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ESTABLISHING A MORE EFFECTIVE SAFMR SYSTEM: THE COSTS AND BENEFITS OF HUD'S 2016 SMALL AREA FAIR MARKET RENT RULE

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Abstract

This Note analyzes the new HUD rule finalized in November 2016, which dramatically changed the structure of the Housing Choice Voucher program in select metropolitan areas. In August 2017, HUD suspended automatic implementation of the rule until 2020 for twenty-three of the twenty-four selected metropolitan areas, but in December 2017, a preliminary injunction was granted requiring HUD to implement the rule as of January 1, 2018. The rule as written changes the method for calculating the vouchers from using a metropolitan area-wide average to calculating a separate level for each zip code. Such a change could greatly deconcentrate poverty and reduce economic and racial segregation; a result that the current status quo has failed to accomplish. The new rule, however, is not without its flaws. This Note offers a number of recommendations for changing the rule to address these flaws: (1) tweaking metro area selection criteria to include large, highly-segregated areas; (2) granting public housing agencies flexibility in implementing the rule; (3) including new protections for gentrifying neighborhoods and additional funding for landlord outreach and mobility counseling; and (4) revising methodology to increase accuracy. Despite the problems with the new rule, as long as HUD is truly committed to implementing it, its benefits are likley to outweigh its flaws.

I. The HCV Program and the New SAFMR Rule

A. *Introduction*

In June 2016, the Department of Housing and Urban Development (HUD) announced a significant change to its Housing Choice Voucher (HCV) program,[1] which it finalized on November 16, 2016.[2] The final rule will change HUD's existing fair market

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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. 39,218 (proposed June 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983 & 985).

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. 80,567 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985) [hereinafter Establishing a More Effective Fair Market Rent System].

rent (FMR) calculation in certain metropolitan areas from the fiftieth percentile rent for the entire area to small area fair market rents (SAFMRs).[3] In these metro areas, FMRs, which are the voucher amounts given to program participants, will instead be calculated at the zip code level.[4] HUD believes that the rule will deconcentrate poverty by helping voucher holders move to higher-opportunity, lower-cost neighborhoods.[5]

In August 2017, HUD announced that it was suspending the mandatory implementation of SAFMRs until 2020 in twenty-three of the twenty-four metro areas which had been set to implement SAFMRs in October 2017. HUD stated three reasons for suspending the rule: (1) review of the interim findings of the SAFMR demonstrations received in April 2017; (2)review of forthcoming public comments in response to an invitation to find regulations that are outdated, ineffective, and excessively burdensome; and (3) the necessity of completing guidance and technical assistance for impacted public housing agencies (PHAs).[6] In the suspension notice, HUD recognized that some PHAs may still voluntarily implement SAFMRs, and it promised to expedite the approval process for PHAs in the twenty-three impacted metro areas.

However, in December 2017, the District Court for the District of Columbia issued a preliminary injunction requiring HUD to implement the rule on its effective date of January 1, 2018, finding that HUD's suspension of the rule without allowing for notice and comment was unlawful, and that suspension was arbitrary and capricious.[7] The court found that because HUD failed to identify adverse rental housing market conditions local to the twenty-three impacted metro areas, HUD did not meet the requirements of 24 C.F.R. § 888.113(c)(4), and thus lacked authority to suspend the rule as it did.[8]

This Note analyzes the final rule as written, focusing especially on the changes HUD made in response to concerns that were brought

3. 24 C.F.R. § 888.113(i)(1)(i)(2017).

4. 24 C.F.R. § 888.113(d)(2).

5. 81 Fed. Reg. at 80,567.

6. As a note, reasons two and three appear to be merely justifications for suspending the rule as part of the Trump administration's larger policy of slimming the Federal Register. See, e.g., Eric Lipton & Danielle Ivory, Trump Says His Regulatory Rollback Already Is the 'Most Far-Reaching', The New York Times (December 14, 2017), https://www.nytimes.com/2017/12/14/us/politics/trump-federal-regulations.html1. I anticipate that the comments solicited in reason two will not find this rule to be outdated, ineffective, or burdensome, and while HUD should provide PHAs with additional guidance and technical assistance, it could do so while allowing implementation of the rule.

7. Open Communities Alliance v. Carson, No. 17-2192, at 17 (D.D.C. Dec. 23, 2017).

8. *Id.* at 17-18.

up during the notice and comment period. These changes include additional protections for existing voucher holders, adding additional criteria for a metro area to switch to SAFMRs, and addressing administrative burdens. Uncertainty exists resulting from HUD's suspension of the rule and its subsequent re-implementation as a result of the preliminary injunction, as well as the possibility of an appeal. Despite flaws in the final rule which could prevent SAFMRs from having their desired impact, the rule should be implemented, as it offers a real chance to bring about the results HUD anticipates.

Part I of this Note discusses the history and structure of the HCV program and lays out the provisions of the final rule as written. Part II analyzes the rule and its potential impacts, focusing on six key issues raised by the comments to the proposed rule. Part III offers recommendations for tweaking the rule and argues that the rule should be implemented, since it has the potential to benefit HCV voucher holders.

B. *History and Structure of the HCV Program*

Before Congress created the HCV program in 1974, the government housed low-income families in traditional public housing. Public housing, however, had the effect of destroying nearby property values, and was often associated with segregation, social stigma, and the "misery and hopelessness of poverty."[9] The HCV program was designed to break this cycle—and effectively attack concentrated poverty and housing segregation—by enabling voucher holders to move where they please.[10] Since the mid-1980s, nearly every new federal dollar for low-income housing has gone to HCVs, rather than public housing.[11]

The HCV program serves 2.2 million families, which constitutes only around a quarter of qualified people.[12] To qualify, a household must earn less than fifty percent of the metro area median income.[13] Given the number of low-income people, there is often a

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9. J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 528 (2007).

10. *See* 42 U.S.C. § 1437f (2012).

11. *See* Kristine L. Zeabart, Note, *Requiring a True Choice in Housing Choice Voucher Programs*, 79 IND. L.J. 767, 768 (2004).

12. *See* Alana Semuels, *How Housing Policy Is Failing America's Poor*, ATLANTIC (June 24, 2015), http://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/.

13. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING AND URB. DEV., [https://web.archive.org/web/20180113214153/https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet] (last visited Jan. 13, 2017). In addition, at

lengthy waiting list to receive a voucher.[14] Once a family receives a voucher, it searches on the private market for a unit, for which it pays thirty percent of its income in rent, with the voucher covering the rest.[15] Voucher holders have only a limited time to find an apartment; if they do not, they lose their voucher.[16] There are a number of reasons why a voucher holder might fail to find a unit: lack of affordable and available housing stock,[17] too few participating landlords, inability to understand the program, and discrimination against voucher holders, among others.[18] Landlord cooperation is voluntary,[19] but if landlords choose to take an HCV tenant, they must follow HUD regulations, including passing annual inspections.[20]

HUD funds the HCV program through grants to local PHAs.[21] HUD sets voucher amounts according to FMR levels, which it defines as "housing market-wide estimates of rents" that allow voucher holders "to rent standard quality housing throughout the geographic area. . . ."[22] HUD uses a variety of data sources to calculate FMRs: the Census, American Community Survey (ACS) data calculated every four years, random telephone dialing, and any statistically valid data it receives.[23] The FMRs are adjusted from year-to-year using national Consumer Price Index data. HUD uses its two-bedroom estimates as the basis for other unit sizes, rather than calculating an estimate for each unit size independently.[24] Prior to

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least seventy-five percent of families in the program in any given area must be given to "applicants whose incomes do not exceed 30 percent of the area median income." *Id.*

14. *See* Byrne & Diamond, *supra* note 9, at 605. For example, the New York City Housing Authority has not accepted new applications since 2007, and 147,033 families currently sit on the waiting list. *See* Community Service Society et al., Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), http://www.regulations.gov/document?D=HUD-2016-0063-0044.

15. *See* 42 U.S.C. § 1437f(o)(2)(A); *see also* Byrne & Diamond, *supra* note 9, at 605. While a family can choose to pay more than thirty percent of their income, they cannot pay more than forty percent. *See* 42 U.S.C § 1437f(o)(3).

16. Byrne & Diamond, *supra* note 9, at 605. This is not a rare occurrence: the national success rate for leasing a unit is sixty-nine percent, over half of voucher holders take longer than six months to find an apartment, and a quarter lose their vouchers altogether. *See* Community Service Society et al., *supra* note 14, at 4.

17. *See* David A. Vandenbroucke, *Is There Enough Housing to Go Around?*, 9 Cityscape: J. Pol'y Dev. & Res. 175, 176 (2007) (analyzing whether there is enough affordable, available, and adequate housing for low-income people).

18. Byrne & Diamond, *supra* note 9, at 605–06.

19. *See, e.g.*, Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 300 (2d Cir. 1998).

20. *See* 24 C.F.R. §§ 982.401–06 (2017).

21. *See* 42 U.S.C. § 1437f(o)(1)(A) (2012).

22. 24 C.F.R. § 888.113(a).

23. 24 C.F.R. § 888.113(e)(1).

24. 24 C.F.R. § 888.113(f)(1).

the SAFMR rule, HUD set FMRs at the fortieth or fiftieth percentile rent (depending on the geographic area), which is "the dollar amount below which the rent for [forty] or [fifty] percent of standard quality rental housing units falls."[25]

C. *The Final SAFMR Rule as Written*

Unfortunately, the HCV program has not had its intended effect of deconcentrating poverty and establishing racial desegregation;[26] despite a voucher holder's ability to use his voucher anywhere, the national majority still live in low-rent, high-poverty neighborhoods.[27] In response, HUD promulgated the SAFMR rule, switching from metro area-wide FMRs to SAFMRs. The rule's purpose is to "[establish] a more effective means for HCV tenants to move into areas of higher opportunity and lower poverty,"[28] which HUD hopes will "help reduce the number of voucher families that reside in areas of high poverty concentration."[29] A 2016 study found that moving to lower-poverty areas as a young child has significant long-term effects in terms of college attendance rates and adult earnings.[30] These gains increase the younger the child is at the age of the move.[31]

HUD explains that switching to a smaller geographic area for calculating FMRs will accomplish these goals because SAFMRs reflect neighborhood differences, instead of a single standard that may be too high or too low for the resident's neighborhood.[32] To account for these intraregional rent variations, HUD chose to use zip codes as proxies for neighborhoods.[33] HUD's belief that a smaller geographic area will lead to more mobility is backed by promising early returns from the few PHAs that have implemented SAFMRs on a

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25. *Id.*
26. In *Open Communities Alliance*, HUD conceded as much. *See* Open Communities Alliance, *supra* note 7, at 46. *See also, e.g.*, Stacy Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 L. & CONTEMP. PROBS. 173, 188–94 (2016) (finding minimal voucher household access to low-poverty neighborhoods in New Orleans).
27. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,567–68 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).
28. *Id.* at 80,567. *See generally* Kirk McClure, *The Prospects for Guiding Housing Choice Voucher Households to High-Opportunity Neighborhoods*, 12 CITYSCAPE: J. POL'Y DEV. & RES. 101, 118 (2010) (identifying the characteristics that make a high-opportunity neighborhood).
29. 81 Fed. Reg. at 80,567.
30. Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).
31. *Id.*
32. 81 Fed. Reg. at 80,567.
33. *Id.* at 80,568.

trial basis.[34] HUD cites the results from these PHAs as evidence that the program will have the desired effect nationally.[35] The trial programs were first announced in 2010, and HUD began using SAFMRs in five PHAs as a demonstration in 2012.[36] However, SAFMRs were first implemented in practice in 2011 not as part of these demonstrations, but separately in Dallas as part of a settlement to a lawsuit.[37] A 2016 study of the results of the Dallas program, upon which HUD relied heavily in adopting this rule, found that the switch to SAFMRs led to a rise in neighborhood quality for voucher holders while being cost-neutral for the PHA.[38]

HUD projects that the main benefit of the program will be to assist households in affording units in high-opportunity areas with better schools and less poverty, with ancillary benefits being short-term per-voucher cost decreases for PHAs and reducing overpayment of rent where neighborhood rent is lower than the metro average used for FMRs.[39] HUD also identified three main concerns associated with the switch to SAFMRs. First, it anticipates administrative costs for PHAs to implement the new standards.[40] Second, it projects that households that cannot or choose not to move to a higher-opportunity area will be worse off as their voucher amount will decrease.[41] Third, it concludes that the switch will lead to long-term raises in per-voucher costs as families move to higher cost areas, which ultimately would cause fewer households to get assistance without a commensurate increase in total HCV funding.[42]

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34. *See id.*

35. *See id.*

36. The PHAs are Cook County (Ill.), Long Beach (Calif.), Chattanooga (Tenn.), Mamaroneck (N.Y.), and Laredo (Tex.). *See id.* at 80,570.

37. *See id.* HUD's August 2017 announcement delaying implementation of SAFMRs exempted Dallas, ensuring that SAFMRs would continue to be in place there despite the legal proceedings. *See* Semuels, *supra* note 12.

38. Robert Collinson & Peter Ganong, The Incidence of Housing Voucher Generosity 4 (July 1, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255799. The factors that the authors used to measure neighborhood quality are: (1) poverty rate; (2) fourth grade test scores at the local school; (3) unemployment rate; (4) share of children in families with single mothers; and (5) violent crime rate. *Id.* at 15. They found that the neighborhoods where voucher holders moved had large improvements in violent crime rate, moderate improvements in poverty and unemployment rates, and no statistically significant improvement in test scores and share of families with single mothers. *Id.* at 16.

39. *See* 81 Fed. Reg. at 80,569.

40. *See id.*

41. *See id.*

42. *See id.*

As discussed above, the rule mandates a switch from fiftieth percentile FMRs to SAFMRs in certain metro areas.[43] HUD adopted five criteria to determine which metro areas will switch to SAFMRs: (1) the number of vouchers under lease in the metro FMR area; (2) the percentage of the standard quality rental stock lying in zip codes where the SAFMRs are over 110% of the metro area FMRs; (3) the percentage of voucher families living in concentrated low-income areas (CLIAs); (4) the percentage of voucher families living in CLIAs out of the percentage of all renters in CLIAs across the metro area; and (5) the metro area's vacancy rate.[44] The proposed rule did not include the last two factors, which HUD added into the final rule after receiving public comments.[45] In the final rule, HUD did not change its methodology to calculate FMRs, its adjustment process from year-to-year, or its adjustments for bedroom sizes.

II. ANALYSIS OF THE FINAL RULE AS WRITTEN

In the final rule, HUD responded to many of the issues raised during the notice and comment period, either making changes to the proposed rule or explaining why it did not do so.[46] It did not change its methodology to calculate FMRs, its year-to-year adjustment process, or its adjustments for bedroom sizes. It did, however, make a number of changes reflecting the comments received, which can be grouped into a few broad categories: (1) burdens for PHAs and landlords; (2) protections for current voucher holders; (3) methodology problems; (4) concerns about desegregation impacts; (5) need for greater flexibility for PHAs; and (6) promulgation before the SAFMR demonstrations are finished. This Note addresses each of these categories in turn, identifying how the final rule handles each issue and analyzing the effects that may occur as a result of implementing the final rule.

43. 24 C.F.R. § 888.113(i) (2017). The rule eliminates the fiftieth percentile FMR designation completely, and all metropolitan areas that do not switch to SAFMRs will use fortieth percentile FMRs. *Id.*

44. 24 C.F.R § 888.113(c)(i)–(v) (2017). HUD explains that it codified the selection criteria in the regulatory text, but not the selection values, which it will make available for public comment in notices published in the Federal Register. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,569 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985). It set these values at: (1) at least 2,500 vouchers; (2) at least 20% of standard quality rental stock in zip codes where SAFMRs are over 110% of metropolitan area FMRs; (3) the ratio of voucher holders living in CLIA to all renters is over 1.55; (4) the proportion must be over 25%; and (5) a vacancy rate over 4%. *See id.* at 80,568–69.

45. *See id.* at 80,568-69.

46. *See id.* at 80,568, 80,571–79.

A. *Burdens for PHAs and Landlords*

Commenters, especially PHAs, worried that switching to SAFMRs will add administrative burdens for PHAs. Most obviously, the rule increases the number of payment standards that PHAs must navigate, especially for those with large jurisdictions.[47] This increase is the point of the rule, but implementing more standards will require new software systems, landlord outreach and training programs,[48] as well as possibly causing conflicts with other voucher programs.[49] Commenters also found problematic the notion that SAFMRs, if they work as designed, will decrease the number of families that PHAs can serve. Simply put, if large numbers of low-income voucher holders move to higher-cost areas, the amount HUD must pay per voucher will increase, and without additional funding, PHAs will have to reduce the number of vouchers they issue.[50]

In the proposed rule, HUD solicited comments as to whether it should raise its standard for rent reasonableness redeterminations from five to ten percent to minimize administrative burdens on PHAs.[51] Rent reasonableness is a requirement that a PHA not approve a lease until it determines that the rent offered is reasonable, and PHAs must redetermine the reasonable rent for all units where FMRs decline by a certain percentage from the previous year.[52] Most commenters argued that HUD should raise the trigger percentage because five percent is low enough to trip the requirement when HUD alters the methodology or data sources for SAFMRs.[53]

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47. *See, e.g.*, Area Housing Authority of the County of Ventura, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0103 (noting that the authority's jurisdiction includes forty zip codes).

48. California Association of Housing Authorities, Comment Letter on Proposed Rule to Use Small Area Fair Market Rents for the Housing Choice Voucher Program 3 (Aug. 11, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0025.

49. *See* California Housing Partnership, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0054. The rule limits the use of SAFMRs to the HCV program, which will force PHAs to use SAFMRs for HCVs, but metropolitan area FMRs for other voucher programs. *Id.*; *see* 81 Fed. Reg. at 80,575.

50. *See* Prairie State Legal Services., Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 11, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0028. Commenters argued that the cost neutrality of the SAFMR program in Dallas will not be extrapolated nationally. *See, e.g.*, Community Service Society et al., *supra* note 14, at 5–6.

51. *Id.* at 85,074.

52. *See* 24 C.F.R. § 982.507 (2017).

53. *See e.g.*, Center on Budget and Policy Priorities (CBPP), Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 5 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0092. *But see* National Association of

Commenters also anticipated that switching to SAFMRs will cause many landlords to leave the program. Since the HCV program gives voucher holders money to find housing in the private market, landlord participation is essential to the program's success. For landlords that own property in multiple zip codes, HUD adds a series of differing payment standards to an already burdensome process of renting to an HCV tenant, which will force landlords to rent nearby units at different prices.[54] Commenters also worried that landlords will leave if payment standards decrease (which they will in many areas),[55] because decreased payment standards will not lead to anticipated decreases in rent.[56] In Alameda County (Calif.), where FMRs have not kept up with rent increases, the program lost 910 landlords over the previous five years and 687 over the last two.[57] Looking forward, the Tacoma (Wash.) Housing Agency surveyed local landlords about SAFMRs and found that many would leave the program.[58]

HUD in the final rule did not address many of these concerns. It acknowledged that PHAs could be burdened, but did not attempt to alleviate the burden, instead merely listing it as one of the rule's potential costs.[59] Similarly, it did not make any changes to prevent landlords from leaving the program, and the results of the final rule in terms of landlord participation remain to be seen. It did,

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Home Builders, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 7 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0048 (arguing that HUD should leave the requirement at five percent but allow PHAs to opt out of SAFMRs).

54. *See* California Association of Housing Authorities, *supra* note 48, at 3; Rent Stabilization Association of NYC, Inc., Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 8, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0017.

55. *See, e.g.*, Oakland Housing Authority, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0036 (noting that the hypothetical 2015 SAFMRs would have decreased payment standards by over five percent in all but one zip code in Oakland).

56. *See* New York City Department of Housing Preservation and Development (NYCHPD) & New York City Housing Authority (NYCHA), Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 4 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0078.

57. Housing Authority of the County of Alameda, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0061.

58. Tacoma Housing Authority, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 10, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0114.

59. Establishing a More Effective Fair Market Rent System, Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,570 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).

however, adopt the commenters' consensus suggestion for rent reasonableness. The final rule incorporated this suggestion for all FMR and SAFMR areas, as well as including a limit on the annual decrease of FMRs, including SAFMRs.[60] HUD explained that this limit is for protecting tenants, but will also alleviate PHA burden where SAFMRs are well below metro area FMRs.[61]

In the August 2017 notice delaying implementation of SAFMRs, HUD identified these administrative concerns as a reason for the delay. Specifically, it stated that it has been developing guidance and technical assistance to aid PHAs in implementing the rule, but that these services have not yet been provided to PHAs due to a review of various regulations and policies, concerns about implementing the SAFMR rule in concert with regulatory burden reduction and reform, and the necessity of incorporating the data from the April 2017 interim report into these services.

B. *Protections for Current Voucher Holders*

HUD claims that SAFMRs will increase tenant choice.[62] Commenters, however, feared that this choice will not be a decision regarding which high-opportunity neighborhood to move to, but one regarding whether to pay more out of pocket to stay in the person's current unit or face eviction. The payment standards for the vast majority of voucher holders in SAFMR areas will decrease with a switch to SAFMRs.[63] This is not surprising given the distribution of voucher holders in low-income neighborhoods; in fact, it is an essential feature of SAFMRs' push-pull approach. The pull is higher standards for high-rent areas to incentivize voucher holders to move there, while the push is lower payment standards in low-rent areas to incentivize them to move away from there.[64] This approach assumes that voucher holders will be able to find housing in high-income neighborhoods. Several commenters questioned this

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60. *Id.* at 80,575.

61. *Id.*

62. *See id.* at 80,571.

63. Approximately seventy-eight percent of current voucher holders (435,000 families) in metropolitan areas that would have switched to SAFMRs under the proposed rule would have lower payment standards. The National Preservation Working Group, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 4 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0047. In all but two of the SAFMR areas from the proposed rule, over half of voucher holders would have lower payment standards. *Id.*

64. *See* Community Service Society et al., *supra* note 14, at 3.

assumption. These commenters cited a lack of available housing,[65] no housing mobility counseling, high security deposits and moving expenses, and racial and source of income discrimination as barriers to moving.[66] The commenters also argued that many voucher holders chose to live in low-income neighborhoods and should not be forced to move. Reasons for doing so include family, friends, church, medical care, other support networks, and proximity to employment and public transportation.[67] Thus, some families may not move to what HUD deems a "better" neighborhood even if given the choice.[68]

If voucher holders living in low-rent neighborhoods are unwilling or unable to move to a high-rent neighborhood, they face a potentially devastating choice if they cannot negotiate a lower rent: pay more out of pocket to cover the difference between the rent and their voucher or lose their housing.[69] The commenters argued that HUD should not implement a rule forcing low-income Americans to pay extra to keep their current housing,[70] as these differences may be substantial—for example, $564 on average for hypothetical SAFMRs in Oakland.[71] In New York City, the average household income for voucher holders is only $15,803, making paying more out of pocket very burdensome.[72] In 2013, when the PHA administering the HCV program in New York City lost five percent

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65. For example, in Westchester (N.Y.) County, the high-income town of Briarcliff Manor has hypothetical SAFMRs that are $780 higher than the low-income city of Yonkers, which should incentivize HCV tenants to move to Briarcliff Manor, but Yonkers has fifteen times the number of available apartments. *See* Supportive Housing Network of New York, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0051.

66. *See* Homes and Community Renewal, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 10, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0115; National Association of Housing and Redevelopment Officials, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3–5 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0113; The Housing Authority of the City of Los Angeles, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0104.

67. *See* National Multifamily Housing Council, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0080; The Preservation Working Group, *supra* note 63, at 4.

68. *See* The Preservation Working Group, *supra* note 63, at 4.

69. *See* Community Service Society et al., *supra* note 14, at 8.

70. *See, e.g.*, Prairie State Legal Services, *supra* note 50, at 2.

71. California Housing Partnership, *supra* note 49, at 3.

72. Debi Rose, New York City Council, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0082.

of its budget, 4,583 families faced this move/pay choice, and eighty-three percent chose to stay and pay more.[73]

Commenters worried that SAFMRs will have a particularly damaging effect in gentrifying neighborhoods. Gentrifying neighborhoods are previously low-income neighborhoods that are rapidly improving in quality and increasing in price—which will not be reflected in HUD's outdated ACS data.[74] Low-income residents will want to continue to live in desirable gentrifying neighborhoods as income levels rise, amenities improve, and crime rates fall.[75] However, they will not be able to do so, as payment standards are likely to decrease with SAFMRs, forcing low-income renters into the move/pay choice described above.[76] Of course, SAFMRs will presumably catch up to rising rents in a few years, but it is likely that the lag will force out current tenants in the meantime and make them less likely to be able to move back once the units there are taken.[77]

Based on these comments, HUD substantially changed the rule to protect tenants from adverse effects. First, it incorporated a section of the Housing Opportunity Through Modernization Act of 2016, allowing PHAs to hold harmless those tenants who stay in their units.[78] Second, it limited the amount that FMRs can decrease annually to ninety percent of the previous standard.[79] Third, it gave PHAs more flexibility to set payment standards between the existing metro area FMRs and the new, lower SAFMRs, giving PHAs some budgetary leeway but still ensuring that the reduction for tenants is modest.[80] Each of these provisions will protect voucher holders—especially those in gentrifying neighborhoods—from immediate application of dramatic payment standard reductions, giving them

73. NYCHPD & NYCHA, *supra* note 56, at 4.

74. *See* Community Service Society et al., *supra* note 14, at 6.

75. *Id.*

76. *See* Maxwell Austensen et al., N.Y.U. Furman Ctr., State of New York City's Housing and Neighborhoods in 2015 6 (2016), http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf (classifying fifteen New York City neighborhoods as gentrifying); Community Service Society et al., *supra* note 14, at 6 (citing the Austensen report to assert that twelve of the fifteen gentrifying neighborhoods would see lower payment standards).

77. *See* Council of Large Public Housing Authorities, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 7 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0070.

78. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,572 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985); *see* Enterprise Community Partners, Inc., Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 4 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0081.

79. 81 Fed. Reg. at 80,572; *see* CBPP, *supra* note 53, at 4.

80. 81 Fed. Reg. at 80,572.

time to adjust to the new program and find a unit in a higher-cost neighborhood. However, it is likely that some voucher holders will still face adverse consequences before any potential reductions because PHAs do not have to implement the hold harmless policies and FMRs are already near the lower edge of the market in many areas.[81]

C. *Issues with HUD's Methodology*

Many of the commenters questioned both HUD's methodology for calculating the SAFMRs and the criteria used to determine which metro areas must switch to SAFMRs. First and foremost, many commenters argued that HUD uses outdated data that undervalues the true rent values in many markets.[82] In the final rule, HUD merely adopted the data sources currently used for FMRs, which were already "a longstanding complaint. . . ."[83] Particularly problematic is the continued use of the ACS data calculated every four years, causing the projected SAFMRs to be lower than actual market rents in areas with increasing rental costs.[84] Commenters from across the country, from New York City,[85] to Washington, D.C.,[86] to Oakland,[87] offered data showing the gap between the proposed SAFMRs and their local conditions. Switching to SAFMRs will only exacerbate this problem, as smaller areas are subject to faster and greater change than entire metro areas.[88]

81. *See, e.g.*, District of Columbia Housing Authority, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0112 (noting that SAFMRs lag behind market rent in two District of Columbia. zip codes by over $600).

82. *See, e.g.*, Housing Partnership Network, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 4 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0079.

83. *Id.*; *see also* Geoff Boeing & Paul Waddell, *New Insights into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Rental Listings*, 37 J. PLAN. EDUC. & RES. 457, (2016) (finding that nationally, thirty-seven percent of listings are below the FMRs, but in some areas, fewer than ten percent of the listings are below the FMRs).

84. *See* National Multifamily Housing Council, *supra* note 67, at 5.

85. *See, e.g.*, Daniel Squadron & Brian Kavanagh, New York State Senate and Assembly, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0107 (noting a $441 drop for vouchers on Manhattan's increasingly costly Lower East Side).

86. *See, e.g.*, District of Columbia Housing Authority, *supra* note 81, at 1 (noting that sixty-five of D.C.'s sixty-nine zip codes would see a decrease from FMRs to SAFMRs).

87. *See, e.g.*, Non-Profit Housing Association of Northern California, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 11, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0034.

88. *See* Tacoma Housing Authority, *supra* note 58, at 2.

The commenters also pointed to other features carried over from the FMR calculation that they alleged will lead to inaccurate SAFMRs: using national rather than local inflation trend factors, not basing SAFMRs on local survey data, and not using separate calculations for each unit size. Using national inflation trends ensures that SAFMRs will not keep pace with rents where rent increases faster than the national average.[89] For example, in Oakland, the fastest growing rental market in the country,[90] recent FMRs have been around the same or even declined.[91] In 2013 and 2015, PHAs and interested nonprofits in the Bay Area paid for rental surveys that convinced HUD to raise FMRs there by sixteen and thirty-four percent, respectively.[92] But commenters argued that these groups should not have to pay for costly surveys to get accurate SAFMRs.[93] To fix these issues, commenters suggested that HUD should use and carry forward local rent survey data where available,[94] and should use the percentage change in metro area-wide rents that HUD publishes quarterly as a more accurate local inflation factor.[95] Lastly, they contended that HUD should calculate SAFMRs for all unit sizes to avoid "apples-to-oranges comparisons" between different unit sizes.[96]

Second, many commenters questioned the criteria HUD uses to determine which metro areas must switch to SAFMRs. The Center on Budget and Policy Priorities (CBPP) argued that HUD should use absolute measures of voucher-holder concentration, rather than relative concentration, because using relative concentration excludes metro areas where high percentages of all renters are concentrated in low-income areas.[97] CBPP also argued that the requirement that twenty percent of rental stock is located in high-SAFMR zip codes should instead be fifteen percent, which would

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89. *See* Preservation of Affordable Housing, Inc., Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0041.

90. *See* Housing Authority of the County of Alameda, *supra* note 57, at 2.

91. *See* Non-Profit Housing Association of Northern California, *supra* note 87, at 1.

92. *See id.*

93. *See* California Housing Partnership, *supra* note 49, at 2 (together, the surveys cost $160,000).

94. *See, e.g.*, CBPP, *supra* note 53, at 15–16.

95. *See* Housing Partnership Network, *supra* note 82, at 4.

96. *See* CBPP, *supra* note 53, at 15.

97. *Id.* at 6. In addition, The Inclusive Communities Project questioned exclusions based on tiny margins, noting that Dallas is included in SAFMRs with a concentration ratio of 1.544955957, while Los Angeles is excluded with a ratio of 1.54. *See* The Inclusive Communities Project, Inc. (ICP), Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 11–12 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0062.

include "[a] number of large, highly segregated metro areas" which could benefit from SAFMRs.[98] Other commenters wrote that HUD should consider, in addition to the proposed rule's three criteria, a number of other factors which would ensure that SAFMRs are implemented in the metro areas with the highest need and where they will have the greatest impact.[99]

Almost all commenters urged HUD to consider a minimum vacancy rate of five percent for implementation of SAFMRs.[100] A comment by three New York City nonprofits explained that this is necessary because of the SAFMRs' aforementioned push-pull approach.[101] This system works well in a loose rental market like Dallas,[102] but both the push and pull mechanisms break down in tight markets like New York City.[103] With such high demand for any available unit, landlords have a choice of tenants, and will almost always take a non-HCV tenant over an HCV one. There are a few reasons why they prefer to do so, but the most common are because non-HCV tenants pay with one source of funds, are more likely to have good credit and rental history, and can move in immediately

98. CBPP, *supra* note 53, at 7.

99. *See* Housing Authority of the City of San Buenaventura, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 7–8 (Aug. 6, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0022 (suggesting wages and employment factors, availability of rental housing, proximity to medical facilities and disability and social services); Housing Authority of the County of Santa Clara, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0102 (percentage of owner-occupied units); Massachusetts Department of Housing and Community Development, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0095 (access to public transportation and employment centers); San Diego Housing Commission, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (July 26, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0012 (transportation access, employment and crime rates, environmental health, and school quality); Tacoma Housing Authority, *supra* note 58, at 1–2 (dispersion of voucher holders and average rents in highest-cost neighborhoods).

100. *See, e.g.*, California Housing Partnership, *supra* note 49, at 2. This five percent number is nearly unanimous among the comments which discussed vacancy rates, as a five percent vacancy rate is "generally considered to be the threshold for a tight rental market." Enterprise Comm. Partners, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 3 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0081.

101. *See* Community Service Society et al., *supra* note 14, at 3.

102. *See* Collinson & Ganong, *supra* note 38, at 4. Dallas has a vacancy rate of 8.7%, above the national rate of 7%. National Fair Housing Alliance, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 5 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0090.

103. New York City's vacancy rate is just 3.45%, and it is just 1.8% for units with rent less than $800. Community Service Society et al., *supra* note 14, at 1.

without mandatory inspections, repairs, and paperwork.[104] Thus, in tight markets, SAFMRs are unlikely to be effective in moving voucher holders to high-rent areas, where rents and demand are highest and availability lowest.[105]

SAFMRs also pose a threat for voucher holders who choose to stay in their current units. As noted above, even with the final rule's inclusion of hold harmless provisions, these tenants face a risk of losing their housing due to decreased payment standards—a risk which is particularly strong in tight markets.[106] In tight markets, high demand and low vacancy rates—even in low-income areas—mean that displaced voucher holders would face competition from non-HCV tenants for the few available apartments.[107] If SAFMRs significantly decrease payment standards, landlords in cities with rent control ordinances may have an incentive to purposely fail HUD's annual inspection, forcing their HCV tenant to move out, allowing the landlord to take the automatic rent increase that comes with vacancy, and then renting to a less-burdensome non-HCV tenant.[108]

While HUD made substantial changes to its selection criteria,[109] it did not address any of the commenters' methodological issues.[110] Thus, it is likely that the methodology issues raised by the commenters will continue with the switch to SAFMRs. In the final rule, however, HUD did acknowledge commenters' complaints of its selection criteria. First, it agreed that the voucher concentration criterion should be adjusted to "better target communities where voucher concentration is most severe."[111] To achieve this, it added an additional criterion for becoming a SAMFR area: the metro area must have a certain minimum proportion of voucher tenants living in CLIAs, in order to only capture those areas with a high concentration of voucher tenants.[112] Second, it added a criterion for vacancy rates, explaining that very low rates indicate "rental markets in disequilibrium."[113] It chose four percent as the minimum, to be calculated using ACS data, which HUD explained is the equivalent to an actual rate of five percent.[114] In addition, HUD stated that it

104. *See* Housing Authority of the County of Alameda, *supra* note 57, at 2.
105. *See* The Housing Authority of the City of Los Angeles, *supra* note 66, at 4–5.
106. *See* Rent Stabilization Association of NYC, Inc., *supra* note 54, at 2–3.
107. *See id.* at 3.
108. *See* Community Service Society et al., *supra* note 14, at 11–12.
109. *See* Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,576–78 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).
110. *Id.* at 80,579.
111. *Id.* at 80,576.
112. *Id.* at 80,569.
113. *Id.* at 80,576.
114. *Id.*

will evaluate a number of additional variables for future consideration.[115]

These added criteria dramatically changed the list of metro areas which must switch to SAFMRs, removing many of the areas where the commenters were most pessimistic about the effects of implementation, including Oakland and New York City. Although HUD did not incorporate every proposed change to its selection criteria, the inclusion of the aforementioned two additional criteria indicates that HUD is concerned about the consequences of the SAFMR program and wants to ensure that the areas using SAFMRs are those which will be most helped by the program.

D. *The Rule Does Not Attack Housing Segregation*

Several commenters argued vociferously that the proposed rule should directly combat housing segregation. Inclusive Communities Project (ICP)—a Dallas advocacy group that brought the lawsuit in 2011 which eventually led to the initial adoption of SAFMRs in Dallas—suggested that HUD's criteria for adopting SAFMRs are "arbitrary and artificial formulas [that] will perpetuate racial segregation."[116] ICP alleged that HUD initially included a measure of racial segregation in the proposed rule but later removed it.[117] ICP claimed that HUD, by doing so, excluded twenty-two large metro areas from SAFMRs, of which twenty meet HUD's standard of "High Segregation," while seven of the included areas in the proposed rule have only "Moderate Segregation."[118]

ICP focused on the proposed rule's selection criteria, specifically on how they excluded some of the country's most segregated metro areas.[119] As discussed above, using relative, not absolute, concentration ignores the fact that renter-occupied housing is over concentrated in low-income and often highly segregated, areas.[120] In its comment, CBPP pointed to Bridgeport (Conn.) as an example of a city left out by the relative concentration requirement.[121]

115. *Id.*

116. ICP, *supra* note 97, at 1.

117. *Id.* at 4.

118. *Id.* at 4–5.

119. CBPP argued that if HUD accepted its revised criteria, the result would be to add large, heavily-segregated areas such as Cincinnati, Detroit, Memphis, and St. Louis, among others. CBPP, *supra* note 53, at 8–9.

120. *Id.* at 7.

121. In Bridgeport, voucher holders are very concentrated in CLIAs, but its relative concentration does not meet HUD's criterion because its ratio of voucher holders in low-income areas to total renters there is insufficiently high. CBPP, *supra* note 53, at 6.

The Metropolitan St. Louis Equal Housing and Opportunity Council (MSTL) suggested that the twenty percent criterion leaves out segregated areas as well, writing that "the relationship between poverty, race, and the availability of rental units" from long-term segregation makes these areas unlikely to meet the requirement.[122]

HUD responded to these criticisms, emphasizing that its focus is on voucher concentration, not residential segregation.[123] HUD did add the additional criterion for targeting the most severe concentration, which, given the numerous connections between poverty and race, presumably will have desegregation effects. It did not, however, switch from relative to absolute concentration, or lower the twenty percent criterion. Thus, while HUD identified "concentrated poverty and economic and racial segregation" as the problems that the new rule hopes to address, it appears that addressing racial segregation is a higher priority for some of the commenters than it is for HUD.[124]

E. *Need for Greater Flexibility*

Many commenters argued that the new rule locks SAFMR areas into a national policy that ignores the specific characteristics of local markets, and urged HUD to give PHAs flexibility in implementing SAFMRs.[125] They argued that HUD should simplify the process for requesting and granting exception payment standards. Under the new rule, PHAs can adjust payment standards to 110% above SAFMRs, but must get HUD approval for special exceptions above 110%.[126] Although commenters disagreed on the precise numbers, many argued that exception standards should be far easier to apply for and should go much higher than 110% of

122. Metropolitan St. Louis Equal Housing and Opportunity Council, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0042.

123. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,576 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985). *But see* Metropolitan St. Louis Equal Housing and Opportunity Council, *supra* note 122, at 3–4 (arguing that applying SAFMRs to heavily-segregated cities with concentrated poverty and low economic and social mobility should be the purpose of the rule).

124. 81 Fed. Reg. at 80,567; *cf.* ICP, *supra* note 97, at 2, 12 (alleging that HUD's failure to include racial segregation as a factor violates its duty to affirmatively further fair housing merely for HUD's administrative convenience).

125. *See, e.g.*, Oakland Housing Authority, *supra* note 55, at 2 (disapproving of HUD's "one size fits all" approach).

126. 24 C.F.R. § 982.503(b)(1)(iii)–(iv) (2017); *see also* California Association of Housing Authorities, *supra* note 48, at 2.

SAFMRs.[127] Another suggestion was that HUD maintain the current exception standard of 150% of metro area FMRs.[128]

Commenters also pointed to the potential unsuitability of using zip codes as proxies for neighborhoods, arguing that PHAs should have flexibility to define neighborhoods according to their local knowledge.[129] The Supportive Housing Network of New York, a collection of fair housing organizations, argues that New York City's 260 zip codes "do not delineate any logical neighborhood and rental geographies."[130] There is also a general concern that zip codes may include both high- and low-rent areas, which threatens to make SAFMRs unrepresentative for large segments of the zip code.[131] Thus, commenters argue that PHAs should have the flexibility to define small areas according to their local conditions by bundling together zip codes or dividing them into census tracts.[132] Similarly, the San Diego Housing Commission worries that the mandatory nature of the proposed rule will prevent PHAs from devising their own local solutions.[133]

HUD did not address these concerns in the final rule, other than noting that they were raised. It did not change the exception payment standard requirements in the final rule,[134] but it argued that its hold harmless provisions achieve the same results in terms of

127. *See* Enhanced Section 8 Outreach Program in Yonkers, NY, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0053; Housing Partnership Network, *supra* note 82, at 3; Philadelphia Housing Authority, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 11, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0029.

128. This change would have made a significant impact. In Chicago's North Side Lakeview neighborhood, the average rent for a two-bedroom apartment is $1,880. Metropolitan Planning Council, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0066. The adjusted 150% two-bedroom FMR for Chicago is $1,764, while the unadjusted hypothetical two-bedroom SAFMR is far lower, only $1,280. *Id.*

129. *See, e.g.*, Housing Authority of the County of Santa Clara, *supra* note 99, at 2 ("The [Authority] has a more thorough understanding of the County's economic break down by neighborhood and would be able to set better neighborhood/zip code specific payment standards than HUD.").

130. Supportive Housing Network of New York, *supra* note 65, at 2.

131. *See* Greater New Orleans Housing Alliance, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0063; Housing Authority of the County of Santa Clara, *supra* note 99, at 2 (showing the dispersion of poverty in Santa Clara (Calif.) County, with eleven of the twenty low-income census tracts spread across two cities and thirteen zip codes).

132. *See* Council of Large Public Housing Authorities, *supra* note 77, at 8 (describing successful sub-FMR area programs across the country).

133. *See e.g.*, San Diego Housing Commission, *supra* note 99, at 1.

134. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,577 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).

protecting tenants from dramatic decreases in payment standards.[135] Similarly, HUD did not adopt greater flexibility, sticking instead with measuring SAFMRs at the zip code level. Thus, the effect of using zip codes—rather than some other determinant of small areas—on a national scale is yet to be determined.[136]

F. *Waiting Until Demonstrations Finish*

The last major issue that commenters raised with the rule is that it is "not evidence-based policy making."[137] The Seattle Housing Authority observed that HUD assumes a few results from the switch to SAFMRs, but it offers no "rigorous, systematic evaluation" to support these claims.[138] The proposed rule "only cite[d] a single article [Collinson & Ganong] that looks at a single metropolitan area [Dallas]."[139] HUD did not even wait to finish its five demonstrations before implementing the proposed rule, let alone analyze the results.[140] Preservation Working Group, a national coalition of housing interests, noted the irresponsibility of moving forward with SAFMRs when the largest pre-SAFMR mobility program was the Gautreaux Assisted Housing Program, which moved 7,100 families in Chicago over more than a decade, while this rule would affect seventy-five times that many immediately.[141]

In addition, the commenters argued that the results of the Dallas demonstration cannot be extrapolated nationally because the conditions in Dallas are not representative of the country as a whole. Dallas has lots of available land, few restrictions on new housing

135. *See id.* at 80,573.

136. *See id.* at 80,579.

137. Council of Large Public Housing Authorities, *supra* note 77, at 2.

138. Seattle Housing Authority, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 2 (Aug. 5, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0064.

139. Council of Large Public Housing Authorities, *supra* note 77, at 2; *see also* 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, 39,221, 39,231 n.14 (proposed June 16, 2016), (to be codified at 24 C.F.R. pts. 888, 982, 983 & 985); Collinson & Ganong, *supra* note 38. It is worth noting that two commenters raise issues with the methodology and the validity of the conclusions of the Collinson and Ganong paper cited by HUD in the proposed rule. National Association of Home Builders, *supra* note 53, at 2; National Multifamily Housing Council, *supra* note 67, at 2.

140. *See* The Housing Authority of the City of Los Angeles, *supra* note 66, at 8.

141. *See* The Preservation Working Group, *supra* note 63, at 4, at 1–2. *See generally* Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 319–23 (2002).

supply, is relatively affordable,[142] and has a vacancy rate above the national average, allowing forty-four percent of voucher households to move in the three-year period that SAFMRs were implemented.[143] As the Housing Authority for the County of Alameda (Calif.) states, "A preliminary assessment of one mid-western suburban city seems insufficient to embark on a nationwide mandatory rule (which HUD estimates will [affect] 28 percent of all vouchers). . . ."[144]

In the final rule, HUD brushed off these concerns. It acknowledged that more information will come as the demonstrations finish, but decided to move forward with the rule anyway.[145] It argued that "it is not premature to implement [SAFMRs] on this limited basis in those areas where it has the potential to address significant voucher concentration concerns."[146]

The August 2017 delaying notice reversed this stance, citing the interim report received in April 2017 as one of the reasons for the delay. The notice stated that the interim findings justify delay to further study the costs and benefits of SAFMRs, specifically rent burdens on voucher holders and the availability of units. However, the District Court found material differences between the metro areas in the interim report and the twenty-three affected metro areas, which calls into question the usefulness of the findings of the interim report altogether.[147] It remains to be seen how much weight HUD, interested parties, and reviewing courts will place on the findings of the demonstrations for extrapolating the rule's national impact.

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142. *See* Housing Authority of the County of Alameda, *supra* note 57, at 3; BRIAN STROMBERG & MINDY AULT, PAYCHECK TO PAYCHECK 2016 app. A (2016), https://www.nhc.org/wp-content/uploads/2017/03/nhc-p2p-2016.pdf (finding Dallas to be only the seventieth least affordable metropolitan area for working renters); *see also* National Housing Conference, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 5, n.7 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0043 (citing the Stromberg & Ault survey).

143. *See* California Housing Partnership, *supra* note 49, at 5.

144. Housing Authority of the County of Alameda, *supra* note 57, at 3.

145. *See* Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,579 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).

146. *Id.*

147. *See* Open Communities Alliance, *supra* note 7, at 29-36.

III. RECOMMENDATIONS

A. *SAFMRs Have the Potential to Provide Great Benefits*

Despite the unaddressed issues raised by commenters and HUD's subsequent decision to delay implementation, the rule should not be abandoned altogether. As currently calculated, FMRs have not proven effective at deconcentrating poverty, as the majority of voucher holders still live in low-income neighborhoods.[148] SAFMRs are an appealing solution to the problems caused by using metro area FMRs. The National Housing Conference (NHC) points to two suburbs of Boston—Lynn, with a $47,195 median income, and Newton, with a $118,639 median income—as emblematic of why metro area FMRs do not work.[149] The differences in income levels indicate that rental housing will be more expensive in Newton than in Lynn. An average between the two price levels is likely to be above the median price in Lynn but below the median price in Newton, covering many units in Lynn but very few in Newton.[150] Thus, metro area FMRs push voucher holders towards the lower-income communities whose rental values are below the metro area average. SAFMRs, on the other hand, allow HUD to calculate FMRs at an amount more appropriate for Newton, opening up far more of the available units there.

Along with simply being a change from an ineffective status quo, the new rule's purpose is an admirable one. HUD proposed the switch to SAFMRs specifically to break up concentrations of poverty, and eliminate racial and economic segregation prevalent in many of the nation's metro areas.[151] Properly calculated, SAFMRs offer low-income people the opportunity to move into lower-poverty neighborhoods that can offer greater opportunities. Research found that this can have a significant long-term impact for young children—increasing a child's lifetime earnings by over $300,000, and making him or her more likely to attend college.[152] Benefits such as these extend into the next generation as well.[153]

Although the results are preliminary, SAFMRs appear to work both in practice and in theory. Researchers at U.C. Davis studying the hypothetical impact of SAFMRs in three California regions (San

148. *Id.* at 80, 567–68.
149. National Housing Conference, *supra* note 142, at 2.
150. *Id.*
151. *See* Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,567 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).
152. Chetty et al., *supra* note 30, at 5, 22.
153. *Id.* at 25–26.

Diego, Sacramento, and the Bay Area—San Francisco, Oakland, and San Jose) concluded that switching to SAFMRs would increase a voucher holder's access to rental units in low-poverty and job-rich neighborhoods.[154] Although they projected some potential adverse effects,[155] overall, they found that SAFMRs would accomplish HUD's goal of deconcentrating poverty.[156] Similarly, Robert Collinson and Peter Ganong, studying the Dallas SAFMR demonstration, found that voucher owners tended to move to much higher quality neighborhoods, especially when compared with results in neighboring Fort Worth, which used metro area FMRs.[157] Further, they found SAFMRs to be a more effective means of improving neighborhood quality than simply raising FMRs or shifting from fortieth percentile FMRs to fiftieth percentile.[158]

B. *Specific Recommendations for Adopting and Tweaking the Final Rule*

Given the potential positive impact of SAFMRs and the encouraging early results from the demonstrations, this Note recommends that HUD immediately implement the rule, while continuing to tweak it as necessary now that it is implemented nationally. HUD should not continue to attempt to delay implementation, and it certainly should not revoke it entirely. The final rule dramatically improved upon the proposed rule, fixing many of the biggest flaws identified by the commenters. However, not all of the issues raised by the commenters have been sufficiently alleviated, and switching to SAFMRs will likely have some adverse effects, which HUD should address as they arise.

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154. *See* MATTHEW PALM & DEBBIE NIEMEIER, UNIV. OF CAL., DAVIS, THE IMPACT OF SCALE CHANGES OF FAIR MARKET RENTS ON TRANSIT AND JOBS ACCESS OF SECTION 8 ELIGIBLE UNITS IN THREE OF CALIFORNIA'S LARGEST MPOS 17 fig.2 (2016), https://www.regulations.gov/document?D=HUD-2016-0063-0075. Of the regions studied by the researchers, only Sacramento (where they found the most positive results) and San Diego are included in the metro areas covered by the final rule. Memorandum from Dep't Hous. & Urban Development, Suspension of Small Area Fair Market Rent (FMR) Designations (Nov. 16, 2016), https://www.huduser.gov/portal/portal/sites/default/files/pdf/SecretarysDetermination.pdf; *see also* Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations; Solicitation of Comment, 82 Fed. Reg. 58,349 (Dec. 12, 2017).

155. Of particular concern: accessibility in Oakland would decline by fifty percent and would make large parts of San Jose inaccessible. PALM & NIEMEIER, *supra* note 154, at 38. Researchers suggested that HUD could mitigate these effects by establishing floors below which SAFMRs could not fall, which HUD incorporated into the final rule. *Id.* at 47.

156. *Id.* at 47–48.

157. Collinson & Ganong, *supra* note 38, at 15–16.

158. *Id.* at 18.

First, although HUD rejected a more explicit focus on segregation, it should nevertheless tweak its selection criteria to incorporate the changes recommended by CBPP to include the large, highly-segregated metro areas where SAFMRs may have the greatest impact. CBPP would drop the percentage of rental units in high-SAFMR zip codes from twenty percent to fifteen and would switch from relative to absolute voucher concentration.[159] In both the proposed and final rules, HUD emphasized fighting concentration in low-income areas as the foremost goal of SAFMRs,[160] yet it never offered a justification as to this preference, nor did it address why housing segregation is not provided a higher priority.[161] Given that the current HUD policy remains to affirmatively further fair housing, HUD should do more to ensure that its SAFMR rule actively fights segregation, rather than exist merely as a byproduct of reducing voucher concentration.[162]

Second, HUD should allow PHAs to implement SAFMRs flexibly because a national rule may not perfectly match local conditions. HUD should make it easier for PHAs to apply for exception payment standards, which should go above 110% of metro area FMR.[163] Third, PHAs should be able to define neighborhoods according to their local knowledge and either bundle zip codes

159. CBPP, *supra* note 53, at 7.

160. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567, 80,567–68 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).

161. *See* 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 (proposed June 16, 2016) (to be codified at 24 CFR pts. 888, 982, 983, 985) ("The purpose of this proposed rule is to establish a more effective means for HCV tenants to move into areas of higher opportunity and lower poverty . . . and . . . help reduce the number of voucher families that reside in areas of high poverty concentration."); 81 Fed. Reg. at 80,568 ("Based on early evidence from PHAs using Small Area FMRs that are in place in certain metropolitan areas in the U.S., HUD believes that Small Area FMRs are more effective in helping families move to areas of higher opportunity and lower poverty.").

It is worth noting that the political situation since this rule was proposed and finalized has changed. It is unclear what the Trump administration's policy on the HCV program is, what HUD's budget will be, or what the status of this rule is going forward. *See* Open Communities Alliance, *supra* note 7; *see* Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations; Solicitation of Comment, 82 Fed. Reg. 58,349 (Dec. 12, 2017) (inviting comments on whether HUD ought to change the suspension).

162. *See generally* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

163. *See* Enhanced Section 8 Outreach Program in Yonkers, NY, *supra* note 127, at 1 ("For exception payment standard requests between 110% to 120% of the SAFMRs, the only program justification required should be inability to secure housing . . . ."); Housing Partnership Network, *supra* note 82, at 3 (advocating that exception payment standards should go "up to 120% of FMR without HUD approval to streamline program administration"); Philadelphia Housing Authority, *supra* note 127, at 2 ("PHA believes that exception payment standards up to 150% of the SAFMR should be available through this streamlined process.").

together or divide them if necessary.[164] Fourth, given the effect that SAFMRs will have in gentrifying neighborhoods,[165] HUD should grant PHAs the authority to define these neighborhoods and specifically protect them from payment standard decreases. Fifth, HUD ought to provide additional funding for PHAs for landlord outreach to keep landlords in the program, as well as mobility counseling, which has proven effective in Dallas in helping voucher holders move.[166]

Lastly, HUD should revise its methodology for calculating SAFMRs to increase their accuracy. HUD should follow Housing Partnership Network's suggestion to use the percentage change in the metro area rents published in HUD's Office of Policy Development and Research quarterly regional reports instead of national inflation factors.[167] HUD should also calculate SAFMRs independently for each bedroom size. CBPP advises that HUD do this by determining the ratio of rent for each unit in the zip code to the median rent for that unit size in the metro area, finding the median of these ratios for all units of all sizes in the zip code, and multiplying this median ratio for each unit size to determine the SAFMR for that unit size.[168]

Despite the numerous concerns raised by the commenters, many of them remain optimistic about the effect SAFMRs will have.[169] The strongest case for implementing the proposed rule is from the Housing Authority of Cook County, which has been actively using SAFMRs since 2013 as part of HUD's demonstration, stating:

> we would not go back to the days when our payment standards were set at the 50th percentile FMRs (let alone the 40th percentile). The SAFMRs have expanded housing choice for our

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164. *See* Council of Large Public Housing Authorities, *supra* note 77, at 8.

165. *See* Community Service Society et al., *supra* note 14, at 6, 11–12 ("Because the hypothetical SAFMRs incentivize tenants to move from these neighborhoods, the rule would have the unintended consequence of hastening gentrification and displacement from neighborhoods which are beginning to see the changes brought by new residents and new investment.").

166. *See* Prairie State Legal Services, *supra* note 50, at 3.

167. Housing Partnership Network, *supra* note 82, at 4.

168. CBPP, *supra* note 53, at 15.

169. *See, e.g.*, Greater New Orleans Housing Alliance, *supra* note 131, at 1 ("[Greater New Orleans Housing Alliance] is excited about the proposed [SAFMR] rule."). *But see* National Association of Home Builders, *supra* note 53, at 2 ("[W]e believe that the case is very weak for using [SAFMRs] set at the zip code level . . . .").

> participants, which would otherwise have been nearly impossible. While it was administratively burdensome to implement the SAFMRs, it was worth every effort it took.[170]

Conclusion

HUD is right to promulgate a rule that works in theory and in practice, is supported by those whom it will affect, and has a noble purpose. It was also right to change the proposed rule to reflect the serious concerns of many groups who will interact with this rule: PHAs, elected officials, and concerned nonprofits, among others. Due to serious concerns about the likely adverse effects that the rule, as promulgated, will have, HUD should pay close attention to these consequences and alter the rule accordingly to best serve HCV holders. Low-income Americans deserve an effective SAFMR rule that will help, not harm them.

170. Housing Authority of Cook County, Comment Letter on Proposed Rule Establishing a More Effective Fair Market Rent System 1 (Aug. 15, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0111.