformed the regulations to Section 107 of the Housing Through Opportunity Modernization Act (HOTMA) by granting PHAs the discretion to hold current tenants harmless from a reduction in the payment standard due to a change in the FMR during the term of the HAP contract.**⁴ Should the PHA choose to reduce the payment standard, the lower payment standard goes into effect at the family's second annual recertification.⁵

HUD also included the provision that **a PHA can set and then gradually reduce the payment standard to any amount that is within the PHA's payment standard schedule.**⁶ This allows the PHA significant flexibility in setting payment standards. In general, it would benefit tenants if PHAs implemented this provision by adopting a policy that mandates gradual changes in the payment standard for tenants when there is a jump in the FMR.

Note that the PHA must include in its Administrative Plan how it will handle reductions in the

¹ Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 80,567 (Nov. 16, 2016) (hereinafter "Final Rule").

² 24 C.F.R. § 982.503(b)(1)(i).

³ <https://www.huduser.gov/portal/datasets/fmr/smallarea/index.html>

⁴ 24 C.F.R. § 982.505(c)(3).

⁵ *Id.* at § 982.505(c)(3)(i).

⁶ *Id.* at § 982.505(c)(3)(iii).

payment standard and that, once adopted, the PHA must follow its Administrative Plan. Therefore, advocates should recommend that their PHA implement a local policy in the Administrative Plan that holds all current tenants harmless from rent increases with implementation of SAMFRs. Please contact NHLP if you are in a jurisdiction adopting SAFMRs and would like assistance developing comments on the local Administrative Plan.

HUD's SAFMR regulation includes one additional protection for tenants facing potential rent increases as a result of the transition to SAFMR: the Final Rule limits the annual decrease in SAFMRs to no more than 10% of the area's FMR in the prior fiscal year.⁷ Advocates should be aware of this limitation and carefully track any reductions in FMRs.

II. SAFMR Selection Criteria

HUD requires PHAs to implement SAFMRs in metro areas that meet its selection criteria.⁸ Factors that will be considered include the: (1) number of vouchers under lease, (2) percentage of the rental stock in small areas where the SAFMR is more than 110% of the metro FMR, (3) percentage of voucher families living in concentrated low income areas, (4) percentage of voucher families living in concentrated low-income areas relative to the percentage of all renters within these areas, and (5) vacancy rate. The HUD criteria identify some of the most segregated metro areas around the country, while also excluding areas where the vacancy rate is so low that families will be unable to move with a voucher should they be forced to do so because of an increase in their rental contribution.

HUD revised the originally proposed criteria as a result of advocacy from NHLP, HJN, and others. Most notably, **HUD added a vacancy rate factor.**⁹ HUD will calculate the vacancy rate using American Community Survey (ACS) data and specifically, the number of "Vacant for Rent Units" divided by the sum of the number of "Vacant For Rent Units," the number of "Renter Occupied Units," and the number of "Rented, not Occupied Units."¹⁰ HUD will initially set the threshold at 4%, meaning that the areas that HUD designates for mandatory adoption of SAFMRs must have a vacancy rate greater than 4%.

Additionally, in the Final Rule, HUD altered the voucher concentration criteria for selecting mandatory SAFMR areas.¹¹ The proposed rule required that the ratio of vouchers in concentrated low-income areas (CLIAs) to rental units in CLIAs exceed 1.55.¹² For example, under the proposed rule, a metropolitan area that had 22% of vouchers in CLIAs and 12% of rental units overall in CLIAs would meet the criteria because $22 / 12 = 1.83$, which is greater than the 1.55 threshold. But, as some commenters pointed out, an area with only 22% of vouchers in CLIAs is,

⁷ 24 C.F.R. § 982.507(a)(2)(ii)

⁸ 24 C.F.R. § 888.113(c).

⁹ *Id.* at § 888.113(c)(v).

¹⁰ Final Rule at 80,568-80,569.

¹¹ Final Rule at 80,569.

¹² CLIAs are defined as census tracts with a poverty rate of 25% or more OR any Qualified Census Tract where more than 50% of households earn incomes less than 60% of the Area Median Income. See Question 19, pg. 7 in HUD's Proposed SAFMR Rule FAQ for more citations:

<https://www.huduser.gov/portal/datasets/fmr/fmr2016p/SAFMR-Proposed-Rule-FAQ.pdf>

relative to the rest of the country, performing well in moving voucher holders out of high poverty areas. Consequently, HUD altered the criteria in the Final Rule, such that only those metropolitan areas where the percentage of vouchers in CLIAs exceeds 25% meet HUD's requirement for mandatory implementation of SAFMRs. Under the revised criteria, the hypothetical metropolitan area above would not automatically qualify for SAFMRs because the 22% of voucher holders residing in CLIAs is less than the new 25% threshold.

Importantly, this change does not address the concerns of some commenters that the proposed SAFMR doesn't do enough to target class segregation. The Center on Budget and Policy Priorities, for example, suggested altering the rule such that any area with more than 40% of voucher holders living in CLIAs would qualify.¹³ CBPP also proposed replacing the ratio with a simple difference formula, where any metropolitan area with a gap of 15% or more between voucher holders in CLIAs and rental units in CLIAs would qualify.¹⁴ Both changes would have made the rule target any area with high voucher concentration in CLIAs, whereas the change implemented as part of the Final Rule simply excludes those areas with a relatively low voucher concentration in CLIAs. In other words, the change in the Final Rule raises the floor for participation, instead of lowering the ceiling to qualify.

It is important to note that in the Final Rule, **HUD chose to codify the selection criteria for setting SAFMRs, but declined to set any specific values.** For example, vacancy rate as a factor in selecting regions will be codified, but the 4% threshold is subject to review. HUD published the selection criteria and values for the first round of SAFMR regions in the Federal Register. Any future changes to the selection value must go through public notice and comment period in the Federal Register.¹⁵

III. SAFMRs and PBVs

HUD declined to require PHAs to apply SAFMRs to existing PBVs. But HUD did allow PHAs operating a tenant-based program using SAFMRs to use SAFMRs for future PBV projects.¹⁶ In these jurisdictions, the Final Rule also allows the use of SAFMRs for current projects, provided the PHA and project owner agree to the change. The main reason that HUD exempted existing PBVs from mandatory adoption is because HUD recognized that FMRs have a different relationship to project-based units than to tenant-based ones. Specifically, as NHLP and HJN noted in our comments, adoption of SAFMR policies for PBV projects could have unintended collateral consequences on the existing inventory of PBV-supported affordable properties that could create financial instability or lead to systemic disinvestment in low-rent neighborhoods. HUD notes that it will monitor the use of SAFMRs in PBV projects for fair housing and civil rights violations.¹⁷ Note that the policy to use SAFMRs for future PBV projects must be stated in the PHA's Administrative Plan.

IV. Changes to the Exception Payment Standard Regulations

¹³ See Center on Budget and Policy Priorities, Comments on SAFMR Proposed Rule, pg. 6-7 (August 15, 2016).

¹⁴ *Id.*

¹⁵ Final Rule at 80,569.

¹⁶ 24 C.F.R. § 888.113(h)

¹⁷ Final Rule at 80,571.

HUD made two important changes to the Exception Payment Standard (EPS) regulations. First, **even in places that are *not* using SAFMRs, PHAs can apply to raise payment standards to up to 110% of the Small Area FMR for a particular zip code.**¹⁸ In other words, a PHA that doesn't use SAFMRs may still adopt SAFMRs and notify HUD that it plans to raise the payment standard to 110%. This means that PHAs that are not mandated to adopt SAFMRs will be able to piecemeal adopt SAFMRs by zip code and apply for EPS based on the SAFMRs.

Second, HUD eliminated the regulation that placed a 50% population cap on EPS within a zip code. **A PHA therefore can adopt an EPS for its entire jurisdiction.** For particularly tight rental markets, where HUD's FMRs and SAFMRs tend to be least accurate, this may be a valuable tool in raising payment standards. Of course, there are trade-offs: wide-scale adoption of EPS will also strain PHA budgets and could, potentially, limit the number of vouchers that a PHA can use.

Despite these changes, there remains confusion surrounding EPS. HUD, by and large, did not adopt the recommendations that NHLP and our partners suggested in comments on the proposed rule. Three of these changes are worth highlighting because of their implications for the adoption of SAFMRs. First, HUD has yet to clarify the qualitative standards that PHAs need to meet for HUD to approve EPS. As it stands, PHAs must not only show local rent data to justify EPS, they must also provide evidence that changing the payment standard will allow families to move outside of high poverty areas, find housing before their vouchers expire, and prevent financial hardship (for exception payment standards above 120%). Though these qualitative standards are required, they are ill defined and hard to standardize across jurisdictions. HUD should rely only on the more straightforward quantitative data related to rental costs in determining whether EPS is appropriate. Second, HUD continues to scrutinize EPS above 110% in arbitrary and uneven ways. NHLP proposed that all EPS be automatic up to 120% of the FMR. CBPP suggested that HUD raise the standard for heightened scrutiny to 150% of FMR. Neither proposal was adopted. Third, HUD continues to require PHAs to renew EPSs annually, instead of allowing them to roll over. HUD often doesn't approve the EPS until well into the year, so requiring annual re-application is burdensome for PHAs and could cause displacement for tenants if the PHA fails to submit the EPS paperwork to HUD in a timely manner. Advocates are encouraged to voice these concerns to their local PHAs, so that they may pass them on to HUD.

V. Phase out of 50th Percentile Rents

The Final Rule phases out 50th percentile rents, a policy formerly used by HUD to address voucher concentration. 50th percentile rents (versus the standard way of calculating FMRs which looks at the rent level needed to access 40% of units in a metropolitan area, known as 40th percentile rents) were not effective in improving voucher utilization, housing choice, and mobility. 50th percentile rents were also administratively cumbersome for PHAs to adopt. **The Final Rule phases out the methodology and replaces it with SAFMRs.**

The Final Rule also includes new regulations that address the transition away from 50th

¹⁸ 24 C.F.R. § 982.503(b)(1)(iii)

percentile rents.¹⁹ PHAs that are currently using 50th percentile rents will either transition to SAFMRs (if in a mandatory jurisdiction or one that voluntarily adopts SAFMRs)²⁰ or phase out the use of 50th percentile rents at the end of three years.²¹ PHAs using the 50th percentile rent that reverts back to the 40th percentile rent may also request HUD approval of a payment standard amount based on 50th percentile rents according to 982.504(f).²² But, going forward, no new 50th percentile designations will be made.

VI. Expansion of SAFMRs to All Rental Assistance Programs

The final SAFMR rule applies only to regular and special use HCVs.²³ HUD asked for comment on the rule's expansion to other programs such as HOPWA and CoC Rental Assistance, but HUD declined to broaden the reach of SAFMRs at this time, "due to the myriad of programs and program rules, it is beyond the scope of this rulemaking to make changes to these programs."²⁴

VII. Manufactured Homes

HUD's Proposed Rule suggested applying SAFMRs to manufactured homes, although it specifically requested comment on the issue. NHLP and many others commented that manufactured homes should be exempt due to a variety of reasons, including the costs of moving a mobile home. **The Final Rule exempts vouchers used to rent homes in a mobile home space.**

Appendix: Mandatory SAFMR Jurisdictions (Prior to August 2017 HUD letters)

Atlanta-Sandy Springs-Marietta, GA HUD Metro FMR Area
Bergen-Passaic, NJ HUD Metro FMR Area
Charlotte-Gastonia-Rock Hill, NC-SC HUD Metro FMR Area
Chicago-Joliet-Naperville, IL HUD Metro FMR Area
Colorado Springs, CO HUD Metro FMR Area
Dallas-Plano-Irving, TX Metro Division
Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Metro Division
Fort Worth-Arlington, TX HUD Metro FMR Area
Gary, IN HUD Metro FMR Area
Hartford-West Hartford-East Hartford, CT HUD Metro FMR Area
Jackson, MS HUD Metro FMR Area
Jacksonville, FL HUD Metro FMR Area
Monmouth-Ocean, NJ HUD Metro FMR Area
North Port-Bradenton-Sarasota, FL MSA

¹⁹ 24 C.F.R. § 888.113.

²⁰ *Id.* at § 888.113(i)(1)(i).

²¹ *Id.* at § 888.113(i)(1)(ii).

²² *Id.* at § 888.113(i)(2).

²³ Final Rule at 80,575.

²⁴ *Id.*

Palm Bay-Melbourne-Titusville, FL MSA
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA
Pittsburgh, PA HUD Metro FMR Area
Sacramento-Arden-Arcade-Roseville, CA HUD Metro FMR Area
San Antonio-New Braunfels, TX HUD Metro FMR Area
San Diego-Carlsbad-San Marcos, CA MSA
Tampa-St. Petersburg-Clearwater, FL MSA
Urban Honolulu, HI MSA
Washington-Arlington-Alexandria, DC-VA-MD HUD Metro FMR Area
West Palm Beach-Boca Raton-Delray Beach, FL Metro Division