NATIONAL LOW INCOME HOUSING COALITION

DETAILED SUMMARY and ANAYSIS
FINAL SECTION 3 REGULATION

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INTRODUCTION

HUD under the Trump Administration published a final Section 3 rule on September 29, 2020, updating the 1994 interim rule. The final rule, which is effective on November 30, 2020, implements the Section 3 obligations of public housing agencies (PHAs) and other recipients of HUD housing and community development funding. The final rule adopts most of the very problematic proposed rule, but it does make three good changes.

The purpose of Section 3 of the Housing and Urban Development Act of 1968 is to ensure that when HUD funds are used to assist housing and community development projects, "to the greatest extent feasible," preference for some of the jobs and other economic opportunities created go to low-income people, "***particularly those who are recipients of government assistance for housing***." Another Section 3 obligation is to support businesses owned or controlled by low-income people or businesses that hire them.

PHAs and jurisdictions using Community Development Block Grant (CDBG), HOME Investment Partnerships program, and other HUD funds must comply with Section 3 and ensure that contractors and subcontractors comply.

HUD under the Trump Administration HUD issued a proposed rule on April 4, 2019 that NLIHC and other advocates found severely flawed. Three recommendations in NLIHC's comment letter, however, are adopted in the final rule. During the Obama Administration, HUD proposed significant changes to the then interim rule from 1994. Many of those changes reflected input from advocates, including NLIHC, after numerous conference calls with HUD staff. That proposed rule never cleared the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). The Trump Administration replaced the previous proposed rule with the one now made final.

Page references in this summary refer to the large-format version of the final regulation "text" and HUD's explanation of the text, called the "preamble."

THREE POSITIVE CHANGES IN THE FINAL RULE

Requiring PHAs and Jurisdictions to Track and Report "Labor Hours" instead of "New Hires"

The 1994 interim rule required PHAs and jurisdictions to have goals of 30% of "new hires" at projects be so-called Section 3 residents. However, as advocates had long observed, some contractors would hire Section 3 residents for a short time so that they would "count" toward the 30% goal, but lay them off in short order. Or, a Section 3 resident would only be given 20 hours or less of work per week. Some contractors would shift some of their existing workforce to a Section 3 project so that the contractor could claim that they did not need to hire anyone new for the Section 3 project.

As HUD rightly notes in the preamble to the final rule [pages 5, 12, and 19], a focus on labor hours worked instead of new hires will measure total actual employment by Section 3 Workers and the proportion of that total employment performed by Section 3 Workers. Using labor hours worked can also emphasize continued employment. As an example, HUD observes that with a new hires standard, hiring five new workers for one or two months would be counted as more valuable than hiring one person for a full year [page 5, proposed rule]. A full-time job sustained over a long period provides a Section 3 Worker with the potential to gain skills that can lead to greater self-sufficiency.

The proposed rule required jurisdictions to switch to labor hours worked, but asked whether PHAs should use labor hours worked or continue to use the new hires standard. NLIHC urged that PHAs also be required to switch to labor hours worked.

HUD agreed; the final rule requires PHAs to also make the switch to labor hours worked. [pages11,12, & 20]

Small PHAs, those with fewer than 250 public housing units, will not be required to report the number of labor hours. [page 65 preamble; §75.15(d), page 155 text] Instead they have the option to report qualitative efforts [§75.15(b), page 154 text], such as holding job fairs, referring residents to services supporting work readiness, and outreach efforts to generate job applicants. Out of 2,950 PHAs, 2,250 are small PHAs.

NLIHC comments: Small PHAs should not be exempt; they could have significant contractor and subcontractor activity in any given year. In addition, inexpensive software is available for Small PHAs to use to report on the labor hours worked by their permanent staff as well by contractors and subcontractors.

Removing "Qualified Census Tract" Option from Definition of "Section 3 Worker"

The *proposed* rule would replace the 1994 rule's term "Section 3 Resident" with a new term, "Section 3 Worker," who is someone meeting one of the following:

1) The worker's income is less than the income limit set by HUD for the program triggering Section 3 (for example 80% of area median income, AMI, for CDBG and HOME); or,

2) The worker lives in a "qualified census tract;" or,

3) The worker is employed by a Section 3 business. (see next topic)

NLIHC and other advocates urged HUD to remove option #2 because someone living in a qualified census tract (QCT) will not necessarily be a low-income person. Depending on how the qualified census tract is drawn, a large number of residents could be higher-income.

HUD agreed; the final rule eliminates the QCT option.
[pages 13 & 41, preamble; §75.5, page 147 text]

(A QCT is a term created for the Low Income Housing Tax Credit program. A QCT is a census tract with a poverty rate of 25% or more or with at least 50% of the households having income less than 60% of AMI. HUD officially designates QCTs each year.)

More about "Section 3 Worker" is on page 6.

Changing the Definition of "Section 3 Business"

The *proposed* rule would significantly change the definition of "Section 3 business" to be a business meeting one of the following:

1. At least 51% of the business is owned by low-income people; or,

2. Low-income people work more than 75% of the labor hours worked at a business; or,

3. At least 25% of the business is owned by public housing residents or Section 8 residents (either tenant-based or project-based).

Regarding the third option, NLIHC commented that setting a 25% threshold for public housing or Section 8 ownership of a business risks rewarding businesses that are merely front entities, a problem sometimes experienced with minority-owned and women-owned business programs. For example, the other 75% of the owners could be regular business people who do not have the best interests of residents at heart.

The final rule improves the third option by requiring a business to be one that is at least 51% owned and controlled by current public housing residents or Section 8 residents (either tenant-based or project-based).[pages 14&58 preamble; §75.5, page 146 text text]

More about "Section 3 businesses" is on page 8.

STRUCTURE OF THE FINAL RULE

The final rule has four subparts: Subpart A for general provisions, Subpart B for public housing, Subpart C for "Section 3 projects," (projects funded by other HUD programs such as CDBG and HOME), and Subpart D for projects with public housing and other HUD funds.

HUD ELMINATES SECTION 3 COMPLAINT PROCESS

The final rule eliminates any Section 3-specific complaint process. Instead, complaints may be reported to the relevant HUD program office or to the local HUD field office. [§75.33(b), page165 text]

The Relevant program offices are those that provide the funds that trigger the Section 3 obligation, such as the Office of Public and Indian Housing (PIH) for public housing, the Office of Community Planning and Development (CPD) for CDBG and HOME, and the Office of Recapitalization, ReCap (for Rental Assistance Demonstration, RAD, demolition, rehabilitation, or new construction). However, the preamble to the rule is confusing, stating that the Office of Field Policy and Management (FPM) will filter complaints to the appropriate HUD program office, instead of every HUD program office having its own complaint process. [page 113]

The 1994 interim regulation had an entire section about complaints and compliance, including a section with details for residents to submit complaints. Other HUD program areas do not have detailed provisions for residents to register failure on the part of a PHA or jurisdiction to meet a program requirement.

NLIHC recommended that the final rule require each federal program have a detailed complaint process identical to or similar to the one used under the 1994 rule, but assign enforcement to an independent HUD office.

The best independent office would be the Office of Davis-Bacon and Labor Relations (DBLR). It has experience with the construction industry and with providing training and technical assistance to jurisdictions and PHAs. In addition, DBLR has a working relationship with the Department of Labor.

HUD REMOVES SECTION 3 FROM FHEO

Historically, the Section 3 regulations had been at 24 CFR part 135, which was under the umbrella of the Office of Fair Housing and Equal Opportunity (FHEO). The final rule removes the Section 3 regulations from part 135 and creates a new part 75, which is under the umbrella of the Office of the Secretary.

Monitoring and enforcement of Section 3 is removed from FHEO and transferred to the relevant program office. [§75.33(b), page165 text]

The relevant program offices are those that provide the funds that trigger the Section 3 obligation, such as the Office of Public and Indian Housing (PIH), the Office of Community Planning and Development (CPD), and the Office of Recapitalization, ReCap (for RAD demolition, rehabilitation, or new construction).

This is a problem because Section 3 monitoring and enforcement should be carried out by HUD staff who are independent of the HUD program offices because program staff (PIH, CPD, and ReCap staff) are too close to the PHAs, jurisdictions, and the development projects funded by their programs.

According to a separate *Federal Register* notice on October 5, a separate HUD office will manage Section 3 evaluation and reporting – the Office of Field Policy and Management (FPM).

NLIHC commented that in the past, FHEO Field Office staff have complained that other HUD program offices were not responsive to Section 3 problems. In the past, program staff (PIH or CPD) have declared that their "constituents" are the PHAs or the jurisdictions, failing to include residents who are supposed to benefit from HUD programs.

Section 3 monitoring and enforcement should be carried out by HUD staff who are independent of HUD program offices that are too close to the development projects funded by their programs

RECIPIENT

Residents and advocates should be aware that HUD, PHAs, and jurisdictions will often use the term "recipient." As with the 1994 rule, the final rule uses the term "recipient."

A recipient is any entity that receives funds directly from HUD, such as a PHA receiving public housing Capital and Operating funds, or states, counties, or cities receiving CDBG, HOME, and other funds awarded through Notices of Funding Availability (NOFAs). Nonprofits also sometimes receive HUD funds directly through NOFAs.
[§ 75.5, page 146 text]

SECTION 3 WORKER [§ 75.5, page 147 text]

The rule replaces the interim rule's term "Section 3 resident" with a new term, "Section 3 Worker."

The first paragraph explains that a Section 3 Worker is someone who currently fits *or when hired within the past five years fit* at least one of the following:

i. The worker's income for the previous or annualized calendar year is below the income limit set by HUD for the program triggering Section 3 (for example 80% of AMI for CDBG and HOME); or,

ii. The worker is employed by a "Section 3 business" (explained on page 8); or

iii. The worker is a YouthBuild participant.
(YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

The final rule also amended the opening line of the definition of Section 3 Worker by *adding the text in italics.* Section 3 Worker means:

> "Any worker who currently fits *or when hired within the past five years fit* at least one of the following categories, as documented:…"

HUD explains that the addition of "*or when hired within the past five years,*" is intended to encourage an employer to keep Section 3 Workers.

HUD explains this new language in the preamble:

> "HUD agrees with the commenters that a worker whose income has risen should only be counted for Section 3 purposes for five years. HUD wants to ensure employers are invested in keeping Section 3 workers employed, and that there is enough opportunity to build skills and experience so that Section 3 workers may develop self-sufficiency and compete for other jobs in the future. An employer may choose whether the workers are defined as Section 3 workers for that five-year period at the time of the workers' hire, or the date from which the workers are certified as meeting the Section 3 worker definition." [looking back five years]. [page 44],

NLIHC comment: Retention is a good consideration, but does a five-year look-back period unduly reward a business that perhaps admirably hired a low-income person at low wages five years ago and still pays low wages? Even if a person's income grows over five years as HUD assumes, is that too long a look-back period?

NLIHC comment: The definition is not written to clearly state that a low-income person hired today could still be counted for five years going forward, but the preamble text [page 44] shows that HUD intends a business to also have a five-year forward option. Later in the final rule's section on "Recordkeeping" [see page 15] the text of the rule clearly gives a business the option of looking forward five years or looking back five years.

***SECTION 3 WORKER**, continues*

The preamble reinforces HUD's intent to encourage businesses to retain Section 3 Workers by having either a five-year look back or forward option:

> "HUD's proposed rule provided that labor hours for Section 3 workers and Targeted Section 3 workers could be counted as long as the worker met the definition of a Section 3 worker or Targeted Section 3 worker at the time of hire. Based on public comments and further consideration, HUD agrees that a worker whose income has risen should only be counted for Section 3 purposes for a limited time period. HUD wants to ensure employers are invested in keeping Section 3 workers employed, and that there is enough opportunity to build skills and experience so that Section 3 workers may develop self-sufficiency and compete for other jobs in the future. Therefore, HUD provides that for purposes of reporting the labor hours for Section 3 workers and Targeted Section 3 workers, an employer may choose whether the workers are defined as Section 3 workers for a five-year period at the time of the workers' hire, or when the workers are first certified as meeting the Section 3 worker definition." [page 15],

NLIHC Comment Regarding Option i

Option i. fails to address a concern raised by NLIHC and other advocates: people should not be counted as Section 3 Workers simply because they are paid low wages. The language in the text does not address this problem. The preamble [page 59] only addresses this when discussing one of the options for considering a business as a "Section 3 business." [explained next page] HUD replies:

> "As for the concern that the definition will limit wage growth or promotion or result in Section 3 business concerns where all employees have low-income wages, HUD provides that the qualification of a Section 3 worker takes place at either the date of the Section 3 covered activity or the date of initial hire by the employer, not more than five years previously. Labor hours of an employee who is low- or very low-income at hire will continue to count for 5 years even if that person grows into a new, more advanced position. HUD anticipates that the employee with 5 years of experience with that same employer would be moving up in the business and would eventually need to be replaced by a new, presumably low- or very-low income entry-level employee." [page 59]

NLIHC Comment Regarding Option ii

This definition begins a circular definition because one option in the definition of a Section 3 business (option ii) is a Section 3 Worker. The proposed rule's option ii for Section 3 business used to be "low- or very low-income person. (see next page)

Two Other Provisions under Definition of "Section 3 Worker"

1. The definition states that someone's status as a Section 3 Worker shall not be negatively affected if they have had a prior arrest or conviction.

   NLIHC comment: The Housing Justice Network (an informal group of legal services attorneys) submitted a comment letter to HUD (signed on by NLIHC) suggesting that the final rule be more direct to read:

   > "A recipient, contractor, or subcontractor shall not refuse to hire a Section 3 Worker on the basis of a prior arrest or conviction, unless otherwise required by federal, state, or local law."

2. The rule clearly states that an employer is not required to hire someone just because they meet the definition of a Section 3 Worker, and the Section 3 Worker must be qualified for the job.

SECTION 3 BUSINESS [§ 75.5, pages 146-147 text]

Although the proposed rule emphasized employment, Section 3 is not solely about employment and training opportunities – there is also an obligation to make "best efforts" to give preference in awarding contracts to businesses owned and controlled by low-income people, or to those that hire a substantial number of low-income people.

The proposed rule would significantly change the definition of "Section 3 business." As proposed, a Section 3 business would meet one of the following:

i. At least 51% of the business is owned by low-income people; or,

ii. Low-income people work more than 75% of the labor hours at the business; or,

iii. At least 25% of the business is owned by public housing residents or residents living in Section 8-assisted housing (either tenant-based or project-based).

The final rule amends the opening line of the definition of Section 3 business by *adding the text in italics.* Section 3 business means:

> "A business concern meeting at least one of the following criteria*, documented within the last six-month period*:"

HUD explains in the preamble why it added the six-month provision:

> "HUD understands that businesses need time when bidding on contracts and prior to the contract's execution to assemble materials and to assess labor hours. This change is responsive to commenters who expressed concerns about Section 3 status retention, since labor hours can be dependent on the number of contracts on which a business bids and receives." [page 14]

<u>Option i</u>

The final rule makes two minor improvements to Option i. It now reads (*italics is new*):

> [The business] is at least 51% owned *and controlled* by low- *or very low-income* income persons.

SECTION 3 BUSINESS, *continues*

Option ii

The final rule makes two changes to Option ii. It now reads (*changes in italics*):

> "Over 75 percent of the labor hours performed for the business *over the prior three month period* are performed by *Section 3 workers*."

The preamble [page 14] explains the addition of "over the prior three-month period" is to help "business determine whether or not they meet the criteria."

The proposed rule called for the labor hours to be performed by persons who are "low- or very low-income." That was more precise that "Section 3 Workers" because as explained earlier, HUD is using a circular definition; the definition of "Section 3 Worker" includes at (ii) someone employed by a Section 3 business.

Option iii

As indicated above [page 8], the final rule changes option iii to require a business to be one that is at least 51% owned and controlled by current public housing residents or Section 8 residents (either tenant-based or project-based). [pages 14 & 58 of the preamble]

The final rule also adds that the business must not merely be owned, it must also be *controlled* by public housing residents or residents living in Section 8-assisted housing.

Therefore, the final rule defines a Section 3 business to mean:

1. A business meeting at least one of the following criteria, documented within the last six-month period:

   i. It is at least 51% owned and controlled by low- or very low-income persons;

   ii. Over 75% of the labor hours performed for the business over the prior three-month period are performed by Section 3 Workers; or

   iii. It is a business at least 51% owned and controlled by current public housing residents or residents who currently live in Section 8-assisted housing.

Two Other Provisions under Definition of "Section 3 Business" *next page*

Two Other Provisions under Definition of "Section 3 Business"

1. The final rule states that the status of a Section 3 business shall not be negatively affected by a prior arrest or conviction of the owners or employees.

   NLIHC comment: The Housing Justice Network (an informal group of legal services attorneys) submitted a comment letter to HUD (signed on by NLIHC) suggesting that the final rule be more direct to read:

   > "A recipient, contractor, or subcontractor shall not refuse to recognize a Section 3 Business on the basis of a prior arrest or conviction of the owners or employees, unless otherwise required by federal, state, or local law."

2. In addition, the final rule clearly states that there is no requirement to contract or subcontract with a Section 3 business, and any Section 3 business must meet the specifications of a contract.

SECTION 3 EMPLOYMENT PRIORITIES

The final rule reflects the statute's requirements for giving priority to certain categories of Section 3 Workers.

PHAs [§ 75.9(a), page 149 text]

PHAs and their contractors and subcontractors must make "best efforts" to provide employment and training opportunities to Section 3 Workers in the following order of priority:

i. Residents of the public housing project funded with public housing money;

ii. Residents of a PHA's other public housing projects, or residents with Section 8 vouchers or project-based rental assistance;
(*the addition of Section 8 residents is an improvement over the old rule*)

iii. YouthBuild participants; and,
(YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

iv. People in the metro area (or non-metro county) with income less than 80% of the area median income (AMI).

NLIHC noted that because women are under-represented in the construction trades, the last priority should have ended with "especially women." HUD did not accept this.

Jurisdictions *next page*

Jurisdictions [§ 75.19(a), page 156 text]

The final rule states that jurisdictions and their contractors and subcontractors must "to the greatest extent feasible" ensure that employment and training opportunities "arising in connection with" Section 3 projects are provided to Section 3 Workers who live in the metro area (or non-metro county).

The final rule adds that "where feasible" jurisdictions "should" give priority to providing employment and training opportunities to Section 3 Workers who live in a project's "service area or neighborhood" and to YouthBuild participants.

HUD defines the "service area or neighborhood" of the project as an area within one mile of a Section 3 project. If there are fewer than 5,000 people within one mile, then within a circle centered on the Section 3 project that includes at least 5,000 people. [§ 75.5, page 148]

While the final rule repeats the language in the statute, it strays from the old rule's priorities, which gave first priority to residents of the service area or neighborhood of a project, (second priority to YouthBuild participants), third priority to homeless people, and only as a last priority other Section 3 residents in the metro area or non-metro county.

NLIHC offered comments that HUD did not accept:

NLIHC recommended retaining the old rule's definition of service area (the geographical area in which the persons benefitting from the project live) and neighborhood for housing activities (the geographical location in the jurisdiction designated in ordinances or other local documents). HUD did not accept this.

According to Chicago Women in Trades (CWIT), in 2018, women made up only 3.4% of construction workers. Because most assisted households are headed by single mothers and because women are under-represented in the construction trades, NLIHC recommended that "especially women" be added after "provided to Section 3 Workers who live in the metro area (or non-metro county)" and "Section 3 Workers who live in a project's 'service area or neighborhood.'" HUD did not accept this.

NLIHC commented that geographic limits often contribute to few or no women being hired, and can also limit access to certain types of jobs to men as well as women depending on the labor pool in a given geographic area. Therefore, jurisdictions should be allowed to go beyond a service area, neighborhood, jurisdiction, or metropolitan area or non-metropolitan county *if* they are able to demonstrate that there are not enough Section 3 residents with the requisite job skills within a project's geographic area. HUD did not accept this.

SECTION 3 CONTRACTING PRIORITIES

PHAs [§ 75.9(b), page 150 text]

PHAs and their contractors and subcontractors must make "best efforts" to award contracts and subcontracts to businesses that provide economic opportunities to Section 3 Workers in the following order of priority:

i. Section 3 businesses that provide economic opportunity for residents of the public housing project funded with public housing money;

ii. Section 3 businesses that provide economic opportunity for residents of the PHA's other public housing projects, or residents with Section 8 vouchers or project-based rental assistance; (*the addition of Section 8 residents is an improvement over the old rule*)

iii. YouthBuild participants; *and,*
(YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

iv. Section 3 businesses that provide economic opportunity to low-income people living in the metro area (or non-metro county).

Jurisdictions [§ 75.19(b), page 156-158 text]

Jurisdictions and their contractors and subcontractors must "to the greatest extent feasible" ensure that contracts for work awarded "in connection with" Section 3 projects are provided to Section 3 businesses that provide economic opportunities to Section 3 Workers in the metro area (or non-metro county).

Where "feasible" jurisdictions "should" give priority to:

i. Section 3 businesses that provide economic opportunities to Section 3 Workers living in the service area or neighborhood of the project; and

ii. YouthBuild participants.
(YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

HUD defines the "service area or neighborhood" of a project as an area within one mile of the Section 3 project. If there are fewer than 5,000 people within one mile, then within a circle centered on the Section 3 project that includes at least 5,000 people. [§ 75.5, page 148]

NLIHC recommended retaining the old rule's definition of service area (the geographical area in which the persons benefitting from the project live) and neighborhood for housing activities (the geographical location in the jurisdiction designated in ordinances or other local documents). HUD did not accept this.

According to Chicago Women in Trades (CWIT), in 2018, women made up only 3.4% of construction workers. Because most assisted households are headed by single mothers and because women are under-represented in the construction trades, NLIHC recommended that "especially women" be added after "provided to Section 3 Workers who live in the metro area (or non-metro county)" and "Section 3 Workers who live in a project's 'service area or neighborhood.'" HUD did not accept this.

TARGETED SECTION 3 WORKER

This is a new idea HUD intends to give PHAs and jurisdictions an incentive to focus on reaching workers given priority in the statute and workers at Section 3 businesses.

Targeted Section 3 Workers are a subset of all Section 3 Workers.

PHAs [§ 75.11(a), pages 150-151 text]

A Targeted Section 3 Worker for PHAs is:

1. A worker employed by a Section 3 business; or,
2. A worker who currently fits or when hired fit at least one of the following categories, *as documented within the past five years*:
    i. A resident of any of the PHA's public housing or any resident assisted by Section 8, whether a voucher or project-based rental assistance; or,
    ii. A resident of other public housing projects or Section 8-assisted housing managed by the PHA that is using public housing assistance; or,
    iii. A YouthBuild participant.
    (YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

As with the definition of Section 3 Worker, the five-year look-back is HUD's intent to encourage long-term employment.

NLIHC comment: The definition of "Section 3 Worker" includes as one option, "a worker employed by a Section 3 business." The first option under the definition of Targeted Section 3 Worker is "A worker employed by a Section 3 business concern." Repeating a "worker employed by a Section 3 business" as one option in the definition of a "Targeted Section 3 Worker" dilutes the targeting concept HUD proposes for Benchmarking [see next page]. NLIHC recommended deleting "a worker employed by a Section 3 business." In the preamble to the proposed rule, HUD stated that its intent is to make best efforts to award contracts to Section 3 businesses.

Jurisdictions [§ 75.21, page 157 text]

A Targeted Section 3 Worker for jurisdictions is:

1. A worker employed by a Section 3 business; or,
2. A worker who currently fits or when hired fit at least one of the following categories, *as documented within the past five years*:
    i. Living in the service area or neighborhood of a project; or,
    ii. A YouthBuild participant.
    (YouthBuild programs receive assistance under the Workforce Innovation and Opportunity Act.)

The problems are the same as those regarding PHAs, compounded by the geographic limitations of the rule's definition of service area.

SECTION 3 BENCHMARKS

[PHAs §75.13(b)(3), pages 151-152 text; Jurisdictions §75.23(b)(3), pages 158-159 text]

The final rule establishes Section 3 "benchmarks" to replace the old rule's "goals." (see box with the old rule's goals provisions at Attachment on page 20).

The benchmarks will be used to monitor a PHA's and a jurisdiction's accomplishments toward directing job opportunities to Section 3 Workers and the new subcategory of Section 3 Worker called "Targeted Section 3 Worker." (described on page 13)

The benchmarks are the same for PHAs and jurisdictions:

1. Section 3 Workers make up 25% of the total number of labor hours worked by all workers; ***and***
2. Targeted Section 3 Workers make up 5% of the total number of labor hours worked by all workers.

A March 25, 2021 HUD Frequently Asked Question (FAQ) clarified that the 5% Targeted Section 3 worker benchmark is included as part of the 25% threshold.

NLIHC and other advocates commented that the benchmark of 5% for Targeted Section 3 Workers was far too low; at least 15% was recommended. However, the final rule keeps the benchmark at 5%.

HUD will establish Section 3 benchmarks every three years through a notice in the *Federal Register*. A separate *Federal Register notice* on September 29, 2020 stated that FPM will review benchmarks every three years and adjust if appropriate. On October 5, 2023, a new *Federal Register* notice announced that FPM would not update the benchmark because FPM could not obtain sufficient labor hour data to support changing the 2020 benchmark. The notice stated that another notice regarding an update to the Section 3 benchmark would be made no later than three years from October 5, 2023.

SAFE HARBOR

[PHAs, § 75.13(a), page 151 text; Jurisdictions, § 75.23(a), pages 157-158 text]

If a PHA or jurisdiction certifies that it has met the priorities for job and contract opportunities (pages 10 and 12 above) and has met the jobs benchmark, then HUD presumes the PHA or jurisdiction is complying with Section 3 – unless residents or advocates tell HUD about evidence that contradicts the PHA or jurisdiction.

HUD calls this the "safe harbor." At this stage, a PHA or jurisdiction would not have to continue reporting any additional Section 3 employment or contracting activities.

If a PHA or jurisdiction cannot certify that it has met the job and contract priorities and jobs benchmark, then it will have to send to HUD "qualitative" reports on their efforts. (see "Reporting" next page).

Residents and advocates should monitor and report to HUD any evidence that contradicts a PHA or jurisdiction.

REPORTING

The reporting requirements are the same for PHAs and jurisdictions.
[PHAs, § 75.15, pages 152-155 text; jurisdictions § 75.25, pages 159-161 text]

The final rule requires PHAs and jurisdictions to report to HUD their benchmark data:

- Total number of labor hours worked;
- Total number of labor hours worked by Section 3 Workers; and,
- Total number of labor hours worked by Targeted Section 3 Workers.

[paragraph (a)(1)]

This includes labor hours worked by contractors and subcontractors. [paragraph (a)(3)]

Section 3 Workers' and Targeted Section 3 Workers' labor hours may be counted for five years from when their status as a Section 3 Worker or Targeted Section 3 Worker is established following the "Recordkeeping" section of the rule at § 75.31. [paragraph (a)(2)]

§ 75.31(b) is there to "ensure that workers meet the definition of a Section 3 Worker or Targeted Section 3 Worker **at the time of hire or the first reporting period**…" This means a PHA or jurisdiction can count back five years or count forward for five years.

The final rule does not require inclusion of professional services in the benchmark.
[paragraph (a)(4)]

- These are defined as non-construction services *that require an advanced degree or professional licensing* such as contracts for legal services, financial consulting, accounting, environmental assessments, and architectural and engineering services. The text in italics indicates modification of the proposed rule that is a slight improvement.
- PHAs and jurisdictions *may* include labor hours worked by people in professional services when counting Section 3 Workers and Targeted Section 3 Workers for their benchmark, without including them in the total number of hours worked. This could increase a PHA's or jurisdiction's benchmark number.

If a contractor or subcontractor does not track labor hours, a PHA or jurisdiction "may" accept the contractor's or subcontractor's "good faith assessment" of the labor hours of full-time or part-time employees. [paragraph (a)(5)]

If the benchmark is not met, a PHA or jurisdiction will be required to use a HUD form to report on the "qualitative" nature of its activities or the activities of contractors and subcontractors. [paragraph (b)]

Small PHAs may choose to only report their qualitative efforts. [paragraph (d)]

The final rule lists 14 examples of possible qualitative efforts, such as reaching out to generate job applicants, holding job fairs, connecting people with entities that help draft resumes and prepare for job interviews, referring people to job placement services, and reaching out to identify bids from Section 3 businesses.

PHAs and jurisdictions will report to HUD each year. ***REPORTING**, continues*

***REPORTING**, continued*

For both PHAs and jurisdictions HUD proposes that recipients submit a Section 3 report annually in a manner consistent with the reporting requirements for the applicable HUD program. [PHAs, § 75.15(c), page 155 text; jurisdictions § 75.25(c), page 162 text]

Annual reporting does not enable residents and advocates to detect and attempt to correct slow or insufficient Section 3 compliance.

Prior to the final rule, the public housing program reported Section 3 compliance through an electronic system called SPEARS. PIH needed to devise a new electronic reporting system that could collect labor hours worked data. That new system, to be called S3R had yet to be implemented as of November 2023. However, PHAs have been required to obtain and retain labor hours worked information since required to comply with the new rule after July 2021.

The major CPD programs report through an information system called IDIS which is used to create the Consolidated Annual Performance and Evaluation Report (CAPER), which is not due until 90 days after the close of the program year. The Consolidated Plan regulations do not have provisions regarding Section 3.

The Section 3 rule requires reporting only on projects completed during the program year; CDBG projects sometimes extend beyond a program year.

NLIHC recommended that reporting be done on a quarterly basis, and for CPD projects the reporting should be based on projects underway. NLIHC also recommended that the Consolidated Plan regulations be amended to specifically include Section 3 reporting. And, because there are no equivalent reporting requirements with the public housing program, NLIHC recommended that PIH develop a Section 3 reporting format.

HUD rejected all of the recommendations, claiming quarterly reporting would be an administrative burden for PHAs, jurisdictions, and HUD staff. [page 90] HUD did indicate, however that it would issue sub-regulatory guidance on reporting for each program area. [page 91]

SECTION 3 PROJECT [§ 75.3(a)(2), page 143 text]

The final rule defines a "Section 3 project" as one that is not funded with public housing Capital and Operating funds, but instead receives at least $200,000 in funds from other HUD programs, such as CDBG and HOME, for housing rehab or new construction or for other public construction projects (such as road repair).

- A "project" is defined as "the site or sites together with any buildings and improvements located on the site(s) that are under common ownership, management, and financing."

The per-project threshold is $100,000 for various Lead Hazard and Healthy Homes programs.

The Section 3 requirements apply to the entire Section 3 project, whether the project is fully or partially funded by a HUD program.

NLIHC had long raised concerns about the old rule's $100,000 per project threshold. The new rule makes things even worse.

With the rule's definition of "project" and a $200,000 per project threshold, many contractors would not have to comply with Section 3. Contractors awarded significant amounts of Section 3 covered funds in a single year to cumulatively spend on a number of small, discreet activities (such as homeowner housing rehabilitation) would not have to hire Section 3 Workers or subcontract with Section 3 businesses because each component activity costs less than $200,000.

For example, if a contractor receives $1 million in CDBG funds to rehab seven single-family homes and the contractor spends $130,000 per home, that contractor would not have to comply with Section 3 because each home is considered a single project and not one of the seven rehabs had a contract for more than $200,000.

The $200,000 per project threshold is a significant limitation, as is the 100,000 per project threshold for Lead Hazard and Healthy Homes activities. Jurisdictions and contractors can avoid Section 3, even if a contractor is getting a lot more HUD money to do construction work, by breaking up construction activities into small contracts of less than $200,000. While Lead Hazard and Healthy Homes costs for many buildings might be less than $100,000, a PHA or jurisdiction might award a considerable amount of CDBG or HOME dollars to a single contractor in a given year to address many properties, yet that single contractor would not have to comply with Section 3.

NLIHC recommended that Section 3 obligations apply to any contractor that receives at least $1million during a program year for a given type of activity, such as repaving city streets, laying water/sewer lines, and rehabbing single-family homes.

RENTAL ASSISTANCE DEMONSTRATION (RAD)

The Notices by which the Rental Assistance Demonstration (RAD) operates have, since the initial draft Notice and through the current Notice PIH-2019-23/(HA) H-2019-0, REV-4, limited Section 3 to the construction- or rehabilitation-related activities identified in the RAD Financing Plan and RAD Conversion Commitment. Specifically:

1. Pre-development conversion costs remain subject to regular Section 3 public housing provisions (first priority for employment and other economic opportunities must be given to residents of public housing or Section 8-assisted housing).
2. After RAD Closing (which takes place before final conversion), any rehabilitation or new construction required by the conversion is subject to the Section 3 provisions for housing and community development activities – except that first priority for employment and other economic opportunities must be given to residents of public housing or Section 8-assisted housing. If funding comes from CDBG or HOME, then first priority is to low-income residents in the project's neighborhood.

   (In response to an inquiry by NLIHC, HUD clarified in an email that Section 3 applies to the entire RAD scope of work. That is, under RAD, related non-housing work such as a parking lot, sidewalks, landscaping, etc., are considered a part of "housing construction" and is covered by Section 3.)

After the conversion, unless additional federal financial assistance is later used for rehabilitation, Section 3 no longer applies.

NLIHC has written comments to HUD in response to the initial draft and subsequent drafts of RAD Notices, urging HUD to extend Section 3 obligations post-conversion because application of Section 3 obligations pertaining to permanent PHA staff – a potential source of Section 3 training and employment – can substantially diminish if a significant portion of the portfolio is converted or can be totally lost if an entire portfolio is converted.

NLIHC acknowledged that the public housing portion of the Section 3 statute that applies to the operating assistance provided by Section 9 of the Housing Act of 1937 does not extend to public housing converted to Project-Based Rental Assistance. PHAs will continue, however, to "manage" or have a controlling interest in public housing converted to Project-Based Vouchers (PBVs). Therefore, NLIHC urged that the RAD Notice (currently at Section I.1.4A.5) be modified to state that Section 3 will still apply to the permanent staff slots of the entities owning or managing a development converted to PBVs. This would extend some Section 3 training and employment opportunities post-conversion, rather than diminish them.

HUD dodged the issue in the preamble, and at best indicates that one option of the definition of Targeted Section 3 Worker includes residents of Section 8 housing – but that does not address the concern that job slots of PHA staff who worked at public housing projects prior to RAD conversion to PBV are no longer subject to Section 3 once personnel in those slots turnover. HUD's position shrinks economic opportunities for residents of RAD-converted properties because only new construction or rehabilitation would trigger Section 3 after RAD conversion; as with public housing, Section 3 obligations should continue to apply to non-professional services staff involved in project operations. [pages 84 & 127]

HUD declined to extend Section 3 to the Section 8 portfolio "as that would be a significant expansion of the Section 3 statute's parameters." HUD chose to ignore the statute's declaration of policy:

> "It is the policy of the Congress and the purpose of this section to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, ***particularly those who are recipients of government assistance for housing***."

MULTIPLE FUNDING SOURCES [§ 75.29, pages 162-165 text]

When a project is funded with public housing funds and also meets the Section 3 project criteria (page 17 above), the project must follow the public housing Section 3 requirements for the public housing portion of the funds, and may follow the public housing Section 3 requirements or the Section 3 project requirements for the community development funds.

When a Section 3 project receives housing and community development funds from two different HUD programs (for example CDBG and HOME), HUD will tell the jurisdiction which HUD program office to report to.

NLIHC does not summarize this section of the final rule.

The *Federal Register* version of the final Section 3 rule is at: https://bit.ly/33e0Vos

An easier to read version of the final rule is at: https://bit.ly/30mPLf7

The benchmark *Federal Register* notice is at: https://bit.ly/3520zko

An easier to read version of the benchmark notice is at: https://bit.ly/3j2PbKc

Information about the now-defunct Section 3 regulations is on page 7-75 of NLIHC's *2020 Advocates' Guide* and on NLIHC's public housing webpage.

ATTACHMENT, The current interim rule's "goals"

The current rule goals:

Employment

If PHAs and jurisdictions – and their contractors and subcontractors – have new job slots at housing or community development construction projects funded by HUD programs, they must, "to the greatest extent feasible", attempt to reach minimum "goals" for filling those "new hires" with "Section 3 residents".

There are two levels of goals:

1. A goal of 30% of new hires applies to:

    a. Public housing capital improvements or operating funds.
    This includes management and administrative jobs, technical, professional, building trades, and non-construction jobs at all levels. (Section 3 Frequently Asked Questions, page 14)

    b. Non-housing construction…mostly CDBG.
    (eg roads, sidewalks, sewers, recreation centers, community centers, commercial buildings, etc.)

2. A goal of 10% of new hires applies to other HUD programs to rehab or construct housing *(eg, HOME, CDBG, NSP, Continuum of Care Homeless Assistance programs, lead-based paint abatement, etc.).*

[Sec. 135.3(a)], [Sec. 135.30(a)(1) & (4)], [Sec. 135.30(b)]

Contracts

There are two numerical goals for contracts:

1. At least 10% of the total dollar amount of all Section 3 covered contracts should be awarded to "Section 3 businesses" for any building trades work♠ for:
    a. Public housing maintenance, repair, modernization, or construction; *or*,
    b. Housing rehab or construction arising from other HUD housing programs; *or*
    c. Other public construction projects.

2. At least 3% of the total dollar amount of all other (non-building trades) Section 3 covered contracts should be awarded to "Section 3 businesses".

[Sec. 135.30(c)]

♠"Building Trades Work" is not defined in the regs, but it probably includes obvious things like bricklaying, plumbing, and painting. "Other" kinds of contracts might be carpet installation, lawn care, re-painting, routine maintenance, HVAC servicing, clerks, etc. (for the PHA or construction company).