

January 11, 2018

Regulations Division
Office of General Counsel
451 7th Street SW, Room 10276
Department of Housing and Urban Development
Washington, DC 20410-0500
Submitted electronically through www.regulations.gov

Re: Docket No. FR-6070-N-01: “Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations”

Dear Regulations Division, Office of General Counsel, HUD:

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and the Housing Justice Network (HJN) regarding the proposed rule published on Tuesday, December 12, 2017, “Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations.”¹ NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for protected classes. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. In addition, NHLP hosts the national Housing Justice Network, a vast field network of over 1,000 community-level housing advocates and tenant leaders. HJN member organizations are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. The following comments draw on NHLP and HJN’s extensive experience working for decades with advocates, residents, and Public Housing Authorities (PHAs).

Wide-spread adoption of Small Area FMRs (SAFMRs) would expand housing choice and mobility by matching rental costs with voucher payment standards, in turn helping families afford homes in high opportunity areas. Moreover, implementing the SAFMR rule would allow HUD to take a demonstrable step to fulfill its duty to affirmatively further fair housing, particularly in the mandatory 23 regions that represent areas with high rates of class and racial segregation. We therefore oppose HUD’s suspension of the mandatory implementation of SAFMRs. Our reasons are detailed below.

- I. Suspension will keep a barrier in place that makes it harder for families to move to areas of opportunity in regions across the country, both within and outside the 23 mandatory jurisdictions.

The suspension of the mandatory implementation of Small Area Fair Market Rents (SAFMRs)

¹ Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations, 82 Fed. Reg. 58,439 (Dec. 12, 2017).

will keep intact a barrier faced by low-income voucher families to find safe and stable housing in areas of opportunity throughout the country. In many cases, local payment standards prohibit voucher families from moving to neighborhoods with high-performing schools, reliable transportation, and quality jobs. Particularly in the 23 regions that were slated for mandatory adoption in 2018, residents are steered to high-poverty zip codes by payment standards that don't reflect local conditions. SAFMRs would immediately help lower barriers for voucher families to move to homes in low-poverty, high opportunity zip codes.

Suspension of the rule's implementation will also impact voucher families in regions outside of the 23 mandatory regions because (1) HUD stated it would provide extensive guidance to mandatory PHAs on implementation which would have encouraged PHAs in non-mandatory areas to adopt the rule and (2) it will delay the reporting of positive outcomes from areas of mandatory adoption, thus slowing voluntary adoption by PHAs in other jurisdictions including those where voucher families are concentrated in segregated, high poverty areas.

Voluntary adoption of SAFMRs, which is allowed even if mandatory implementation is suspended, is not a solution. At best, it would leave a patchwork of housing authorities using the altered rent standards; at worst most, if not all, PHAs would fail to adopt SAFMRs.

II. Suspending mandatory implementation violates the Fair Housing Act, specifically HUD's statutory duty to affirmatively further fair housing.

The adoption of the SAFMR final rule represents an important step toward addressing the concentration of voucher families in high-poverty, racially segregated neighborhoods. In the preamble to the proposed SAFMR rule, HUD acknowledges that the agency's existing policy of utilizing 50th percentile rents to address voucher concentration "has not proven effective in addressing the problem of concentrated poverty and economic and racial segregation in neighborhoods," because "the majority of HCV tenants use their vouchers in neighborhoods where rents are low but poverty is generally high."² This problem is, in part, a result of the FMR methodology that restricts voucher families to neighborhoods with lower rents. The SAFMR rule, in revising the ways that FMRs are calculated, sets out to deconcentrate voucher families from areas of high poverty by expanding affordable housing options in a range of neighborhoods and communities.

Suspending the rule will frustrate HUD's effort to remedy policies that resulted in voucher families disproportionately living in high-poverty neighborhoods, outside of areas of opportunity. Such a suspension is inconsistent with HUD's obligations under the Fair Housing Act, specifically the mandate that HUD administer its programs and activities in a manner that affirmatively furthers fair housing.³ By continuing to administer the Housing Choice Voucher program in a manner that has failed to address racial segregation and concentrations of poverty, HUD itself is acting contrary to the aims of the FHA, and is abrogating its duty to affirmatively

² 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. 39,218, 39,219. (Jun. 16, 2016).

³ 42 U.S.C. § 3608(e)(5).

furthering fair housing---by perpetuating policies that limit Voucher families' options in locating housing in integrated, low-poverty communities.

Suspending the rule would negatively impact members of protected classes, including racial and ethnic minorities, persons with disabilities, and families with children, by limiting affordable housing options in higher-cost, low-poverty neighborhoods. Because of the impact that suspension of the rule would have on these groups, suspension of the rule is inconsistent with HUD's affirmatively furthering fair housing obligation.

III. Because HUD included important tenant protections in the final rule, PHAs already have the tools to implement SAFMRs in a way that does not negatively impact participants.

Many stakeholders, including NHLP and HJN, commented to HUD during the extensive rulemaking process that it should implement tenant protections to avoid displacement of existing voucher families. In response, HUD included the following policies in the final rule:

1. 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 would go into effect at the family's second annual recertification.⁵
2. The 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.⁶
3. HUD included the provision that a PHA can gradually reduce the payment standard to any amount that is within the PHA's payment standard schedule.⁷

These policies allow PHAs significant flexibility in setting payment standards, resulting in gradual rent changes to tenants, if any, and shielding them from the potential negative impacts of SAFMR adoption. These policies also improve housing choice and mobility because PHAs can tailor rents in different neighborhoods based on the needs of an individual community.

If HUD is concerned about the potential negative impact of SAFMRs, as it states in justifying the suspension of mandatory adoption of SAFMRs, it could include in its guidance clear direction to PHAs on implementing these protective policies. HUD can and should play a key role in working with local PHAs to use the tools provided in the final rule to alleviate potential harm to tenants.

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).

⁷ *Id.* at § 982.505(c)(3)(iii).

In the final rule, HUD also revised the criteria for mandatory participation by adding a vacancy rate exception. By taking into consideration the surrounding housing market, HUD chose to expand only in areas where there is a sufficient amount of available rental housing and where competition won't lead to displacement from an entire region.

Finally, HUD implemented safeguards so that voucher families will not be met with a reduction in available units due to the implementation of SAFMRs. The final rule allows PHAs flexibility in setting payment standards by zip code. Therefore, in higher poverty neighborhoods, a PHA could revise the payment standard to keep those units in the voucher program.

IV. HUD does not provide sufficient reasons to support a suspension.

In its suspension notice, HUD provides several reasons for delaying mandatory SAFMR implementation. First, according to HUD, a study by Abt associates of SAFMR demonstration sites indicates that further research is needed to address SAFMR's potential harm to voucher families. However, the Abt study does not provide support for a suspension. In fact, the findings support moving ahead with the program. The Abt study shows that voucher families in SAFMR regions were in fact able to move to high-opportunity areas at a higher rate and lower cost than in non-SAFMR jurisdictions.⁸ HUD also points to negative outcomes for voucher families in SAFMR demonstration areas, even though, as stated above, the negative outcomes can be avoided through tenant protections put in place by the final rule. Additional research also found that implementation of the SAFMR rule will result in an approximately 10% increase in units available for voucher holders to rent. 20 of the 24 areas required to adopt the rule would see an increase, with the four areas that would experience a decrease all seeing less than 5% decreases in units.⁹

HUD also states that it needs more time to analyze the research findings and determine what measures are necessary to mitigate the negative effects of SAFMR implementation. However, (1) HUD has had ample time to analyze the research results and (2) in light of the recent court decision in *Open Communities Alliance et al v. Carson*,¹⁰ HUD sent notices to PHAs stating that implementation guidance will be expeditiously sent to all PHAs. HUD put in place various mechanisms to alleviate potential harm to tenants. **The most effective thing HUD can do to mitigate harm to voucher participants is to provide implementation guidance to PHAs that includes the tenant protections provided in the final rule.**

In addition, HUD relies on language in 24 C.F.R. § 888.113(c)(4), which provides that HUD may suspend SAFMRs (1) in a presidentially declared disaster area (2) where there is a sudden influx of displaced households needing permanent housing and (3) other events as determined by HUD. Surely, HUD did not intend for this provision to allow the wholesale suspension of the

⁸ Wil Fisher, Center on Budget and Policy Priorities, Trump Administration Blocks Housing Voucher Policy That Would Expand Opportunity, *available at* <https://www.cbpp.org/research/housing/trump-administration-blocks-housing-voucher-policy-that-would-expand-opportunity>

⁹ Furman Center. "How Do Small Area Fair Market Rents Affect the Location and Number of Units Affordable to Voucher Holders?" January 5, 2018.

¹⁰ Case citation

cornerstone of the SAFMR rule: mandatory implementation in highly segregated regions. A reasonable interpretation of the regulation is that HUD can suspend a mandatory SAFMR designation for an individual region or PHA, based on external circumstances.

V. The legality of HUD's suspension notice is in question.

We are aware of the ongoing litigation challenging the suspension of the SAFMR rule in *Open Communities Alliance et al v. Carson* and the Preliminary Injunction and Order dated December 23, 2017. We submit these comments despite our uncertainty about the legality of HUD's December 12, 2017 notice and request for comment regarding the suspension of mandatory SAFMR implementation.

Delaying mandatory adoption of SAFMRs for two years will restrict choice by making it more difficult for voucher holders across the country to move to higher rent zip codes. Furthermore, by suspending implementation, HUD is perpetuating patterns of racial and class segregation, frustrating HUD's compliance with the agency's obligation to affirmatively further fair housing. We agree with the ruling in *Open Communities* that HUD should apply the original rule and mandate adoption of SAFMRs for the 23 mandatory regions with large concentration of voucher holders in high poverty areas. We urge HUD to develop and distribute SAFMR implementation guidance and resources to all PHAs as soon as is practicable.

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our suggestions. Please contact Deborah Thrope (dthrope@nhlp.org) should you wish to talk with NHLP and/or HJN members to clarify our position on these important issues.

Sincerely,



Deborah Thrope, National Housing Law Project

On behalf of HJN:

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