

Federal Regulations Compliance Packet

CITY OF HOUSTON

HOUSING AND COMMUNITY
DEVELOPMENT DEPARTMENT

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A. APPLICABILITY

The Project or Program to which the construction work covered by this Contract pertains is being assisted by the United States of America, and the following Federal Labor Standards Provisions are included in this Contract pursuant to the provisions applicable to such Federal assistance.

1. Minimum wages and fringe benefits

- i. All laborers and mechanics employed or working upon the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in 29 CFR 5.5(d) and (e), the appropriate wage determinations are effective by operation of law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(v) of these contract clauses; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under 29 CFR 5.5(a)(1)(iii)) and the Davis-Bacon poster (WH-1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

ii. Frequently recurring classifications

- A. In addition to wage and fringe benefit rates that have been determined to be prevailing under the procedures set forth in 29 CFR part 1, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to 29 CFR 5.5(a)(1)(iii), provided that:
 1. The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;
 2. The classification is used in the area by the construction industry; and
 3. The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.
- B. The Administrator will establish wage rates for such classifications in accordance with 29 CFR 5.5(a)(1)(iii)(A)(3). Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

iii. Conformance

- A. The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be

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classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

1. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 2. The classification is used in the area by the construction industry; and
 3. The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
- B. The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.
 - C. If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to DBAconformance@dol.gov. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.
 - D. In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to DBAconformance@dol.gov, refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.
 - E. The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under 29 CFR 5.5 (a)(1)(iii)(C) and (D). The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to 29 CFR 5.5 (a)(1)(iii)(C) or (D) must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

iv. Fringe benefits not expressed as an hourly rate

Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

v. Unfunded plans

If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in 29 CFR 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

- vi. Interest** In the event of a failure to pay all or part of the wages required by the contract, the contractor will be required to pay interest on any underpayment of wages.

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2. Withholding

i. Withholding requirements

The U. S. Department of Housing and Urban Development may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for the full amount of wages and monetary relief, including interest, required by the clauses set forth in 29 CFR 5.5(a) for violations of this contract, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in 29 CFR 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work (or otherwise working in construction or development of the project under a development statute) all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in 29 CFR 5.5(a)(3)(iv), HUD may on its own initiative and after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

ii. Priority to withheld funds

The Department has priority to funds withheld or to be withheld in accordance with 29 CFR 5.5(a)(2)(i) or (b)(3)(i), or both, over claims to those funds by:

- A. A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;
- B. A contracting agency for its procurement costs;
- C. A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;
- D. A contractor's assignee(s);
- E. A contractor's successor(s); or
- F. A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901-3907.

3. Records and certified payrolls

i. Basic record requirements

- A. **Length of record retention.** All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.
- B. **Information required** Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.
- C. **Additional records relating to fringe benefits.** Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(v) that the wages of any laborer or mechanic include the amount of any

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costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

D. Additional records relating to apprenticeship Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

ii. Certified payroll requirements

A. Frequency and method of submission The contractor or subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified payrolls to HUD if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the certified payrolls to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to HUD. The prime contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system

B. Information required The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i)(B), except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker (*e.g.*, the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH-347 or in any other format desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf> or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records).

C. Statement of Compliance Each certified payroll submitted must be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

1. That the certified payroll for the payroll period contains the information required to be provided under 29 CFR 5.5(a)(3)(ii), the appropriate information and basic records are being maintained under 29 CFR 5.5 (a)(3)(i), and such information and records are correct and complete;
2. That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly

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from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

3. That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.
 - D. **Use of Optional Form WH-347** The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 will satisfy the requirement for submission of the “Statement of Compliance” required by 29 CFR 5.5(a)(3)(ii)(C).
 - E. **Signature** The signature by the contractor, subcontractor, or the contractor’s or subcontractor’s agent must be an original handwritten signature or a legally valid electronic signature.
 - F. **Falsification** The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.
 - G. **Length of certified payroll retention** The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.
- iii. **Contracts, subcontracts, and related documents** The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.
- iv **Required disclosures and access**
- A. **Required record disclosures and access to workers** The contractor or subcontractor must make the records required under 29 CFR 5.5(a)(3)(i)–(iii), and any other documents that HUD or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by 29 CFR 5.1, available for inspection, copying, or transcription by authorized representatives of HUD or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.
 - B. **Sanctions for non-compliance with records and worker access requirements** If the contractor or subcontractor fails to submit the required records or to make them available, or refuses to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during working hours on the job, may be grounds for debarment action pursuant to 29 CFR 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced will be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.
 - C. **Required information disclosures** Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to HUD if the agency is a party to

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the contract, or to the Wage and Hour Division of the Department of Labor. If the Federal agency is not such a party to the contract, the contractor, subcontractor, or both, must, upon request, provide the full Social Security number and last known address, telephone number, and email address of each covered worker to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to HUD, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

4. Apprentices and equal employment opportunity

i. Apprentices

- A. Rate of pay** Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- B. Fringe benefits** Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.
- C. Apprenticeship ratio** The allowable ratio of apprentices to journeymen on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to 29 CFR 5.5(a)(4)(i)(D). Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in 29 CFR 5.5(a)(4)(i)(A), must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.
- D. Reciprocity of ratios and wage rates** Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

- ii Equal employment opportunity** The use of apprentices and journeymen under this part must be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

5 Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

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6 Subcontracts. The contractor or subcontractor must insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (11), along with the applicable wage determination(s) and such other clauses or contract modifications as the U.S. Department of Housing and Urban Development may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate.

7 Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8 Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9 Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of eligibility.

- i. By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b) or 29 CFR 5.12(a).
- ii. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b) or 29 CFR 5.12(a).
- iii. The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, 18 U.S.C. 1001.

11 Anti-retaliation It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

- i. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, or 29 CFR parts 1, 3, or 5;
- ii. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, or 29 CFR parts 1, 3, or 5;
- iii. Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, or 29 CFR parts 1, 3, or 5; or
- iv. Informing any other person about their rights under the DBA, Related Acts, or 29 CFR parts 1, 3, or 5.

B. Contract Work Hours and Safety Standards Act (CWHSSA)

The Agency Head must cause or require the contracting officer to insert the following clauses set forth in 29 CFR 5.5(b)(1), (2), (3), (4), and (5) in full, or (for contracts covered by the Federal Acquisition Regulation) by reference, in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses must

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be inserted in addition to the clauses required by 29 CFR 5.5(a) or 4.6. As used in this paragraph, the terms “laborers and mechanics” include watchpersons and guards.

1. **Overtime requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
2. **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in 29 CFR 5.5(b)(1) the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchpersons and guards, employed in violation of the clause set forth in 29 CFR 5.5(b)(1), in the sum of \$31 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in 29 CFR 5.5(b)(1).
3. **Withholding for unpaid wages and liquidated damages**
 - i. **Withholding process** The U.S Department of Housing and Urban Development or the recipient of Federal assistance may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for any unpaid wages; monetary relief, including interest; and liquidated damages required by the clauses set forth in 29 CFR 5.5(b) on this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same prime contractor (as defined in 29 CFR 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld.
 - ii **Priority to withheld funds** The Department has priority to funds withheld or to be withheld in accordance with 29 CFR 5.5(a)(2)(i) or (b)(3)(i), or both, over claims to those funds by:
 - A. A contractor’s surety(ies), including without limitation performance bond sureties and payment bond sureties;
 - B. A contracting agency for its procurement costs;
 - C. A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor’s bankruptcy estate;
 - D. A contractor’s assignee(s);
 - E. A contractor’s successor(s); or
 - F. A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901-3907.
4. **Subcontracts.** The contractor or subcontractor must insert in any subcontracts the clauses set forth in 29 CFR 5.5(b)(1) through (5) and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in 29 CFR 5.5(b)(1) through (5). In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss,

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due to any workers of lower-tier subcontractors, and associated liquidated damages and may be subject to debarment, as appropriate.

- 5 Anti-retaliation** It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:
- i. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in 29 CFR part 5;
 - ii. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or 29 CFR part 5;
 - iii. Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or 29 CFR part 5; or
 - iv. Informing any other person about their rights under CWHSSA or 29 CFR part 5.
- C. CWHSSA required records clause** In addition to the clauses contained in 29 CFR 5.5(b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other laws referenced by 29 CFR 5.1, the Agency Head must cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor must maintain regular payrolls and other basic records during the course of the work and must preserve them for a period of 3 years after all the work on the prime contract is completed for all laborers and mechanics, including guards and watchpersons, working on the contract. Such records must contain the name; last known address, telephone number, and email address; and social security number of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid; daily and weekly number of hours actually worked; deductions made and actual wages paid. Further, the Agency Head must cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph must be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview workers during working hours on the job.
- D. Incorporation of contract clauses and wage determinations by reference** Although agencies are required to insert the contract clauses set forth in this section, along with appropriate wage determinations, in full into covered contracts, and contractors and subcontractors are required to insert them in any lower-tier subcontracts, the incorporation by reference of the required contract clauses and appropriate wage determinations will be given the same force and effect as if they were inserted in full text.
- E. Incorporation by operation of law** The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by 29 CFR 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.

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F. HEALTH AND SAFETY

The provisions of this paragraph (F) are applicable where the amount of the prime contract exceeds **\$100,000**.

1. No laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his or her health and safety, as determined under construction safety and health standards promulgated by the Secretary of Labor by regulation.
2. The contractor shall comply with all regulations issued by the Secretary of Labor pursuant to 29 CFR Part 1926 and failure to comply may result in imposition of sanctions pursuant to the Contract Work Hours and Safety Standards Act, (Public Law 91-54, 83 Stat 96), 40 U.S.C. § 3701 et seq.
3. The contractor shall include the provisions of this paragraph in every subcontract, so that such provisions will be binding on each subcontractor. The contractor shall take such action with respect to any subcontractor as the Secretary of Housing and Urban Development or the Secretary of Labor shall direct as a means of enforcing such provisions.

Previous editions obsolete

Form HUD-4010, (10/2023)
ref. Handbook 1344.1



City Of Houston's Code of Ordinance Article V. Minority, Women, and Small Business Enterprises

Sec. 15-81. - Declaration of policy.

- a. It is the policy of the city to stimulate the growth of local minority, women and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting, as set forth in this article. The purposes and objectives of this article are:
 1. To promote equal opportunity for participation amongst local minority, women and small business enterprises in all phases of city contracting;
 2. To increase the utilization of such local firms in providing certain goods and services;
 3. To provide opportunities to broaden and enhance local firms' ranges of capacities; and
 4. To increase opportunities for such local firms to serve as contractors, in addition to acting as subcontractors to others, where applicable, in an effort to remedy discriminatory practices and eliminate statistical disparities in city contracting.
- b. This article is intended to be remedial in nature and to continue only until its purposes and objectives are achieved. At least every five years the city shall make its best efforts to initiate a review of its minority and women business enterprise program, the results of which shall be provided to city council, who shall determine, upon its receipt of recommendations and the consideration of other relevant information from the OBO director, whether there is strong statistical and anecdotal evidence of discrimination against minority and women business enterprises in city contracting warranting the continuation of a race and gender conscious minority and women business enterprise program.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-82. - Definitions.

The following words and phrases, when used in this article and in article VI of this chapter, shall have the meanings provided in this section, unless the context clearly indicates another meaning. For the purpose of these definitions, the singular shall also include the plural, and the plural shall also include the singular.

Bidder means any person or legal entity which submits a bid or proposal to provide labor, goods or services to the city by contract for profit.

Commercially useful function means a discrete task or group of tasks, the responsibility for performance of which shall be discharged by the MWSBE by using its own forces or by actively supervising on-site the execution of the tasks by another entity for whose work the MWSBE is responsible. In determining whether a MWSBE is performing a commercially useful function, factors including but not limited to the following shall be considered: (1) whether it has the skill and expertise to perform the work for which it is being utilized and possesses all the necessary licenses; (2) whether it is in the business of performing, managing or supervising the work for which it has been certified and is being utilized; and (3) whether it is performing a real and actual service that is a distinct and verifiable element of the work called for in a contract. MWSBEs shall be responsible for performing more than fifty percent of the task or group of tasks being counted toward the applicable participation goal unless subcontracting such task or group of tasks in excess of fifty percent has been expressly authorized via a waiver by the OBO director.

Contractor means any person or legal entity providing goods, labor, or services to the city by contract for profit.

Established business enterprise means a MWSBE or any business applying for certification as a MWSBE that, by virtue of its size meets or exceeds the standards promulgated by the U.S. Small Business Administration for that category of business, as determined by the procedures described in section 15-87(a) of this Code.



Goal-oriented contract means any contract, agreement or other undertaking anticipated for construction work in excess of \$1,000,000.00 and for the supply of goods or non personal or nonprofessional services in excess of \$100,000.00:

- a. For which competitive bids are required by law;
- b. Which is not within the scope of the disadvantaged business enterprise programs of the United States Environmental Protection Agency or the United States Department of Transportation or any other federal or state agency having jurisdiction; and
- c. That the initiating city department, in consultation with the OBO director, determines has significant subcontracting potential in fields in which there are adequate numbers of known MWSBEs to compete for and perform the subcontract service(s).

Good faith efforts shall refer to steps taken to achieve a MWSBE goal or other requirements which, by their scope, intensity and usefulness demonstrate a bidder's responsiveness to fulfill the business opportunity objective prior to the award of a contract and a contractor's responsibility to put forth measures to meet or exceed a MWSBE goal throughout the duration of the contract.

Joint venture means an association of a MWSBE and one or more other firms to carry out a single, for profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the MWSBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Local firm, local MWSBE, or locally based when describing a firm or entity seeking certification means a sole proprietorship, partnership, corporation or any other business entity with a significant business presence in the Houston-Sugar Land-Baytown metropolitan statistical area, as defined by the Office of Management and Budget within the Executive Office of the President of the United States. A significant business presence includes the requirement that a MWSBE have an established place of business in the Houston-Sugar Land-Baytown metropolitan statistical area at which one or more of its employees is regularly based and that such place of business has a substantial role in the MWSBE's performance of a commercially useful function.

MWSBE means, collectively, MBEs, WBEs, and SBEs.

Minority business enterprise or MBE means a business which is:

- a. A sole proprietorship in which the owner is a minority person who owns, controls and manages the business; or
- b. A corporation in which at least 51 percent of the stock or of the assets of such corporation is owned, controlled and managed by one or more minority persons; or
- c. A partnership in which at least 51 percent of the assets of such partnership is owned, controlled and managed by one or more minority persons; or
- d. Any other business or professional entity in which at least 51 percent of the assets in such business or professional entity is owned, controlled and managed by one or more minority persons; or
- e. Any entity in which at least 51 percent of the assets of such entity is owned, controlled and managed by one or more minority persons and one or more women and such minority person; or
- f. A business which has been certified as an MBE by the office of business opportunity under any other recognized MBE program.

Minority person means a citizen or legal resident alien of the United States who is:

- a. Black American, which includes persons having origins in any of the black racial groups of Africa;
- b. Hispanic American, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- c. Asian-Pacific American, which includes persons having origins from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, the Federated States of Micronesia, or Hong Kong, or the region generally known as the Far East;
- d. Native American, which includes persons having origins in any of the original peoples of North America,



- American Indian, Eskimo, Aleut, Native Hawaiian; or
- e. Subcontinent Asian American, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.

Origin or descent can be regarded as the ancestry, nationality group, lineage or country in which the person or persons' parents or ancestors were born before their arrival in the United States.

Owned, controlled and managed means that the one or more minority persons or women who own the requisite interests in or assets of a business applying for minority or women business enterprise certification possesses equivalent incidents of such ownership, including an equivalent interest in profit and loss, and has contributed an equivalent percentage of capital and equipment to the business. Contributions of capital and equipment must be real and substantial. In instances where expertise is relied upon to demonstrate ownership, control, and management, it must be shown that the expertise is: (1) in a specialized field; (2) in an area critical to the firm's operation and performance of a commercially useful function; (3) critical to the firm's continued success; and (4) documented in the records of the firm, including but not limited to documentation showing the particular expertise and its value to the firm. Additionally, the individual whose expertise is relied upon must have a significant financial investment in the business. Ownership shall be measured as though not subject to the community property interest of a spouse, if both spouses certify in writing that the nonparticipating spouse relinquishes control over his or her community property interest in the subject business (but by doing so is not required to transfer to his or her spouse his or her community property ownership interest or to characterize the property as the separate property of the spouse). The one or more minority person or woman owners shall have recognized, ultimate control over all day-to-day business decisions affecting the MBE or WBE and shall hold a title commensurate with such control. Such ultimate control shall be known to and at least tacitly acknowledged in day-to-day operations by employees of the business.

Regulated contract means any contract, agreement or other undertaking:

- a. For which competitive bids are not required by law;
- b. That is not covered by the MBE/WBE programs of the United States Environmental Protection Agency or the United States Department of Transportation or any other federal or state agency having jurisdiction; and
- c. That the recommending city department has determined, in consultation with the director of the office of business opportunity either:
 - 1. Has significant subcontracting potential in fields in which there are sufficient known MWSBEs to perform the particular subcontract service(s); or
 - 2. Is of a type for which there are sufficient known MWSBEs which have represented their ability to perform the prime contract service to afford effective competition for the prime contract.

Small business enterprise or SBE means a firm whose gross revenues or number of employees, averaged over the past three years, inclusive of any affiliates as defined by 13 CFR Section 121.103, does not exceed the size standards defined in Section 3 of the Federal Small Business Act and applicable Small Business Administration regulations related to the size standards found in 13 CFR Part 121. The term shall also include a certified minority/women business enterprise defined in this Code.

Subcontractor means any business providing goods, labor or services to a contractor if such goods, labor or services are procured or used in fulfillment of the contractor's obligations arising from a contract with the City of Houston.

Woman means a person who is a citizen or legal resident alien of the United States and who is of the female gender.

Women business enterprise or WBE means a business which is:

- a. A sole proprietorship in which the owner is a woman who owns, controls and manages the business; or
- b. A corporation in which at least 51 percent of the stock or assets of such corporation is owned, controlled and managed by one or more women; or
- c. A partnership in which at least 51 percent of the assets of such partnership is owned, controlled and managed by one or more women; or
- d. Any other business or professional entity in which at least 51 percent of the assets in such business or



- e. professional entity is owned, controlled and managed by one or more women; or
- e. Any entity in which at least 51 percent of the assets of such entity is owned, controlled and managed by one or more minority persons and one or more women; or
- f. A business which has been certified as a WBE by the office of business opportunity under any other recognized WBE program.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-83. - Program elements.

- a. Based upon a review of annual awards and purchases by affected city departments, the office of business opportunity shall each year submit a progress report to the city council. The report shall include two percentage figures that are intended to as closely as possible represent the ratio of the prior year’s measured utilization and availability of local MWSBEs to do business in:
 - 1. The supply of goods and nonpersonal or nonprofessional services; and
 - 2. The performance of personal or professional services;
 to the prior year’s total local business community utilization and availability to do business in each of the two named fields of city contracting.

In addition, the report shall include percentage figures that are intended to as closely as possible represent the ratio of the prior year’s measured utilization and availability of local MWSBEs to do business in construction to the prior year’s total local business community utilization and availability to do business in city construction contracting.

The report may also include figures and other evidence of factors prescribed in Part 26, Title 49 of the Code of Federal Regulations in the year the report is made that may affect the aforementioned ratio of utilization and availability.

- b. Based upon the measured utilization and availability and any other relevant factors prescribed in Part 26, Title 49 of the Code of Federal Regulations and identified in the report submitted pursuant to subsection (a) above, city council shall from time to time set annual city-wide percentage goals for city contracting with MWSBEs in each of the two named categories described in subsection (a)(1) and (2) above and for contracting with MWSBEs in the construction category. The adjustment, if any, in the percentage goals shall be made during the first quarter of the fiscal year.
- c. It is the responsibility of each city department to determine which contracts initiated by it are goal-oriented contracts and which are regulated contracts. If the determination is made that a contract is a goal-oriented contract or a regulated contract, the initiating department shall review the contract and shall determine, by reference to the MWSBE register, the number of certified MWSBEs in each of the two named categories described in subsection (a)(1) and (2), above, and for construction, the number of certified MWSBEs in the construction category. The initiating department director or his or her designee shall determine whether the contract is one to which MWSBE provisions should be applied.
 - 1. These provisions are not required to be applied in the following circumstances:
 - a. A public or administrative emergency exists which requires the goods or services to be provided with unusual immediacy;
 - b. The service or goods requested are of such a specialized, technical or unique nature as to require the city department to be able to select its contractor without application of MWSBE provisions (such as contracts for expert witnesses, certain financial advisors or technical consultants);
 - c. If application of MWSBE provisions would impose an unwarranted economic burden or risk on the city or unduly delay acquisition of the goods or services, or would otherwise not be in the best interest of the city; or
 - d. If the possible MWSBE participation level based on MWSBE availability would produce negligible MWSBE participation.

If one of the above-listed conditions is determined to exist, the department director shall certify that determination in writing prior to the award of the contract, specifying the conditions which lead to the determination, and submit the determination to the OBO director for review and approval.



2. If the contract does not fall within one of the above-listed exceptions, based upon its overall review, the initiating department shall assign an appropriate MWSBE participation level, if any, for the contract (whether goal-oriented or regulated) considering the local availability of certified MWSBEs in the contract field.

The intention of this article is to provide administrative flexibility in the application of MWSBE provisions of this Code and in the percentage participation level on a contract-by-contract basis so as not to limit access to city contracting by non minority-owned, non women-owned or established business enterprises to a greater degree than necessary to meet the city-wide annual goal and the policies and objectives of this article.

- d. The bidding documents and the contract documents for goal-oriented contracts for which a MWSBE participation level has been established shall contain a provision detailing the purposes and objectives of the city's MWSBE ordinance and shall incorporate by reference this article and the then-current motion or ordinance establishing MWSBE annual goals. Regulated contracts which are determined to have significant subcontracting potential for which a MWSBE participation level has been established shall contain contractual provisions (and proposal provisions if submitted for proposals or for bids) requiring the contractor to meet or exceed the determined MWSBE participation level for that contract, or to establish that it has made good-faith efforts to do so, and that notwithstanding such efforts, was unable to meet or exceed the determined participation levels. The OBO director shall establish procedures defining good-faith efforts. These procedures will be reviewed and approved by the mayor and the city attorney.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-84. - Office of business opportunity.

- a. Applications for certification as a MWSBE and any addenda thereto shall be made on a form promulgated by the OBO director, and the requirements for certification shall be consistent with the applicable requirements set forth in subsection (b) below.
- b. The office of business opportunity has responsibility for:
 1. Establishing procedures for the implementation of this article, and reviewing and approving procedures established by city departments, such procedures to be narrowly designed to attain the purposes and objectives specified herein without unduly limiting non minority-owned or non woman-owned or established business enterprises. Such procedures shall be reviewed and approved by the mayor and by the city attorney prior to implementation;
 2. Certifying businesses as minority, small or women business enterprises and maintaining and distributing to affected city departments a current register, updated monthly, of such business (including a separate listing of such businesses whose applications for certification are pending) specifying the categories of city contracting represented by the certified MWSBEs;
 3. Developing educational programs for and otherwise assisting (without offering favoritism in relation to the competitive bidding system) MWSBEs to compete effectively for city contracts;
 4. Making recommendations to the mayor, city council and city departments to further the policies and objectives of this article, including but not limited to assisting city departments in setting contract-specific MWSBE goals;
 5. Reviewing documentation from potential contractors and from contractors concerning good-faith efforts made to meet or exceed the participation level for contracts. The final recommendation to city council for award or for acceptance of work shall be the city department's, although the office of business opportunity may take exception;
 6. Compiling a report of the progress of city departments, by department, in attaining the city-wide goals set by city council. This report shall be based upon MWSBE contractor and subcontractor information, to be specified by the office of business opportunity. Upon completion, the report is to be submitted quarterly to city council members, the mayor and all affected city department directors for their information;
 7. Receiving and reviewing complaints and suggestions concerning the MWSBE program from contractors, MWSBEs and city departments; and
 8. Without limiting the authority of the office of business opportunity to establish procedures that are



consistent with the terms of this article, the office of business opportunity is specifically directed to promulgate and implement procedures as follows:

- a. Grievance procedures for any person aggrieved by any decision of the office of business opportunity under this article. The procedures shall include notice and a hearing before an impartial hearing officer who shall be appointed by the mayor;
 - b. Mediation procedures for the resolution of disputes between contractors or bidders and MWSBE participants or potential participants with respect to any aspect of compliance with this article, including, without limitation, any assertion that a contractor, subcontractor, or MWSBE has failed to make good faith efforts to comply with this article;
 - c. Procedures to implement and enforce any sanctions provided under this article;
 - d. Procedures to ensure performance of work by MWSBEs, which procedures shall include: (i) a requirement that no more than 50 percent of their work may be subcontracted, without a specific waiver from the office of business opportunity for cause; (ii) a requirement that the minority person, small business or woman owner of a MWSBE have the necessary experience, expertise, credentials and regulatory authority to conduct the type of business for which the business is certified; (iii) a requirement that bidders and contractors make good faith efforts to meet or exceed contract MWSBE goals; and (iv) a requirement that MWSBEs accurately represent all material information required for certification and truly perform a commercially useful function;
 - e. Procedures for counting participation by MWSBEs as prime contractors, subcontractors, suppliers and joint venturers on city contracts, which procedures shall ensure that all work performed by MWSBEs is included in the computation of the progress made toward meeting the annual city-wide goals;
 - f. Procedures to ensure that this article is limited in its application to the certification of locally based MWSBEs;
 - g. Procedures to coordinate the operation of this article with other local MWSBE programs, which may include reliance upon certification procedures of other entities that are determined to be reliable and equivalent to this article;
 - h. Procedures to ensure access to necessary records of prime contractors and subcontractors on city contracts; and
 - i. Procedures for handling theft of services (wage theft) complaints of employees of city contractors and subcontractors.
- c. MWSBE certification shall be valid for a period of three years from the date of certification; provided, however, all applicants certified as MWSBEs shall be subject to review on an annual basis pursuant to procedures established by the OBO director to ensure compliance with all applicable provisions of this article.
 - d. Applications for renewal of MWSBE certification shall be evaluated under the same criteria and subject to the same manner of review as original applications.
 - e. All procedures established under this section shall be reviewed and approved by the city attorney prior to implementation. A copy of all procedures hereunder shall be maintained in the office of business opportunity for inspection, and copies may be purchased at the fees prescribed by law.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-84.1. - Responsibilities of city departments; department utilization plan.

- a. Each department director shall be accountable for the oversight and implementation of the following activities:
 1. Informing MWSBE organizations or associations of the department's procurement procedures and future procurement opportunities;
 2. Ensuring that department bid solicitations and requests for proposals are sent to MWSBEs in a timely manner;
 3. Referring MWSBEs to technical assistance services available from the office of business opportunity and other organizations that provide such services;
 4. Reviewing each request for waiver or modification of participation goals prior to its submission to the office of business opportunity for approval;
 5. Monitoring the department's procurement activities to ensure compliance with and progress towards the city-wide participation goals; and



6. Providing the OBO director with the departmental utilization plan prescribed in subsection (b) of this section and any other documentation requested by the office of business opportunity necessary in evaluating a department's progress in achieving city-wide participation goals.
- b. Each department that has procured goods and services in excess of three million dollars during the fiscal year ending on June 30 th of the preceding calendar year shall be required to submit a departmental utilization plan for the following fiscal year commencing on July 1 st . Departmental utilizations plans shall be submitted on or before June 15, 2014, and not later than June 15 th of each calendar year thereafter.
 - c. Each department director shall be responsible for creating, submitting, and implementing an annual departmental utilization plan that shall include, at a minimum, the following:
 1. The department's forecast of anticipated projects and contract specific goals for the upcoming fiscal year;
 2. A detailed, written explanation for any departmental goal that is not consistent with the overall city-wide goals for MWSBE participation;
 3. A list of the names and titles of department personnel responsible for the implementation of the departmental utilization plan;
 4. The methods and relevant activities proposed for achieving the department's participation goals; and
 5. Any other information the department director deems relevant or necessary.
 - d. Upon review by the OBO director, all departmental utilization plans shall be submitted to the mayor and city council for final approval.
 - e. A departmental utilization plan may be amended to reflect changes in the department's projected procurements, expenditures, or other relevant circumstances and resulting changes in the department's participation goals.

Such amendments shall be submitted to the OBO director for review and shall be submitted to city council for final approval not less than 30 days prior to the proposed date of implementation.

(f) Each department director shall be accountable for setting and making reasonable efforts to meet the participation goals stated its departmental utilization plan. Departments shall, at minimum, engage in outreach activities that encourage eligible businesses to apply for certification as MWSBEs and encourage MWSBEs to participate in all facets of the procurement process and compete for city contracts, including contracts awarded by negotiated acquisition and emergency and sole source contracts.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-85. - Filing of plan.

Before execution of any contract or issuance of any purchase order for which a MWSBE goal has been established, a bidder or potential contractor shall submit a plan setting forth how it intends to meet the contract MWSBE goal or documentation demonstrating its proof of good faith efforts to meet the contract MWSBE goal. After execution of a contract or receipt of a purchase order, the contractor shall comply with the submitted plan, unless it has received approval from the OBO director for a deviation therefrom. Approval shall not be unreasonably withheld. While it is not a requirement that a contractor meet its goal, it is required that the contractor objectively demonstrate to the office of business opportunity that it has made good faith efforts to meet the goal. To this end, the contractor shall maintain records as prescribed by the office of business opportunity demonstrating its efforts at compliance. The contractor shall be required to submit to the office of business opportunity reports of its efforts under this article in such form or manner as shall be prescribed by the OBO director.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-86. - Sanctions.

- a. The OBO director is authorized to suspend any contractor who has failed to make good faith efforts to meet any goal established under this article from engaging in any contract with the city for a period up to, but not to exceed, five years. The OBO director is also authorized to suspend any MWSBE who has failed to make good faith efforts to meet all requirements necessary for participation as a MWSBE from engaging in any



contract affected by this article for a period up to, but not to exceed, five years.

- b. In accordance with section 15-84 of this Code, the office of business opportunity shall establish procedures for the imposition of sanctions and shall ensure that no sanction is imposed without notice of the grounds being given and an opportunity for a hearing consistent with the procedures set forth in sections 15-22, 15-23, and 15-24 of this Code. Any procedure established shall be consistent with state law.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-87. - Determination of established business enterprise status.

- a. Based upon a review of data submitted by MWSBEs or MWSBE applicants and any other information available from its files or the files of any other governmental entity, the office of business opportunity shall determine the size of each MWSBE or MWSBE applicant by determining the average of the gross receipts for the prior three years and the average number of employees for the 12 calendar months immediately preceding the review, as applicable. The calculation of size shall be based solely upon the size standards and methods of calculation identified by the U.S. Small Business Administration (SBA) including, without limitation those set forth in 13 C.F.R. part 121, subpart A, secs. 121.101 through 121.107, and sec. 121.201, any amendment or successor thereto, or any other document defining such size standards or the calculation thereof that has been fully and finally adopted by the SBA. The review shall be applicable to business entities applying for initial certification as a MWSBE or to certified MWSBEs, provided that such review may not be initiated until the applicant or certified MWSBE has established a business history of sufficient length to allow calculation of size based on the three year financial or 12 month employee data, as applicable.
- b. Following the review described in this section, each certified MWSBE or MWSBE applicant shall be reevaluated under this section on an annual basis based upon the size standards and methods of calculation identified by the SBA and procedures established by the OBO director to ensure compliance with all applicable provisions of this article.
- c. All MWSBEs and MWSBE applicants shall, upon written request of the OBO director, provide to the office of business opportunity copies of any and all documents, including without limitation financial statements and tax records, requested by the director in connection with the review authorized in subsection (a) of this section, not later than 20 business days following the date of mailing of the request. Failure to timely and completely comply with any such request will authorize the imposition of sanctions under section 15-86 of this Code, or denial of certification in the case of a MWSBE applicant.
- d. Following the review authorized by subsection (a) of this section, the office of business opportunity shall classify each MWSBE or MWSBE applicant whose size meets or exceeds the size standard identified by the SBA for that class of enterprise as an established business enterprise. The classification shall be effective as of the date of mailing of the notice provided in section 15-88 of this Code.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-88. - Notice, appeal and waiver.

- a. Immediately upon classification of a certified MWSBE or MWSBE applicant as an established business enterprise pursuant to section 15-87 of this Code, the office of business opportunity shall notify the business so classified of the action by United States certified mail, return receipt requested, addressed to the last known address of the business and deemed given when placed in a United States mail depository.
- b. Each notice shall inform the affected MWSBE or MWSBE applicant of the following matters:
 1. That the MWSBE or MWSBE applicant has been classified as an established business enterprise;
 2. That the classification is effective as of the date of mailing of the notice;
 3. That the MWSBE or MWSBE applicant may appeal the classification or seek a waiver of the classification pursuant to the procedures established under this section;
 4. That the provisions of section 15-89 of this chapter shall become enforceable with respect to any certified MWSBE one year following the notice of classification, unless the decision is reversed or a waiver is granted and the classification is withdrawn prior to the expiration of the one-year period; and
 5. That any MWSBE applicant deemed ineligible for certification based upon its classification as an established business enterprise shall remain ineligible for certification unless and until any withdrawal of the classification as an established business enterprise is granted pursuant to an appeal or a request for waiver conducted under this section.



- c. In order to appeal a classification as an established business enterprise, a MWSBE or MWSBE applicant must submit to the OBO director a written notice of appeal no later than 60 days following the date of mailing of the notice of classification. The sole basis for an appeal shall be that the office of business opportunity has incorrectly calculated the size of the business according to SBA standards based upon incorrect information or error in computation. The notice of appeal shall be accompanied by any documentation necessary to demonstrate the asserted error. If the OBO director finds that an error or errors were made in calculating the size of the business and that any such error resulted in an incorrect classification as an established business enterprise, the classification shall be withdrawn and the business promptly notified of the withdrawal. If the OBO director finds that no error was made, or that any error would not materially alter the classification, he shall notify the business that the classification is not altered, by certified mail, return receipt requested. The business may within ten days of the date of mailing of the notice submit to the OBO director a written request for a hearing, which hearing shall be conducted under the procedures set forth in subsections (e) through (g) of this section.
- d. In order to seek a waiver of a classification as an established business enterprise, a MWSBE or MWSBE applicant must submit to the OBO director a written request for a hearing no later than 60 days following the date of mailing of the notice of classification. The written request shall include documentary evidence, including but not limited to financial statements and tax records, relevant to the following criteria:
 1. Profitability of the enterprise;
 2. Sales of the enterprise, including a demonstration that 55 percent or more of the enterprise's sales, within the period utilized by the office of business opportunity in its classification determination, are not related to city contracts;
 3. Ability of the MWSBE or MWSBE applicant to obtain bonding, if the enterprise acts as a prime contractor or in a category in which obtaining bonding is required; and
 4. Positive comparison of the enterprise's business and financial profile with those of non-MWSBE firms in the same business category based on an objective industry standard.
- e. The OBO director shall notify the affected MWSBE or MWSBE applicant of the place and time of a hearing before the OBO director or his designee to consider an appeal requested under subsection (c) of this section, or a request for waiver of the classification under subsection (d) of this section, or both, as applicable, by United States certified mail, return receipt requested. The hearing shall be set not later than 30 days following receipt of the request, provided that the OBO director or his designee may in his discretion extend such date by a reasonable period for good and sufficient cause shown. Hearings for businesses that have both appealed under subsection (c) of this section and requested a waiver under subsection (d) of this section may be consolidated in a single hearing at the discretion of the OBO director or his designee.
- f. The OBO director shall promulgate written procedures for the conduct of hearings. The OBO director or his designee shall hear each appeal or request for waiver and shall consider only the criteria set forth under subsections (c) and (d)(1) through (d)(4) of this section, as applicable, in determining whether to withdraw the classification of the affected business as an established business enterprise. The OBO director shall develop objective standards for evaluating each factor set forth under subsections (d)(1) through (d)(4) based upon recognized industry or governmental practices or standards. The burden shall be on the business to demonstrate by clear, convincing and cogent evidence either that a material error in classification was made or that the granting of a waiver is justified by at least two of the criteria set forth in subsections (d)(1) through (d)(4) of this section.
- g. Notwithstanding any provision of this Code or of the rules or regulations of the office of business opportunity to the contrary, including any provision for mediation of a decision of the OBO director, the decision of the OBO director or his designee regarding appeal or waiver shall be final.

(Ord. No. 2013-428, § 10(Exh. A), 5-8-2013, eff. 7-1-2013)

Sec. 15-89. - Effect of classification; re-application.

- a. Upon the expiration of one year following the notice of classification as an established business enterprise referenced in section 15-88(a) of this Code, and in the absence of any withdrawal of such classification by the OBO director, each certified MWSBE so classified shall be ineligible for future participation in any city contract as a MWSBE and its certification shall be withdrawn. No application for re-certification shall be granted absent the prior determination of the OBO director that the applicant does not meet or exceed



the SBA size standards referenced in section 15-87(a) of this Code. Certified businesses whose evaluation results in classification as an established business enterprise shall timely file any re-certification application due prior to expiration of the one year extension of program eligibility referenced in this section, but the application shall not be granted unless and until the classification is withdrawn or waived.

- b. Notwithstanding any provision of this Code or the rules or regulations of the office of business opportunity to the contrary, including any provision for mediation of a decision of the OBO director, any initial applicant for MWSBE certification who meets the criteria for an established business enterprise at the time of its application and is so classified shall be denied certification on that basis alone and shall have no recourse for the denial except through challenging the classification in the manner set forth in section 15-88 of this chapter. Any and all other matters pertaining to the eligibility of the applicant shall be abated and shall only be reinstated if the classification as an established business enterprise is withdrawn.
- c. The office of business opportunity may continue to assist established business enterprises following ineligibility as follows:
 1. Such businesses, if formerly certified by the city, may continue to be listed in any listing of MWSBE firms in a separate category of established MWSBE firms for the information of other private or public entities; and
 2. Such businesses, if formerly certified by the city, may receive information, counseling and referrals to other agencies supporting business enterprises from the office of business opportunity after their classification as established business enterprises.
- d. No sooner than one year following the date of program ineligibility provided in subsection (a) of this section or the denial of certification provided in subsection (b) of this section, any established business enterprise may apply for reinstatement as a fully eligible, certified MWSBE or reinstatement of an application for certification abated under subsection (b) of this section, as applicable, upon demonstrating the existence of one or more of the following conditions:
 1. That the subsequent history from the date of initial classification as an established business enterprise demonstrates that a size calculation as of the date of application for reinstatement would place the business below the SBA size standards for that category of business;
 2. That the established business enterprise has successfully obtained an SBA size determination from a federal agency authorized to make such a determination, or has prevailed in an SBA size protest under 13 CFR § 121.1001, et seq., as amended, including any judicial review thereof, establishing that the business does not meet or exceed the applicable SBA size standard;
 3. That the SBA size standards have been revised in such a manner that the subject business no longer meets or exceeds the size standard for its category based upon the most recent three-year average for receipts or 12 month average for employees, as applicable; or
 4. That the criteria listed in section 15-88(d) of this Code demonstrate the need to grant a waiver and withdraw the classification of the business as an established business enterprise.
- e. Applications for reinstatement shall be on a form prescribed by the OBO director and shall be accompanied by relevant documentary evidence supporting the ground or grounds for reinstatement asserted, as requested by the OBO director.
- f. Within 30 days following receipt of a completed application for reinstatement, the OBO director shall grant the application or deny the application and set the matter for hearing within 30 days of the date of mailing notice of such denial.
- g. The burden on the business applying for reinstatement shall be to demonstrate the existence of one or more of the conditions set forth in subsections d(1) through d(4) of this section by clear, convincing and cogent evidence, to be evaluated by the director under hearing procedures consistent with the nature of the application and, to the extent applicable, with the provisions of subsections (c), (d), (e) and (f) of section 15-88 of this Code. In addition, a business seeking reinstatement under subsection (b)(4) of this section that has previously sought a waiver of classification as an established business enterprise pursuant to section 15-88(d) of this chapter must present evidence of a material and substantial change in circumstances not shown at the preceding hearing, and the OBO director or his designee shall disregard evidence that is repetitious or cumulative of the prior hearing on the matter.
- h. The decision of the OBO director or his designee following a hearing on reinstatement shall be final, and any applicant denied reinstatement is to be notified in writing of the decision within ten days following the hearing. No business denied reinstatement may subsequently apply for reinstatement until the expiration of one year from the date of the denial.

(Ord. No. 2013-428, § 10 (Exh. A), 5-8-2013, eff. 7-1-2013)



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 14, 75, 91, 92, 93, 135, 266, 570, 574, 576, 578, 905, 964, 983, and 1000

[Docket No. FR-6085-F-03]

RIN 2501-AD87

Enhancing and Streamlining the Implementation of Section 3 Requirements for Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: Section 3 of the Housing and Urban Development Act of 1968, as amended by the Housing and Community Development Act of 1992 (Section 3), contributes to the establishment of stronger, more sustainable communities by ensuring that employment and other economic opportunities generated by Federal financial assistance for housing and community development programs are, to the greatest extent feasible, directed toward low- and very low-income persons, particularly those who receive government assistance for housing. In accordance with statutory authority, HUD is charged with the responsibility to implement and enforce Section 3. HUD's regulations implementing the requirements of Section 3 have not been updated since 1994 and are not as effective as HUD believes they could be. This final rule updates HUD's Section 3 regulations to create more effective incentives for employers to retain and invest in their low- and very low-income workers, streamline reporting requirements by aligning them with typical business practices, provide for program-specific oversight, and clarify the obligations of entities that are covered by Section 3. These changes will increase Section 3's impact for low- and very low-income persons, increase compliance with Section 3 requirements, and reduce regulatory burden.

DATES: *Effective Date:* November 30, 2020.

Compliance Dates: Public housing financial assistance recipients must implement their Section 3 activities pursuant to these regulations and comply with the reporting requirements starting with the recipient's first full fiscal year after July 1, 2021. These regulations are applicable to Section 3 projects for which assistance or funds are committed on or after July 1, 2021.

FOR FURTHER INFORMATION CONTACT: For questions, please contact the following people (the phone numbers are not toll-free):

For Public Housing Financial Assistance: Merrie Nichols-Dixon, Director, Office of Policy Program and Legislation, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW, Room 3178, Washington, DC 20410; telephone 202-402-4673 (not a toll-free number).

For Community Development Block Grant (CDBG)/CDBG Disaster Recovery/Section 108 Loan Guarantee Program: Jessie Handforth Kome, Director, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW, Room 7282, Washington, DC 20410; telephone 202-708-3587 (voice/TDD) (not a toll-free number).

For HOME or Housing Trust Fund Section 3 projects: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW, Room 10168, Washington, DC 20410; telephone 202-402-4606 (not a toll-free number).

For Office of Housing programs: Thomas R. Davis, Director, Office of Recapitalization, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW, Room 6230, Washington, DC 20410; telephone 202-402-7549 (voice/TDD) (these are not toll-free numbers).

Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service, at toll-free, 800-877-8339. General email inquiries regarding Section 3 may be sent to: section3@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3 of the Housing and Urban Development Act of 1968 (Pub. L. 90-448, approved August 1, 1968) (Section 3) was enacted to bring economic opportunities generated by certain HUD financial assistance expenditures, to the greatest extent feasible, to low- and very low-income persons residing in communities where the financial assistance is expended. Section 3 recognizes that HUD funds are often one of the largest sources of Federal funds expended in low- and very low-income communities and, where such funds are spent on activities such as construction and rehabilitation of housing and other public facilities, the expenditure results

in economic opportunities. By directing HUD-funded economic opportunities to residents and businesses in the community where the funds are expended, the expenditure can have the dual benefit of creating new or rehabilitated housing and other facilities while providing opportunities for employment and training for the residents of these communities.

The Section 3 statute establishes priorities for employment and contracting for public housing programs and for other programs that provide housing and community development assistance. For example, the prioritization as it relates to public housing assistance places an emphasis on public housing residents, in contrast to the prioritization as it relates to housing and community development assistance, which places more emphasis on residents of the neighborhood or service area in which the investment is being made.

In the 25 years since HUD promulgated the current Section 3 regulations, significant legislation has been enacted that affects Section 3.¹ In addition, HUD has also heard from the public that there is a need for regulatory changes to clarify and simplify the existing requirements. HUD's experience in administering Section 3 over time has also provided insight as to how HUD could improve its Section 3 regulations. HUD, thus, concluded that regulatory changes were necessary to streamline Section 3 and more effectively benefit low- and very low-income persons through HUD financial assistance to achieve the Section 3 statute's purposes.

II. The Proposed Rule

HUD issued a proposed rule on April 4, 2019 (84 FR 13177) to update the existing regulations and streamline the Section 3 program.

Promote Sustained Employment and Career Development

The proposed rule included multiple elements designed to increase Section 3's impact in directing employment opportunities and sustaining employment for the people served by

¹ This legislation includes, but is not limited to, the following: Reforms made to HUD's Indian housing programs by the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (Pub. L. 104-330, approved October 26, 1996); public housing reforms made by the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Pub. L. 105-276, approved October 21, 1998); reforms made to HUD's supportive housing programs by the Section 202 Supportive Housing for the Elderly Act of 2010 (Pub. L. 111-372, approved January 4, 2011); and the Frank Melville Supportive Housing Investment Act of 2010 (Pub. L. 111-347, approved January 4, 2011).



HUD financial assistance programs. The rule proposed tracking and reporting labor hours instead of new hires. While the previous new hire framework was valuable for measuring entry into employment, the new hire framework did not capture the extent to which new hiring opportunities are created relative to the total work performed, nor whether those opportunities are sustained over time. The proposed rule's focus on labor hours sought to measure total actual employment and the proportion of the total employment performed by low- and very low-income workers. In addition, the change to labor hours emphasized continued employment. For example, the prior exclusive focus on counting new hires regarded five new hires for one-month opportunities as a more valued outcome than one 12-month opportunity, and it did not distinguish between full- and part-time employment. A full-time job sustained over a long period allows a low- or very low-income worker to gain skills and is a strong indicator of progress towards self-sufficiency. The new focus on labor hours would ensure that longer-term, full-time opportunities are appropriately recognized.

HUD's proposed rule also sought comment on maintaining the new hire framework for only Public Housing Agencies (PHAs). HUD held a number of listening sessions and heard from some PHAs that they would prefer to keep reporting new hires rather than switch to reporting labor hours. Therefore, while HUD believes tracking labor hours is the best option and would simplify reporting, HUD did seek comment on the alternative option of maintaining the new hires framework for PHAs.

Align Section 3 Reporting With Standard Business Practices

HUD also proposed tracking labor hours rather than new hires because it would be more consistent with business practices. Most construction contractors working on HUD assisted projects already track labor hours in their payroll systems because they pay their employees based on an hourly wage. In some cases, they are also subject to prevailing wage requirements.² HUD believes a consistent labor-hour tracking mechanism makes compliance with Section 3 easier not only for recipients of HUD assistance, but also for contractors and subcontractors. The proposed rule provided that for employers who do not track labor hours in detail through a time-and-attendance

² See 42 U.S.C. 1437j(a), 24 CFR 905.308(b)(3)(ii), 24 CFR 965.101, 25 U.S.C. 4225(b)(1)(A), and 24 CFR 1006.345(b).

system, such employers could provide a good faith assessment of the labor hours for a full- or part-time employee. However, if a time-and-attendance system is later implemented, the accurate labor hour accounting would be required.

Applicability and Thresholds

The Section 3 statute applies to both: (1) HUD's Public Housing Program, and (2) Other HUD programs that provide housing and community development assistance. For ease in administration for recipients using one or both of these HUD funding streams, the proposed rule provided definitions for these types of funding and specified Section 3 requirements for each type. The proposed rule included the following definitions for the scope of such financial assistance:

(1) Public housing financial assistance covers:

- (a) Development assistance provided pursuant to Section 5 of the United States Housing Act of 1937 (the 1937 Act),
- (b) operations and management assistance provided pursuant to Section 9(e) of the 1937 Act (Operating Fund), and
- (c) development, modernization, and management assistance provided pursuant to Section 9(d) of the 1937 Act (Capital Fund); and

(2) Section 3 projects cover HUD program assistance used for housing rehabilitation, housing construction and other public construction projects that generally exceed a \$200,000 project threshold or any Section 3 project funding from HUD's Lead Hazard Control and Healthy Homes programs.

The proposed definitions defined the scope of programs subject to Section 3 requirements but did not expand such coverage beyond the compliance requirements of HUD's prior regulations. HUD proposed the \$200,000 threshold for housing rehabilitation, housing construction and other public construction projects because work below that amount would likely not trigger long-term employment opportunities for which the recipient could show measurable labor hours. The proposed rule also clarified that contracts, subcontracts, grants, or subgrants subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5307(b)) or subject to tribal preference requirements as authorized under Section 101(k) of the Native American Housing Assistance and Self-Determination Act (25 U.S.C. 4111(k)) must provide preferences in employment, training, and business

opportunities to Indians and Indian organizations.

Reporting and Targeted Section 3 Workers

The proposed rule aimed to align Section 3 reporting requirements more closely to the statutory priorities; HUD's previous regulation tracked only public housing residents or low- or very low-income persons who lived in the metropolitan area or nonmetropolitan county of the project, rather than whether the statutory priorities were met. The rule proposed a new definition of "Section 3 worker" as any worker or who meets at least one of the following criteria: Low- or very low-income, as established by HUD's income limits; living in a Qualified Census Tract (QCT); or employed by a Section 3 business concern.³

The proposed rule also included a new "Targeted Section 3 worker" definition so that HUD could track, and recipients could target, the hiring of Section 3 workers in selected categories. The Section 3 statute requires certain financial assistance recipients to prioritize their efforts to direct employment and economic opportunities to specific groups of low- and very low-income individuals. The "Targeted Section 3 worker" reflects both statutory and policy priorities that HUD wishes to specifically track. For public housing financial assistance, the proposed definition of a Targeted Section 3 worker was a Section 3 worker who is also:

- (1) A worker employed by a Section 3 business concern; or
- (2) A worker who is currently or who was when hired by the worker's current employer, a resident in a public housing project or Section 8-assisted housing; or
- (3) A resident of other projects managed by the PHA that is expending assistance; or
- (4) A current YouthBuild participant.

For other HUD assistance programs, the proposed priorities were:

- (1) Residents within the service area or the neighborhood of the project, and
- (2) YouthBuild participants.

³ Section 3 business concern means: (1) A business concern that meets one of the following criteria: (i) It is at least 51 percent owned by low- or very low-income persons; (ii) Over 75 percent of the labor hours performed for the business are performed by low- or very low-income persons; or (iii) It is a business at least 25 percent owned by current public housing residents or residents who currently live in Section 8-assisted housing. (2) The status of a Section 3 business concern shall not be negatively affected by a prior arrest or conviction of its owner(s) or employees. (3) Nothing in this part shall be construed to require the contracting or subcontracting of a Section 3 business concern. Section 3 business concerns are not exempt from meeting the specifications of the contract.



There is also a statutory contracting priority for businesses that provide economic opportunities for low- and very low-income workers. Therefore, HUD proposed including labor hours worked by the Section 3 business concern employees for both Section 3

workers and Targeted Section 3 workers. HUD also proposed a new Section 3 business concern definition that reflected the change to labor hours and increased the threshold of work performed by a business by low- and very low-income workers given the

proposed rule's inclusion of all Section 3 business concerns' labor hours in the definition of both Section 3 workers and Targeted Section 3 workers. The proposed rule created the following construct for measuring workers:



Benchmarks

The proposed rule provided that a new Section 3 benchmark measurement would serve as a safe harbor for those recipients that meet the new benchmark. The primary objective of the proposed rule was to reflect and monitor grantees' abilities to direct job opportunities that are generated by HUD financial assistance to Section 3 workers and Targeted Section 3 workers. The proposal included using benchmarks based on ratios of Section 3 workers and Targeted Section 3 workers in comparison to all workers. HUD proposed that the benchmarks would be set by **Federal Register** Notice and amended periodically to provide for updating of the benchmarks to align with the reporting data HUD received. As HUD gathers more data under the new rule, HUD could increase or decrease benchmark figures over time, or tailor different benchmarks for different geographies and different funding types. If a recipient certifies compliance with the statutory priorities and meets the outcome benchmarks, HUD will presume the recipient is complying with Section 3 requirements, absent evidence to the contrary. Recipients are still required to report their outcomes, and HUD will monitor them accordingly through the data reporting methods used to oversee all other program requirements in each applicable program area. Otherwise, recipients would be required to submit

qualitative reports on their efforts, as they are required to do under HUD's previous rule when they do not meet the safe harbor, and HUD may conduct monitoring to review the recipient's compliance, again consistent with practices used to monitor program participants' compliance with other program requirements.

The proposed rule also provided a burden relieving measure for PHAs with fewer than 250 units. For these PHAs, they would only be required to report on Section 3 qualitative efforts and would not need to track labor hours for Section 3 workers and Targeted Section 3 workers.

Multiple Funding Sources

The proposed rule created a new section for housing rehabilitation, housing construction, or other public construction projects assisted with funds from more than one HUD program. Specifically, the proposed rule provided that when a Section 3 project is funded by public housing financial assistance, the public housing financial assistance must be tracked and reported consistent with the public housing financial assistance requirements in subpart B, while the community development financial assistance may follow the requirements in subpart B or subpart C. The proposed rule directed that when a Section 3 project receives housing and community development assistance from two different HUD programs, HUD would designate

guidance through a single reporting office.

Integrate Section 3 Into Program Enforcement

Since HUD program office staff are regularly in touch with HUD's funding recipients on other compliance requirements, HUD proposed that program offices incorporate Section 3 compliance and oversight into regular program oversight and make Section 3 an integral part of the program's oversight work. The proposed rule also streamlined the complaint and compliance process to make Section 3 compliance consistent with existing practices for other requirements. The proposed rule shifted the delegation of authority for Section 3 enforcement and compliance responsibilities from the Assistant Secretary for Fair Housing and Equal Opportunity to reside with each of the applicable HUD program offices.

III. Changes Made at the Final Rule Stage

After review and consideration of the public comments and upon HUD's further consideration of Section 3 and the issues raised in the proposed rule, HUD has adopted the proposed rule as final with a few changes in this final rule. HUD also made minor edits to clarify the rule's language. The following highlights the substantive changes made by HUD in this final rule from the proposed rule.

Removing Alternative 2 for New Hires



After considering the data, Section 3's statutory goals, and the public comments, HUD is not retaining the tracking of new hires for PHAs, but instead requiring tracking of labor hours for all Section 3 outcomes. HUD agrees with commenters that it is in the best interest of the communities served by HUD to implement a more impactful Section 3 standard across all HUD-funded programs. Using different metrics for different programs would unnecessarily further complicate Section 3 reporting. Tracking labor hours is meant to ensure that Section 3 workers have sustained employment and career opportunities. HUD believes that the use of new hires provides an incomplete measure of the employment and local contracting opportunities available to low- and very low-income persons envisioned by the Section 3 statute. HUD expects the labor hour data to present a more accurate assessment of Section 3's impact. The focus on labor hours will measure total actual employment and the proportion of the total employment performed by low- and very low-income workers, which will mitigate contractors' ability to manipulate their Section 3 outcomes.

Section 3 Project Threshold

HUD received many public comments on proposed changes to the Section 3 Project threshold. HUD still considers the \$200,000 threshold for Section 3 projects appropriate given the percentage of projects that will continue to be covered and are likely to result in opportunities for employment of low- and very low-income workers when expended on construction-related activities. However, in response to public comments, HUD is providing that in this final rule, the Secretary may adjust the threshold, through a **Federal Register** Notice subject to public comment, in order to ensure Section 3 compliance. HUD's proposed rule already provided for the Secretary to update the threshold not less than once every five years based on a national construction cost inflation factor; the final rule now provides that the Secretary updates the benchmarks not less frequently than once every three years. HUD believes adding this flexibility is responsive to the comments received by the public. HUD will continue to work with program participants to adjust the thresholds accordingly, if necessary, based on the updated data provided under this final rule.

Setting a Project Threshold for Lead Hazard Control Grants

HUD also received comments regarding the exclusion of projects under HUD's Lead Hazard Control and Healthy Homes program from the \$200,000 project threshold. Lead hazard control projects are generally smaller, so many commenters suggested a lower threshold for such projects. On the other hand, other commenters noted that not including a threshold for lead hazard control grants altogether may incidentally include small grants that should not be subject to Section 3. For example, some Lead and Healthy Homes Technical Studies grants study the health effects of installed housing components in projects typically smaller than \$100,000. As expected, they did not result in opportunities for employment of Section 3 workers under the previous regulations. At the final rule stage, HUD is therefore adopting a \$100,000 project threshold for all projects that receive funding from HUD's Lead Hazard Control and Healthy Homes programs. HUD adopted this number to match the contract threshold in the previous regulations (see previous 24 CFR 135.3(a)(3)).

Removing the Qualified Census Tract Definition

After considering Section 3's statutory goals and the public comments, HUD is removing the QCT definition from this final rule. The addition of this criteria was to encourage hiring in the QCT and to make targeted hiring easier, but HUD recognizes that the inclusion of workers in these areas could inadvertently include individuals who are not low- or very low-income. Rather than the broad QCT definition, HUD is limiting the Section 3 worker definition to be more consistent with the statute, which requires prioritization of low- and very low-income workers and YouthBuild participants. This should also alleviate any potential burden on participants associated with the QCT designation.

Changing the Section 3 Business Concern Definition

In adopting the proposed definition of Section 3 business concern in this final rule, HUD is maintaining the over 75 percent of the labor hours performed for the business on construction are performed by low- or very low-income persons standard, but adding in that such performance must be over the last three-month period to help businesses determine whether or not they meet the criteria. HUD is also maintaining a separate criterion for businesses owned and controlled by current public

housing residents or residents who currently live in Section 8-assisted housing, but increasing the required percentage of owned and controlled to 51%. This change is in response to public comments and to maintain consistency with HUD's public housing regulations on contracting with resident-owned businesses at 24 CFR part 963. HUD also added a change to the documentation timing in paragraph (1) of the Section 3 business concern definition to allow a six-month grace period. 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.

Changing the Professional Services Definition

In this final rule, HUD is amending the professional services definition to clarify that only non-construction services that require an advanced degree or professional licensing, rather than all non-construction services, are excluded from Section 3. HUD wants to ensure this final rule's emphasis encapsulates the statutory requirement to prioritize low- and very low-income workers, and provides this category of exempted workers from reporting given the challenge to hire low- and very low-income workers in jobs that require such degrees and licensing.

Counting Labor Hours for 5 Years

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.

Delayed Effective Date

The rule provides for a delayed transition to labor hours and the associated recordkeeping requirements. HUD recognizes that employers and grantees will need time to transition their systems and reporting practices as a result of this final rule. HUD is mindful of the need to update policies and procedures for planning purposes, and the importance of implementing the rule such that employers will be able to comply. Therefore, HUD has provided for a transition period through at least July 1, 2021. During this transition period, HUD expects that employers and grantees will begin following this final rule's requirements for new grants, commitments, and contracts. The exact date on which any particular recipient of HUD funding will be able to implement the conversion to the new requirements will vary during this transition period, but the transition must be complete by July 1, 2021. The reporting requirements and labor hours tracking will not begin until the dates for each entity specified in the "Compliance Date" section above.

IV. Discussion of Public Comments and HUD's Responses

The public comment period on the proposed rule closed on June 3, 2019, and HUD received 163 public comments. The comments came from state and city government agencies and housing administrations, housing authorities, non-profits, independent consultants, private citizens, housing authority directors, small businesses, the construction industry, and housing authority associations. The following presents the significant issues and questions related to the proposed rule raised by the commenters, and HUD's responses to these issues and questions. HUD would like to thank all the commenters for their thoughtful responses.

"Best Efforts" and "Greatest Extent Feasible"

In the proposed rule, HUD included a specific question for public comment regarding these statutory terms. Some commenters suggested the terms are interchangeable. One commenter suggested that HUD use the term "reasonable best efforts" for CDBG and HOME recipients and remove the term "greatest extent feasible" from the Section 3 regulations or use only "best efforts." Other commenters argued that these words are key to the intent of the statute, which is to provide recipients

leeway when constraints outside their control impede implementation, and recommended that HUD provide guidance materials on how to show best efforts when organizations do not meet their Section 3 goals, such as data collection forms which would indicate best efforts or non-exclusive lists of examples of "best efforts" and "greatest extent feasible."

In contrast, some commenters suggested that these terms are not interchangeable. One commenter said that "best efforts" should be measured by tracking outreach and outcomes of outreach and "greatest extent feasible" is the result of "best efforts." Another commenter argued that "best efforts" can be more clearly defined than "greatest extent feasible," as specific actions can demonstrate efforts, while feasibility is a more passive analysis of what is possible. One commenter argued that the "greatest extent feasible" is a much more rigid and prescriptive standard than the "best efforts" standard and noted that courts have found that the "best efforts" requirement "specifically avoids creating a mandatory obligation on the part of the agencies the statute affects." This "best efforts" standard likewise "does not call for perfect compliance." This commenter encouraged HUD to allow PHAs to retain greater discretion over the development of their own Section 3 programs.

A commenter suggested that Subpart B participants should continue to use "best efforts" while Subpart C participants should use "greatest extent feasible," and agencies receiving funding that triggers compliance under Subparts B and C should use the "best efforts" standard. One commenter suggested using the term "best efforts" to comply with employment, contracting and training opportunities.

Commenters also urged HUD to enforce the terms "best efforts" and "greatest extent possible," suggesting that whatever the standard, if an activity by a recipient, contractor or subcontractor does not adequately serve to hire, train, and retain a Section 3 worker, then it should not meet the standard. These commenters provided an example of a PHA's best effort. Commenters noted that while the recipient or contractor appears to meet the Section 3 goal, or at least made "best efforts" to reach the goal, in practicality such effort is not workable.

One commenter wrote that the terms without any definition are too broad and should be defined to assist in compliance with Section 3. Another commenter proposed that HUD should define the terms by how they will be

measured; for instance, that "best efforts" could be determined by a specific set of metrics around recruitment efforts and the percentage of Section 3 workers in the area. One commenter suggested a way to draft the rule using dollars spent to track compliance such that these terms would not be necessary.

Other commenters requested that HUD not define these terms or should not restrictively define these terms because HUD should trust the judgment and common sense of its professional field staff to determine compliance, because documenting compliance according to specific definitions could create additional administrative burden, because there are constraints outside the grantee's control, and because guidelines may stifle innovation.

HUD Response: HUD appreciates commenters' responses to the specific question regarding "best efforts" and "greatest extent feasible" in the proposed rule. "Best efforts" and "greatest extent feasible" are statutory terms, used in the statute in different contexts. As such, HUD will continue to use both terms to track compliance. HUD agrees with commenters that there are many ways to interpret the language. Traditionally, HUD has used the terms interchangeably, as referenced in the statute, and will continue to be consistent with the statutory language. See 12 U.S.C. 1701u(b)-(d). HUD also agrees with commenters who noted these terms are integral to the statutory intent and provide flexibility, rather than administrative burden, to grantees or recipients.

HUD notes that some perceive "best efforts" to be the more rigorous standard, while others perceive "greatest extent feasible" to be the more rigorous standard. HUD has determined not to define the difference between these two terms, but rather to increase the emphasis on outcomes as a result of these efforts. A recipient's reported results will be compared to the outcome metrics defined in the benchmark Notice. HUD program staff will evaluate the level of effort expended by those recipients that fail to meet the benchmark safe harbor, and thus will ensure that the statutory terms are being properly enforced. HUD included a list of examples in the regulation at §§ 75.15 and 75.25, including engagement in outreach efforts to generate job applicants who are Targeted Section 3 workers, providing training or apprenticeship opportunities, and providing technical assistance to help Section 3 workers compete for jobs (e.g., resume assistance, coaching).



Move to Labor Hours*Support for Using “Labor Hours”*

Many commenters supported the shift to labor hours and, notwithstanding the alternatives presented in the proposed rule for PHAs, encouraged HUD to do the same for public housing construction, modernization, and similar work. These commenters stated that the “new hire” loophole should be eliminated for both housing and community development and public housing projects. Commenters stated that, in practice, contractors have only brought on new hires for short periods of time; the shift to labor hours will promote longer term employment. Commenters also stated that the shift to labor hours would solve the problem of contractors using dishonest practices to meet benchmarks, such as hiring Section 3 residents to fill the 30% benchmark only to lay them off shortly thereafter, or employing Section 3 hires for less than 20 hours a week. Commenters stated that allowing PHAs and their contractors to use “new hires” could provide a loophole to PHAs, allowing them to hire Section 3 workers for a limited or short time frame in order to comply with the regulation. Short-term employment does not allow residents to obtain technical skills, knowledge, or adequate savings. PHAs should be required to use labor hours worked because they can evade Section 3 compliance through manipulative hiring practices.

Commenters stated that the “labor hours” standard is far more effective, less susceptible to manipulation and administratively easier to verify. Commenters stated that the new hire standard is vulnerable to manipulation, because any contractor or subcontractor that performs work on more than one project at a time can easily avoid Section 3 hiring responsibilities by placing their new hires on non-Section 3 covered projects. Commenters asserted the new hire standard may be the single greatest barrier to achieving the employment potential of Section 3.

HUD Response: HUD agrees that counting new hires can be problematic and that collecting labor hours can be a more effective measure. As stated in the proposed rule, HUD believes that counting labor hours is consistent with the statute and mitigates contractors’ ability to manipulate their Section 3 outcomes. HUD has adopted the suggestion by the commenters and in the final rule applies the labor hour requirements to both housing and community development and public housing projects.

Support for Using New Hires

Many commenters supported retaining the new hires metrics. Commenters stated that tracking by labor hours is burdensome, will increase administrative costs, and will not streamline the Section 3 reporting requirements. One commenter refuted HUD’s hypothesis articulated in the proposed rule and stated that a labor hours metric is unlikely to capture the data on sustained employment opportunities that HUD is seeking. Another commenter stated that the proposed labor hours metric would decrease the number of firms willing to bid on contracts, increase the cost of public contracting for both the PHA and contractors, and provide no appreciable increase in Section 3 workers. Commenters stated that HUD should continue to track compliance by new hires for both Subparts B and C.

One commenter stated that labor hours should only apply to projects that already require the collection of certified payrolls as part of Davis Bacon compliance. Another commenter recommended HUD look to existing programs such as the Department of Transportation’s Disadvantaged Business Enterprises for guidance to make substantive changes to Section 3.

Commenters stated that the changes will generate additional administrative burdens. Commenters especially emphasized the potential impact on the Housing Trust Fund (HTF) program and state CDBG and HOME program implementation because states, particularly small and rural community sub-grantees, have limited capacity. Commenters recommended HUD give State CDBG programs a similar alternative to the one offered to PHAs in § 75.15(d). Another commenter proposed HUD allow State CDBG programs to use a good faith assessment of hours, stating that § 75.25(a)(4) will help but will not eliminate the difficulty for State CDBG programs. Another commenter specifically referenced HOME funding and the HTF regulations, noting that stated HTF regulations do not trigger Davis-Bacon and it is rare for a HOME-funded project to trigger Davis-Bacon and prevailing wage requirements.

Commenters stated that HUD’s assumption that labor hours are already tracked by most contractors and subcontractors to comply with the prevailing wage requirement is false. Commenters specifically noted that not all CDBG programs are subject to such requirements. One commenter wrote that even a small maintenance contract could result in 6 extra work hours for

staff charged with ensuring correct payroll entries and compliance, stating that a current contract that does not track labor hours would have an increase of approximately \$606,000 of federal funding required to administer the contracts, an additional 5% of costs. Another commenter stated that the proposed shift to labor hours will create an estimated 110 hours of additional administrative effort for the commenter per construction project, and will not impact the duration of Section 3 worker employment or allow HUD to better determine if long-term employment opportunities are generated. One commenter stated that tracking labor hours would require city contractors and subcontractors to track project labor hours using LCPTracker as the city does, necessitating increased administrative staff and resulting in higher contract amounts. One commenter stated that payrolls required for Davis-Bacon compliance are often submitted in hard copy, so compliance with the shift to labor hours would require manual data entry, a significant added labor-intensive task. Commenters also stated that many contractors are small business owners who do not have payroll software and many housing authorities do not have sufficient staff to track hours worked on all projects. Commenters also noted that many medium and smaller sized PHAs do not use LCPTracker and instead rely on contractor payrolls to monitor Davis-Bacon and Section 3. Other commenters stated that tracking hours could be more burdensome than tracking new hires, because new hires are only reported once. Tracking the workers’ hours necessitates verifying each Section 3 employee each week for the duration of their employment.

HUD Response: HUD carefully considered the diverse public comments on the use of labor hours versus retaining new hires as the measurement for assessing compliance with Section 3 requirements. HUD believes that the use of new hires provides an incomplete measure of the economic opportunities available to low and very low-income persons envisioned by the Section 3 statute. HUD believes that moving to the labor hours metric provides a more robust measure of how Section 3 is intended to work and mitigates contractors’ ability to manipulate Section 3 outcomes. HUD concluded the benefits of the labor hours approach outweighs the marginal cost that would result from this shift. HUD has determined that, while public commenters have concerns about possible burdens that result from the



proposed transition to recording labor hours instead of new hires, it is in the best interest of the communities served by HUD to implement a more impactful Section 3 standard across all HUD-funded programs. The use of labor hours is intended to ensure that recipients of these program funds are fully in compliance with the intent of Section 3—maximizing the economic opportunities arising from Federally funded activities that are available to low- and very low-income persons, including those who reside in public housing.

HUD also notes that the comments revealed a diversity of understanding with respect to HUD's record-keeping expectations in measuring the labor hours metric. HUD does not anticipate the level of detail in record-keeping that is required under the Davis-Bacon prevailing wage framework for purposes of Section 3. The proposed rule does not require prevailing-wage-style payroll reports. HUD does anticipate that either employers have some form of time and attendance system, particularly where employment uses an hourly wage structure, or that employers have salaried staff. The final rule does not require any change in these systems, nor necessitate any software approach to tracking payroll. Those employers that use a time and attendance system to track hourly wages may rely on that data, while the final rule provides a good faith reporting exception which applies to all entities that do not have an existing time and attendance system. The final rule has been modified in an effort to clarify that the good faith exemption applies to all Section 3 reporting entities (not only contractors and subcontractors) and that data from any existing salary-based or time-and-attendance-based payroll records can be used in good faith reporting under Section 3. HUD is mindful of the need to update policies and procedures for planning purposes, and the importance of implementing the rule such that employers will be able to comply. Therefore, HUD has provided for a transition period and a bifurcated compliance date. Public housing financial assistance recipients must comply with the reporting requirements starting with the recipient's first full fiscal year after this final rule's effective date. Section 3 project recipients must comply with the reporting requirements starting with the recipient's first full program year for projects committed or awarded after this final rule's effective date.

Many Section 3 Positions Are Short-Term in Nature

One commenter stated that many of the jobs made available under Section 3 requirements are short term positions specific to the needs of the individual project and/or worksite. These positions provide opportunities for the target population of low-skilled workers to build work experience (leading to possible economic advancement) while helping ensure project costs remain reasonable. Another commenter stated that the Section 3 goal leading to long-term employment and career advancement is unrealistic, as most opportunities generated by Section 3 projects are construction-related and therefore seasonal or project-based; it would be burdensome and complicated to track via labor hours long-term employment that results from a Section 3 worker being hired on a subsequent Section 3 project by a different contractor. Contractors do not keep pools of long-term general laborers on hand for consecutive projects as a means of employing Section 3 workers. Other commenters stated that nothing in the statute states that long-term employment through public housing or other housing and community development funding is the goal of Section 3; the statutory intent is to provide employment and training opportunities to residents of low-income communities where Federal housing and community development dollars are being spent, and tracking new hires better meets this intent.

Similarly, commenters stated Section 3 workers are more likely to assist in temporary work for PHAs. Using new hires better fits with this economic reality. One commenter stated that contractors do not reduce the number of part-time employees so they can provide full-time, long-term employment to fewer Section 3 workers. Other commenters stated that the nature of the construction industry is episodic; workers are not employed by one company for long periods of time, but from project to project, and workers often move from one company to another. The number of hours that a specific person works is generally based on what is required for the project and the type of work they are doing. Commenters asserted it is unreasonable to think that hours for lower-skilled employees will dramatically be increased for a specific construction project by moving to a "labor hours" standard.

Commenters also stated that the move to labor hours will confuse contractors and create more complexity. Another

commenter anticipated pushback from contractors declining to bid, which can lead to an increase in the cost of developing affordable housing. Commenters stated that tracking labor hours could provide contractors with an incentive to hire fewer low-income residents by employing those hired for a greater number of hours. This would have a negative effect on the number of low-income residents hired overall.

HUD Response: HUD recognizes that many Section 3 opportunities are short-term employment opportunities. The shift from measuring new hires to measuring labor hours continues to value these short-term opportunities as creating significant economic opportunities for low- and very-low-income workers, and these short-term opportunities will likely remain a primary source of Section 3 opportunities. At the same time, the shift in metrics more accurately reflects the nature and extent of these employment opportunities and places greater relative weight on those opportunities which do provide long-term career ladders and sustained employment opportunities.

There is no obligation on a reporting employer to track an employee's work beyond the immediate short-term seasonal or project-based employment. The opportunity to track an employee over time is solely an opportunity which can be seized by those reporting employers who have invested the extra time and effort to nurture an employee over time. That extra effort to develop a career track is not recognized by the previous new hire metrics but is recognized in the labor hour metrics. It should be noted, however, that the use of the labor hour metric to reward retention applies only to the relationship with the current employer. (See § 75.11(a)(2) "A worker who currently fits or when hired fit at least one of the following categories, as documented within the past five years . . .") This provides an option for employers to look back to the worker's status at the time of original employment but does not require that an employer do so if the employer only wants to reference the employee's current status. Contrary to the concept referenced in the comments, there is no ability to claim long-term employment when hired on a subsequent Section 3 project by a different contractor.

This rule updates HUD's Section 3 regulations to create more effective incentives for employers to retain and invest in low- and very low-income workers. It is HUD's opinion that the change from new hires to labor hours, in combination with the opportunity to



provide good faith assessments, is consistent with businesses' existing payroll systems. Finally, HUD is of the opinion that this change will better advance the goal of sustained employment and career opportunities for low- and very low-income workers.

Alternatives

Several commenters suggested alternative frameworks for measuring Section 3 results, in some cases using the labor hours metric and/or the new hire metric already articulated in the current and proposed rules and in some cases proposing new alternative metrics entirely.

Some commenters recommended including definitions for both Alternative 1 and Alternative 2 so that agencies may exercise whichever option best suits their local circumstances. One commenter recommended using the \$200,000 project threshold or \$400,000 recipient threshold to determine whether labor hours or new hires should be the appropriate reporting metric, as larger projects have greater potential to create long term employment opportunities. One commenter focused on the safe harbor benchmark, stating PHAs should have the choice of labor hours at 10% or new hires at 30%. A commenter stated that if labor hours is adopted, all recipients and subrecipients should have the same flexibility allowed to PHAs.

Another commenter stated that "labor hours worked" should be used in conjunction with "30% new hires." The commenter wrote that many PHAs do not track the generated new hires metric making the current 30% of new hires mandate irrelevant—some PHAs allow contractors and subcontractors to select how many hires they will take onto a project despite it coming short of the 30% benchmark. The commenter wrote that tracking both "labor hours worked" along with the "30% new hires" provides further assurance that a recipient's contractors and subcontractors do not avoid their responsibilities to pay the prevailing wage in accordance with the Davis Bacon Act.

Other commenters argued neither labor hours worked, nor number of new hires are accurate metrics for Section 3 compliance and impact, where the goal of Section 3 is sustained economic independence and economic enhancement for Section 3 workers in and around HUD's investment areas. Commenters suggested compliance should instead be measured by: (1) Payroll dollars paid to Section 3 employees; (2) training dollars spent training Section 3 workers; and (3)

contract dollars paid to Section 3 contractors. Commenters further asserted tracking employment status would be unnecessary if all Section 3 employment payroll dollars were captured as a percentage of gross payroll dollars instead. Another commenter stated that an alternate suggestion would be to delineate Section 3 workers as full-time or part-time, and that tracking hours by using these two categories would be effective while still giving HUD information about the hours being completed by each worker. One commenter recommended Alternative 2, which continues to track new hires with the addition of Targeted Section 3 workers.

One commenter stated that transparency is needed, and the new revisions of Section 3 should include that contractors and subcontractors must make public the total amount of workers expected to complete a construction project.

Commenters proposed a third alternative to the two proposed, which is to stay with the current existing Section 3 goals, for both new hires (30% of new hires) and for contracting with Section 3 business concerns (10% of construction dollars and 3% of other dollars). Changes to what is already understood by contractors will be administratively burdensome and will require additional education and training for contractors and subcontractors.

HUD Response: HUD appreciates the alternatives suggested and has considered the various comments regarding the alternatives presented in the proposed rule and the modifications to those alternatives presented in the comments. HUD has concluded that both the use of Alternative 2 (New Hires) and the use of a hybrid drawing from both Alternative 1 and Alternative 2 provide an incomplete measure of employment opportunities generated through Section 3. Therefore, HUD decided not to retain the new hire standard. Rather than apply new hires recordkeeping to some programs and labor hours to others, HUD believes it is more efficient and effective for purposes of HUD's objectives with respect to Section 3 to apply the same standard across the board. HUD has determined to align Section 3 reporting requirements with typical payroll business practices by tracking labor hours (whether based on prevailing wage data, non-prevailing wage time-and-attendance system data, good faith assessments of hourly workers not tracked through a data system, or good faith assessments of salaried employees). While commenters varied

on whether tracking Section 3 outcomes through labor hours will be easier for recipients of HUD funding, HUD has concluded that the consistent labor hours metric more accurately reflects the impact of Section 3 and the economic development opportunities created. With respect to the alternatives regarding aggregate payroll tracking or tracking full-time and part-time positions, HUD believes that tracking of labor hours will adequately show hours worked. HUD has determined that tracking of training will be done qualitatively when appropriate.

Process for Tracking Labor Hours

Commenters stated that while they appreciated the idea of streamlining the metric, tracking new hires vs. hours may be a disincentive to developers if the tracking is more onerous or complicated than the current method. If tracking labor hours is a goal similar to Davis Bacon, then the process should be fully integrated with the Davis Bacon procedure including the duration of tracking (only until project completion), reporting requirements, and procedures. Commenters stated that ascertaining whether an employer has any new hires is not a simple task; it involves (1) reviewing pre-award payroll records to determine who was on the employee's payroll at the time of contract award and (2) reviewing ongoing payroll records for the duration of the contract to determine whether any new employees have been hired. Commenters also stated that it makes no sense to apply the "labor hours" standard to only one type of construction and rehabilitation project but not to another, based solely on the type of HUD funds involved. If a contractor employs no Section 3 workers, there should be no requirement to provide the data.

Commenters stated inexpensive software is available that enables contractors to submit electronic payroll reports and allows PHAs and other Section 3 funding recipients to easily determine the hours worked on the project, in each trade, by all workers and by Section 3 residents. Commenters noted such software is available to recipients of housing and community development assistance and also to PHAs and other public housing financial assistance recipients. Commenters stated that commonly used Contract Management and Payroll systems such as LCPTracker and B2GNow have features that align with compliance practices and make monitoring more effective. One commenter stated that HUD could provide appropriate software to all



agencies to assist them in tracking and reporting labor hours. A commenter noted that its city has a Federal labor standard software tracker which only 21% of contracts use, and this rule would require 100% of contractors to use the software, resulting in increased administrative work, contract costs, and system management.

One commenter noted that it would be easier to track labor hours with LCPTracker software if the reporting were more aligned with Davis-Bacon reporting. Commenters also saw potential in the hourly tracking if there were a way to eliminate double paperwork by adding Section 3 reporting to the existing Davis-Bacon worksheets. On the other hand, when Davis-Bacon does not apply to a Section 3 project, some commenters felt the administrative burden of tracking hours could be higher. More information would be needed about how the reporting requirements would be implemented before it could be definitively agreed that tracking hours is less burdensome than tracking new hires.

HUD Response: HUD recognizes the diversity of views on whether tracking labor hours would be less burdensome for organizations obligated to report Section 3 results. Based on the comments, HUD has concluded that it is likely to be less burdensome to track labor hours in many circumstances, and HUD has clarified the applicability of the good faith exemption to mitigate any potential burden for those who do not have payroll systems which would align to a labor-hours reporting metric. For those efforts subject to Davis Bacon requirements, which includes many HUD-funded construction endeavors, tracking labor hours consistent with existing tracking for prevailing wage requirements would almost certainly reduce burden on recipients. HUD is aware that there are existing software options that have the potential for capturing total labor hours and labor hours contributed by Section 3 workers. HUD also is exploring whether and how to operationalize and integrate HUD's Section 3 Performance Evaluation and Registry System (SPEARS) with outside software vendors. The SPEARS system already has optional data fields to capture the Aggregate Number of Staff Hours Worked and Total Staff Hours Worked by Section 3 Employees, and the system will be modified to align with the final rule. Underlying these considerations, however, is HUD's belief, as described above, that tracking labor hours will better allow HUD to determine if long-term employment opportunities are being generated, and

that the metric should be consistent without regard to the identity of the recipient of HUD funds. Unlike a labor hours measure, the new hire measure does not consider the share of actual work done by low- and very low-income workers, and new Section 3 hires may not be given the opportunity to work a substantial number of hours.

Labor Hours Based on Good Faith Assessment

One commenter stated that the proposed new rule allows for recipients to rely on a contractor's "good faith assessment" of labor hours (rather than payroll reports) if the contractor is not subject to other requirements specifying time and attendance reporting. Since a large proportion of housing rehabilitation and construction projects do not meet the unit thresholds that trigger Federal labor standards (*i.e.* eight units for CDBG, 12 units for HOME), grant administrators will regularly have to report labor hours based on a contractor's "good faith assessment." Use of this approach will introduce an unknown error margin into the calculation of labor hour benchmarks. This lack of data integrity calls into question the meaning of the proposed benchmarks and the soundness of using "labor hours" as a unit of measurement. Commenters stated that Section 3 businesses who report labor hours in "good faith" need to have specific recording requirements (*i.e.*, software) to avoid manipulation; it is more efficient to rely on tracking systems instead of contractors' good faith submissions. Commenters stated that not all HUD construction projects are subject to Davis-Bacon compliance and even a good faith assessment of labor hours will require significant PHA resources to monitor, review, and compile. One commenter stated that while the proposed rule states that HUD will permit "a good faith assessment of the labor hours" for certain employers, recipients could still be required to establish new compliance procedures, including determining how to protect the privacy of Section 3 workers and businesses when supplied with labor hours supporting documentation.

HUD Response: The final rule is explicit that employers are not required to acquire a time-and-attendance system in order to comply with the Section 3 rule. The "good faith assessment" is a limited exception to be used by employers who do not have systems in place to track labor hours. This rule was put in place to avoid increased administrative burdens. HUD is aware of the margin of error represented in the good faith assessments, but has

concluded that even with this margin of error, the labor hours metric provides a more accurate reflection of the economic opportunities created in connection with HUD-funded activities than the new hires metric. The exception does not apply if the employer is subject to other time-specific requirements.

Section 3 Applicability Threshold, HUD's Lead Hazard Control and Healthy Homes Programs and All Section 8 Programs

Total Funds Threshold or per Project Threshold Versus an Increased Threshold

The proposed rule set the Section 3 applicability threshold for Section 3 projects to projects where the amount of assistance exceeds \$200,000. HUD received comments both in favor of maintaining the current \$200,000 threshold and in favor of the new proposed threshold. Commenters also addressed the use of a project versus a total funding threshold. In addition, other commenters provided a range of alternative frameworks for setting the threshold amount—different numbers and the inclusion or exclusion of different kinds of funding in the threshold calculations.

Some commenters recommended that the \$200,000 threshold be based on the total amount of funding received within the fiscal year because it is a more simplified and streamlined process. Commenters stated the change to a per project threshold would result in many housing production projects that are mainly small and resource constrained having to comply with Section 3 requirements for the first time, noting that a per project threshold can become complicated and burdensome when a recipient handles a large volume of contracts that are funded by multiple sources. Commenters went on to state that a per project threshold would reduce the number of economic opportunities directed to low-income persons and recommended continuing to subject Project Based Voucher programs to Section 3 requirements to ensure those opportunities are directed toward low-income persons and businesses that employ them. Commenters in this line of thought noted that the \$200,000 per project threshold would potentially exempt projects where the HUD funding is less than \$200,000, even though the combined total project funding is much higher. Commenters stated this could lead to a decrease in the number of projects subject to Section 3 and an



overall reduction in Section 3 program impact.

Other commenters supported the per project threshold generally without commenting on the amount or supported the \$200,000 per project threshold and saw it as an improvement. Some of these commenters noted that while \$200,000 is an improvement over the current threshold, it does not relieve underlying concerns that contractors may break up activities into small contracts of less than \$200,000 each to avoid accountability. Several commenters agreed that a \$200,000 per project threshold would still allow contractors awarded significant funding to avoid Section 3 requirements by carrying out small discreet activities even though they cumulatively spend more than the threshold amount. A commenter suggested that the final rule include a prohibition on such activity, so that HUD has authority to pursue enforcement measures if HUD determines a recipient is “gaming the system” to avoid Section 3 obligations.

Other commenters provided alternative threshold amounts at a range of figures up to \$1 million. Some commenters stated the \$200,000 per project threshold will not necessarily result in employment opportunities for low-income people, arguing a higher project amount does not inevitably translate to the need for new employees or a benefit to Section 3 business concerns. Commenters suggested an alternative \$250,000 threshold which would coincide with the Office of Management and Budget simplified acquisition threshold and could automatically change when that amount is updated. Other commenters supported using the \$250,000 threshold for all projects to include PHAs. Some large PHAs with Section 3 experience recommended raising the threshold to \$350,000 on a per project basis and making this threshold consistent across all programs and funding sources. Commenters in agreement with this notion also noted that HUD has determined that employment opportunities in CDBG funded projects under \$350,000 are very minimal, and these commenters argued that the same is also true of public housing projects. Commenters also recommended \$400,000 or higher to increase the number of program recipients exempted from Section 3 requirements from less than 4 percent to 20 percent, greatly reducing the compliance burden for smaller grantees. Still other commenters recommended a higher threshold of \$750,000, tied to the single audit threshold, noting that smaller grants

generally will not involve sufficient hiring opportunities to warrant the increased administrative burden. Other commenters recommended that a \$1 million threshold would be a better measure of a project of a scale that would have the potential to drive the hiring of Section 3 workers and justify the additional administrative burden on recipients, subrecipients, and contractors to implement the program, particularly state CDBG programs that primarily fund public infrastructure. Another commenter recommended exempting grantees that receive \$1 million or less annually in CDBG or HOME funds because such grantees focus on a finite set of activities that involve small projects.

Commenters stated that a low threshold will create an undue compliance burden for small projects. Commenters suggested that adopting a higher per project threshold would still ensure the majority of CPD grants are covered but would likely offer significant regulatory relief for smaller grantees, builders, developers, contractors, and subcontractors who are disproportionately burdened by regulatory obligations. Some commenters who advocated for a higher threshold linked their reasoning to the effect of the threshold amount on contractors and subcontractors, noting that Section 3 obligations apply to recipients, their sub-recipients and so on. Commenters described cases in which builders forgo using covered funds to avoid the liability and compliance burdens of Section 3, and situations where developers experience costly delays on projects while searching for qualified subcontractors who are not deterred by the Section 3 paperwork and certifications.

Commenters also suggested that both a recipient threshold at \$400,000 and a project threshold of \$200,000, applicable across all programs, would be most appropriate to reduce reporting burdens with a limited impact on the dollar amounts of funding covered. Another recommendation was to apply Section 3 obligations to any entity that receives at least \$200,000 during a program year for a specific program activity. Other commenters suggested either the threshold for contracts should remain \$100,000 in HUD assistance; or a “total contract value” threshold should be defined that will trigger Section 3 on HUD-funded contracts, regardless of the dollar amount of the HUD funding. Other commenters offered an alternative threshold of 10 percent of construction costs per project. Commenters also reiterated that some CDBG grant awards are very small,

ranging from \$50,000 to \$200,000, so units of general local government have difficulty finding contractors to bid on the projects, let alone finding a contractor that is a Section 3 business concern and is willing to work on a small project. Finally, commenters suggested limiting activities that trigger the threshold to only construction and rehabilitation, as defined within the Section 3 statute for CDBG, HOME and other CPD programs.

HUD Response: HUD acknowledges the considerations raised by all the commenters in their responses. HUD found that the portion of Section 3 expenditures excluded by the \$200,000 per project threshold generate relatively few Section 3 jobs. After weighing the various considerations, this final rule maintains the \$200,000 per project threshold in general but makes changes to the Lead Hazard Control & Healthy Homes Programs threshold. HUD believes that project funding levels help accurately define thresholds because the amount of funding spent on a project is directly related to the economic opportunities generated by the project. HUD acknowledges the potential disadvantages mentioned by commenters to using a per project threshold but reiterates the per project threshold will help provide opportunities for those who are recipients of Federal financial assistance for housing or residents of the community in which the Federal financial assistance is spent. In addition, HUD remains open to adjusting thresholds in the future based on updated data analysis. The final rule clarifies that HUD may change the thresholds and benchmarks at a later date via **Federal Register** notice, subject to public comment, based on updated data input and accounting for inflation. HUD also notes that not every contractor, subcontractor or sub-recipient must use Section 3 workers. A funds recipient could meet its Section 3 benchmarks with one contract to a Section 3 business concern where the number of labor hours worked is 25% or more of all the labor hours worked by all workers on a Section 3 project while not using Section 3 workers for other work. The recipient has flexibility in determining how to meet its benchmarks.

Lead Hazard Control & Healthy Homes Programs Inclusion

Commenters who advocated for a single consistent per project threshold across all programs stated that the Lead Hazard Control and Healthy Homes programs should also be subject to the same threshold. Other commenters



agreed that Lead Hazard Control and Healthy Homes projects should be exempted from administrative and compliance burdens based on a threshold of \$200,000 or greater, stating these projects are unlikely to generate many employment opportunities because they are small and Lead Hazard Control abatement and interim controls is to be done by trained and certified workers.

Some commenters agreed that including Lead Hazard Control projects with no threshold would increase the administrative burden without a benefit, and while the exclusion is understandable, HUD should pursue a standardized threshold to avoid complicating Section 3 by creating a different scope for Lead Hazard Control and Healthy Homes programs. Commenters generally supported higher thresholds for Lead Hazard Control and Healthy Homes programs. A commenter suggested it may be appropriate to use the community development assistance threshold for simplicity. Alternatively, commenters suggested a more modest reporting threshold of not less than \$50,000 for Lead Hazard Control and Healthy Homes projects, stating that for grantees working on multifamily projects in high cost cities, projects where the contract is less than \$50,000 tend to be awarded to smaller contractors. A \$50,000 threshold would meet HUD's admirable intention of ensuring greater Section 3 participation from Lead Hazard Control and Healthy Homes grantees without imposing hardship on such small contractors.

HUD Response: HUD agrees that the \$200,000 threshold should not apply to Lead Hazard Control and Healthy Homes programs since those projects are generally smaller dollar amounts. However, in keeping with Section 3's statutory priorities and applicability, HUD is choosing to adopt a \$100,000 project threshold regarding application of Section 3 to Lead Hazard Control and Healthy Homes programs.

Section 8 Programs Exclusion

Many commenters supported the exclusion of Section 8 programs in the proposed rule, as Section 8 programs are not included in the statute. Commenters went on to note that because Section 3 programs are development subsidy sources and Section 8 programs provide operating subsidies, Section 8 assistance recipients should not be subject to Section 3 regulatory responsibilities. Commenters noted that the primary purpose of Section 8 programs is to provide a rental subsidy that covers the difference between the contract rent and 30 percent of the tenant's income,

stating these programs are "affordability tools, not construction tools," and agreed HUD should not increase regulatory burdens on housing providers by expanding the scope of Section 3 to programs not covered in the statute.

Some commenters urged that for Subpart B, HUD should retain an option for PHAs to report on Section 3 requirements for Section 8 funded programs, noting that these programs generate significant employment and training opportunities for Section 3 workers. Commenters suggested HUD format Section 3 reporting so that Section 8 funded placements can be captured as part of a PHA's overall efforts. Commenters also suggested the current reporting system be updated to allow for the reporting of other placements that might be excluded with the new proposed rule, such as placements under professional service contracts.

HUD Response: Section 8 programs are not covered under the Section 3 statute. Therefore, HUD in this final rule maintains the clarification in the proposed rule that Section 8 programs are excluded from Section 3 requirements.

Section 3 Project Definition

Commenters recommended that HUD more clearly define "project" for the purpose of Section 3, and asked how HUD would view a job order contract of more than \$200,000 that may work on various locality-owned sites (e.g., all of a locality's schools or homeless shelters). These commenters also asked, if several unrelated HUD-funded activities are taking place at the same location and have a combined value of more than \$200,000 constitutes a project. Lastly, the commenters asked whether the per-project threshold is based solely on construction-related activities, and whether the level of Federal assistance to a project must exceed the \$200,000 threshold to trigger Section 3.

Another commenter recommended that HUD define "project" as follows: Project means a site or sites together with any building or multiple buildings located on the site(s) that are under common ownership, management, and financing and are to be assisted with Section 3 covered funds as a single undertaking. A program that funds multiple buildings under separate ownership, management and financing is not a project.

HUD Response: HUD supports the Section 3 Project definition within the proposed rule and believes it is consistent with the statutory

requirements of HUD programs. HUD also intends to provide sub-regulatory guidance and technical assistance on a program-by-program basis to assist recipients with Section 3 implementation.

Section 3 Worker

Rule Rewards Creating Opportunities for Persons Who Are Not Low-Income

Commenters stated that the rule, particularly the definitions of Section 3 worker, rewards creating opportunities for persons who are not low-income, which would be counterproductive to the intent of the Section 3 program. A commenter stated that the proposed definition could inadvertently include individuals who are not low-income because categories (ii) and (iii) are not income-based.

Specifically, some commenters objected to category (ii) which allowed workers who live in a Qualified Census Tract (QCT) to be included in the definition of "Section 3 worker" because these individuals will not necessarily be low-income. One commenter noted this is especially true in large metropolitan cities with mixed income communities and gentrifying areas. Another commenter stated that researching employee residence as of the date of hire to determine census tract qualification will be difficult or impossible for long-term employees who may have moved multiple times. Commenters warned that the QCT designation would create a risk of potential abuse by recipients. Some commenters suggested removing the QCT criteria altogether since the definition already includes a low- or very low-income person.

Other commenters objected to category (iii) which included all Section 3 business concern employees as Section 3 workers. These commenters stated that someone working at a Section 3 business concern is not necessarily a resident of HUD-assisted housing, nor is it likely that a business owned by 51% low-income people would hire only public housing or HUD-assisted residents. For this reason, commenters recommended that HUD should exclude "a worker employed by a Section 3 business" from its definition and benchmarks and the definition of Section 3 worker and Targeted Section 3 worker. One commenter noted the phrase "worker is employed by a Section 3 business" is included in both the Section 3 worker and Targeted Section 3 worker definitions and recommended including this term in the Targeted Section 3 worker definition



only and not the Section 3 worker definition.

HUD Response: HUD agrees that paragraph (1)(ii) could inadvertently include individuals who are not low-income. This final rule removes paragraph (1)(ii) regarding the QCT from the definition of “Section 3 worker” from this final rule. However, HUD disagrees that the category of Section 3 business concerns should be removed from the Section 3 worker and Targeted Section 3 worker definitions. The Section 3 statute states that HUD must prioritize Section 3 business concerns. If HUD did not include Section 3 business concerns in the definitions that are used for the benchmarks, PHAs and other HUD funded entities would have no incentive to hire Section 3 businesses. Including all Section 3 business concern employees in the definition of Section 3 worker and Targeted Section 3 worker creates an incentive to contract with a Section 3 business while maintaining a single reporting metric. The final rule maintains that all hours worked on the project by the Section 3 business counts towards the benchmarks. HUD believes these changes are consistent with the statute.

Prior Conviction

One commenter wrote that convictions for certain categories of crimes may have a direct bearing on the worker’s suitability for particular jobs. Previous theft convictions, for example, may be relevant for a worker who will be involved in procurement and distribution of materials. Other commenters supported this language, stating that “there is no evidence that hiring an individual with a criminal history will have a negative impact on employee success.” The commenters also noted that the language is consistent with other HUD guidance on the use of background reports in housing decisions. However, one commenter suggested a minor revision to clarify the regulation: “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.”

HUD Response: HUD agrees with the commenters that convictions for certain crimes, such as fraud or theft, might affect a worker’s qualifications for a particular position, and that “there is no evidence that hiring an individual with a criminal history will have a negative impact on employee success.” HUD notes that the Section 3 worker definition provides that an individual’s prior arrest or conviction shall not negatively impact their Section 3 worker

status, but the definition maintains the requirement that the individual is qualified for the job. Job qualifications may include the worker’s arrest or conviction history. The rule does not require a Section 3 worker with a criminal history to be hired. HUD has considered the suggestions and has chosen to keep the regulatory language in § 75.5. *See Section 3 business concern*, § 75.5 (“The status of a Section 3 business concern shall not be negatively affected by a prior arrest or conviction of its owner(s) or employees.”); *Section 3 worker*, § 75.5 (“The status of a Section 3 worker shall not be negatively affected by a prior arrest or conviction.”); *Targeted Section 3 worker*, § 75.5 (“does not exclude an individual that has a prior arrest or conviction.”)

Additional Categories

One commenter stated that the proposed rule no longer explicitly lists a public housing resident as a “Section 3 resident” and does not provide for the employer to continue counting that worker in the future. Another commenter suggested that staff hired by a PHA should be counted toward Section 3 requirements. Commenters suggested additional categories and expansion of existing categories, and requested HUD explicitly list the following: people immediately prior to hiring are public housing, Section 8, Section 811, Section 202 residents or other low-income people, and women. Commenters recommended that a “Section 3 worker” should be a worker whose income is below the limit set by HUD, or a resident of public or HUD-assisted housing.

One commenter supported the change to using an individual’s status as low-income versus household income, which will increase the pool of persons that can be counted as a Section 3 worker and make meeting the benchmarks more attainable. Commenters requested clarification on whether the HUD-defined low-income level will be based on individual or family income and one commenter recommended the use of only an individual’s income.

HUD Response: HUD wants to clarify that, while the definition of Section 3 worker does not include public housing residents, it does include all workers whose income is below the income limit established by HUD, which is the same limit that would qualify someone for public housing. Therefore, public housing residents would be considered Section 3 workers. HUD does not believe that all staff hired by a PHA should be counted as Section 3 workers.

Those staff that meet the qualification of a low or very low-income person, as defined by HUD’s income limit, would already qualify, and HUD does not think it is appropriate to include all PHA staff. As for expanding the categories further, the Section 3 statute is specific as to the priorities that HUD should be providing with employment and other economic opportunities generated by Federal financial assistance. Therefore, HUD is not expanding the scope of Section 3 workers beyond those listed in the statute. HUD changed the Section 3 worker definition to include a worker whose income is below the income limit established by HUD in place of the family income and appreciates the comments in support of the change.

Setting Time Limits

Commenters recommended that HUD should keep the existing standard of a three-year period for counting workers in order to account for staff turnover and to generate more accurate metrics. Other commenters recommended HUD limit someone counting as a Section 3 person to 5 years. Another commenter stated that because many contractors and subcontractors report no new hires for specific projects, a Section 3 worker should be defined as one who “at the time of hire” was low- or very low-income. One commenter asked HUD to be more specific in defining a Section 3 worker rather than stating low-income is a “limit established by HUD.”

HUD Response: 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.

Guidance

Commenters requested that HUD provide more specific guidance regarding how to calculate labor hours for the purpose of determining Section 3 status. For example, is there a set timeline for consideration, such as during the past year or several years? Or is it based on the business’ last 1–2 payrolls to capture the most recent picture of employment? Commenters stated that it is unclear over what time period labor hours are to be measured.



One commenter stated that it is unclear whether the “labor hours” standard relies on the labor hours on the Section 3 project, or in general.

HUD Response: HUD will provide additional guidance to assist PHAs and grantees in how to calculate labor hours. Generally, labor hours will be calculated based on the labor performed on a Section 3 project for housing and community development financial assistance or on all labor hours performed within the fiscal year for public housing assistance.

Subrecipient

One commenter stated that using the applicable definition of subrecipient in the HOME program would mean that multifamily owners contracting directly with the State may not have to comply with Section 3 requirements because they are not included in that definition for the HOME program in 24 CFR 92.2. This commenter also noted that multifamily owners are also not often contractors (under the proposed definition), because they do not enter into a contract with a recipient to perform the work. This commenter suggested inclusion of owners in the HOME program and changing the definition of subrecipient to say “has the meaning provided in the applicable program regulations, and in 2 CFR 200.93” or suggested HUD amend the definition of contractor to further define the phrase by adding “work in conjunction with a Section 3 project,” to more clearly identify that it includes an owner in the HOME program that contracts with general contractors.

HUD Response: HUD appreciates the comment. However, subrecipient has different meanings in different programs, which is why HUD defined it as either the meaning as is applied in the specific program or 2 CFR 200.93.

Targeted Section 3 Worker Definition

Some commenters supported the new “Targeted Section 3 worker” definition and eliminating tracking Section 3 business concern types separately. Some commenters stated that the Targeted Section 3 worker concept is consistent with the goal of expanding employment opportunities for individuals that receive Federal assistance for housing. Another commenter agreed with HUD’s efforts to track and target certain high priority Section 3 workers separately and efforts to fold Section 3 business concern engagement into other benchmarks.

Other commenters opposed the “Targeted Section 3 worker” definition, stating that it is duplicative with worker categories already given preference

under § 75.9. Commenters stated a separate reporting category for “Targeted Section 3 worker” merely complicates reporting requirements for recipients, contractors, and subcontractors, and recommended HUD keep the existing definition and the existing priority preference order. Other commenters noted that tracking additional information to determine Section 3 compliance would be burdensome.

A commenter recommended that hours worked by Section 3 business employees be categorized as regular Section 3 worker hours and Targeted Section 3 worker hours depending on the employee’s status to avoid inflated reporting of hours worked by targeted Section 3 workers. Other commenters suggested that a worker employed by a Section 3 business only be included in the “Targeted Section 3 worker” definition because it was created to better align the regulation with the law.

Commenters stated that counting all Section 3 business concern employees as Targeted Section 3 workers is problematic and risks questionable data. HUD should exclude “a worker employed by a Section 3 business” from the definition of Targeted Section 3 worker and Section 3 worker. Including “a worker employed by a Section 3 business” in the definition of “Targeted Section 3 worker” dilutes the purpose of creating a Targeted worker designation. It also frustrates the purpose of the statute, which is to give priority to public housing and other HUD-assisted residents in employment and training opportunities, along with low-income families near the Section 3 project location.

Commenters also suggested that HUD include public and HUD-assisted housing residents in the Targeted Section 3 worker definition for Section 3 projects, not just PHA projects. The proposed definition of Targeted Section 3 worker for PHA projects more accurately interprets the statutory priority of Section 3 to employ public housing and other Federally assisted residents than the definition for CPD recipients. One commenter recommended that HUD include the word priority in the definition of “Targeted Section 3 worker” to clarify the requirements and add objective criteria or guidance by which to monitor or measure success or satisfactory performance.

HUD Response: HUD appreciates the commenters’ recommendation to target public and HUD-assisted housing residents in both funding types. However, the statute specifies priority categories differently for recipients of

public housing financial assistance and housing and community development financial assistance. The Targeted Section 3 worker is a concept designed to serve as a proxy for the highest priority categories, allowing HUD to collect data through standardized reporting regarding the funding recipients’ efforts with respect to the priority categories. HUD believes that the definitions of Targeted Section 3 worker for both public housing financial assistance and other housing and community development financial assistance funds provide good reporting proxies for the statutory priorities and should remain as proposed. As Targeted Section 3 workers are a proxy for the priority categories solely for reporting purposes, and do not replace the prioritization that funding recipients must apply in their efforts under Section 3, the use of the word “priority” in the definition would be inappropriate.

§ 75.11 Targeted Section 3 Worker for Public Housing Financial Assistance

Commenters stated that HUD should combine 75.11(a)(2)(i) and (ii) into a single category, “residents of public and HUD-assisted housing” to more clearly include residents of all HUD-assisted housing programs and conversion projects. Commenters supported the addition of Section 8 assisted households. This change mirrors the Section 3 statute, which broadly emphasizes employment and training opportunities for “recipients of government assistance for housing.” Some commenters recommended deleting paragraph § 75.11(a)(1), because it is redundant with § 75.5. Commenters also asked HUD to clarify what “residents of other projects managed by the PHA” covers. One commenter suggested HUD add “administered by the PHA” when describing Section 8 assisted housing.

HUD Response: HUD appreciates the support for the categories in § 75.11 and recommendations to make changes to include additional HUD programs. HUD believes that consistent with the statute, the Targeted Section 3 worker definition for public housing financial assistance should focus on the categories as listed. To be inclusive of residents in other housing assisted by the PHA and residents of housing in the property management portfolio of the PHA, both categories have been included in the regulation in place of the vaguer term “managed by the PHA.” Those residents would also count as Section 3 workers for purposes of Targeted Section 3 workers for public housing financial assistance. The rule’s current “resident



of other projects managed by the PHA'' has been replaced, which should address the commenter's concerns.

§ 75.21 Targeted Section 3 Worker for Housing and Community Development Financial Assistance

One commenter wrote that limiting the definition to a geographic area eliminates large sectors of nearby Section 3 workers and business.

Another commenter noted some State CDBG programs do not operate in areas where public housing residents or YouthBuild participants typically live. Commenters also stated that the proposed definition gives broader opportunity to identify low-income construction employees for Section 3 projects but requires wage calculations and census tract verification from contractors already burdened by paperwork and will remove the focus from employing eligible persons living within a neighborhood.

HUD Response: HUD retained the proposed Targeted Section 3 worker definition in the final rule. The rule creates the "Targeted Section 3 worker" concept so that HUD can track, and recipients can target, the hiring of Section 3 workers in selected categories based on the statute's hiring priorities. The Targeted Section 3 worker category also incorporates the statutory requirements of contracting with business concerns employing low- and very low-income persons. For other HUD housing and community development financial assistance programs, such as the State CDBG program or HOME Investment Partnerships programs, Targeted Section 3 workers would be low- or very low-income workers residing within a one-mile radius of the Section 3 project. If fewer than 5,000 people live within that one-mile radius, the circle may be expanded outward until that population is reached.

The requirement that contractors verify whether workers are low or very low-income for tracking purposes is not new. Contractors were already required to verify new hires as qualifying for Section 3 status, and the statute requires that employment and other economic opportunities generated by work in connection with housing rehabilitation, housing construction or other public construction projects receiving housing and community development assistance be directed to low- and very low-income persons in the local community. HUD's proposal to use Targeted Section 3 workers for housing and community development programs that fall within a defined service area should reduce burden because HUD's mapping tool

will identify the jurisdiction the contractor should target.

§ 75.5: Section 3 Business Concern Definition

Previous Rule's "Dollar Value" Method

Commenters stated that the previous "dollar value" method of reporting contracts awarded to Section 3 business concerns should be kept, as it gives recipients and general contractors a clear benchmark to achieve when selecting subcontractors and aligns with methods many are already using to report on minority-, women-, and veteran-owned businesses. Commenters noted Section 3 is designed to promote wealth-building in addition to employment opportunities and the "dollar value" method is a better measure of economic opportunities provided to low-income owners of Section 3 business concerns than the labor hours worked by their employees. Without having a metric tied to the number of contracts awarded to Section 3 business concerns, commenters anticipated a reduction in the number of contract awards, and a reduction in employment opportunities. One commenter stated that both definitions will likely continue to be a challenging means of qualifying for eligibility and may prove difficult to document.

HUD Response: HUD found the Section 3 business concern definition to be consistent with both the previous regulation and with the statute, although HUD notes that the final rule's definition does impose more rigorous criteria for qualifying as a Section 3 business concern with respect to the percentage of workers who must be Section 3 workers. This additional rigor in the criteria ensures that, if qualifying on the basis that the firm employs Section 3 workers, a high percentage of workers are in fact Section 3 workers, and ensures that, if qualifying on the basis that the owner is a low-income individual, the owner is in operational control and will benefit from the wealth creation opportunities. The changes to the Section 3 business concern definition do not depend on the change in reporting to a labor hours metric.

HUD recognizes that some in the industry have found the "dollar value" method to be workable, and that the dollar value metric does provide a measure of the extent of contracting to Section 3 business concerns. However, HUD believes there is value in having a unitary reporting metric—labor hours—and has designed the metric to measure both direct employment and to reflect prioritization of contracting with Section 3 business concerns. HUD

believes that this new method will be effective, will encourage wealth creation opportunities for the owners of Section 3 business concerns, and will provide the opportunity for recipients of HUD financial assistance to determine which projects use Section 3 businesses in a way that is not administratively burdensome.

Rule Rewards Creating Opportunities for Persons Who Are Not Low-Income

One commenter stated that the focus on hours worked is appropriate in light of the statute's focus on providing economic opportunities to low-income residents, but aggregating hours poses a risk that non-low-income people at Section 3 business concerns may report hours, though this risk is mitigated by the Section 3 business concern definition. Another commenter stated that the 51% owned and 75% labor hours requirements allow Section 3 business concerns to employ persons who are not low-income or very low-income.

Another commenter supported replacing the aggregate dollars spent metric, but stated that including all Section 3 business concerns' employee hours will lead to the misleading inclusion of non-low-income worker hours in the data; only the hours worked by the low- and very low-income employees of a Section 3 business concern should be reported as Section 3 hours worked.

HUD Response: According to the Section 3 statute, HUD must prioritize businesses that provide economic opportunities for low- and very-low-income persons. The statute does not require that HUD prioritize business that only provide economic opportunities for such persons. If HUD were to include only the Section 3 workers in the reporting metrics, the regulation would not effectuate the statutory requirement to also place an emphasis on Section 3 business concerns. The Section 3 statute states that HUD must prioritize Section 3 business concerns in the awarding of contracts. By collecting labor hour data on all employees of Section 3 business concerns, HUD is creating an incentive to contract with a Section 3 business concern while maintaining a unitary reporting metric for Section 3 performance. The final rule maintains the provision of the proposed rule that all hours worked on the project by the Section 3 business concern counts towards the benchmarks, with the awareness that this reporting framework will collect labor hour data for workers who are not low-income. This serves as the incentive to contract with Section 3



business concerns. HUD believes these changes are consistent with the statute.

Verification

A commenter stated that nothing addresses processes for verification of Section 3 business concern eligibility, and that HUD should enhance the Section 3 business concern registry to include confirmation of eligibility or work with Equal Employment Opportunity Commission to assist jurisdictions with certification programs. One commenter noted that using the Section 3 business concern registry to project availability of Section 3 workers is unreliable because the registry is a self-reporting structure with no mechanism to verify the business on the list, it assumes such businesses are able to work in any geographic area, and many PHAs in rural and suburban areas have reported that there are no Section 3 business concerns in their areas.

Another commenter raised the issue that verifying Census tract designations would create an additional burden, especially Census tract data that changes over time, which will result in fewer contractors participating in Section 3 projects.

One commenter stated apprehension about this part of the definition because accurately tracking and reporting labor hours will be much more challenging than tracking and reporting full-time employees. The proposed definition also makes it difficult for Section 3 business concerns and the entities that contract with them to predict with confidence that they will retain their Section 3 status, as labor hours can be dependent on the number of contracts a business bids for and receives.

Another commenter requested clarification regarding how long a business retains the Section 3 business concern status once it is certified as a Section 3 business concern. Commenters suggested HUD or the local government should bear the responsibility for verifying the eligibility of a Section 3 business concern, rather than shunting that responsibility to the builder, general contractor, or subcontractors. HUD's online Section 3 Business Registry⁴ was a positive first step, but HUD does not verify the self-certifications submitted by the business concerns, and it cautions database users to perform due diligence before awarding contracts.

HUD Response: HUD plans to continue the use of the Section 3 Business Registry as an available public

⁴ HUD, *What is the Section 3 Business Registry?*, Hud.gov, <https://portalapps.hud.gov/Sec3BusReg/BBRegistry/What>.

tool. While HUD appreciates the suggestion that HUD or the local government make determinations of eligibility for Section 3 business concerns, HUD believes that, consistent with other paperwork requirements, it is appropriate that the entity receiving HUD financial assistance ensure compliance with Section 3 requirements, which includes confirming that both Section 3 workers and Section 3 Business concerns qualify as such under this regulation. HUD addressed commenters' concerns about Census tract designations by removing that language from the rule, and concerns about labor hours are addressed in previous comment responses. Once a business is certified as a Section 3 business concern, it will retain that status as long as it continues to meet the definition. Status is determined at the time of hiring for each contract and is no different from any other definition. Currently, business concerns self-certify, and verification is done by HUD. The timing is on a project by project basis.

(1)(i) *“At least 51 percent owned by low- or very low-income persons”*

One commenter stated that this part of the definition follows the statute's intent. Another commenter stated that 51 percent ownership by low- or very low-income persons is unrealistic without training programs on business management.

HUD Response: HUD appreciates the feedback from commenters and is keeping this part of the Section 3 business concern definition as it is. HUD has found this definition to be consistent with both the previous regulation and with the statute. HUD notes that the definition also includes other methods by which a business concern may be defined as a Section 3 business concern. See 24 CFR 135.5; 12 U.S.C. 1701u (e)(2).

(1)(ii) *“Over 75 percent of the labor hours. . . performed by low- or very low-income persons”*

Commenters supported changes to definitions of Section 3 business concerns, Section 3 workers, and Targeted Section 3 workers under the new hire approach. One commenter stated that the decision to focus on percentage of hours worked by Section 3 individuals will result in a decrease of self-identified Section 3 business concerns. The commenter asserted that although it is a better metric for proving actual commitment to long-term employment of Section 3 individuals, gathering the data will be overly burdensome. One commenter stated that this option will present undue hardship

to small businesses and should be omitted. Another commenter stated that this requirement will negatively affect HOME and CDBG funded projects.

Some commenters supported tracking Section 3 hiring separately from Section 3 business concern tracking. Section 3 business concerns are already encouraged to retain existing employees to meet the previous Section 3 business concern definition. Counting existing employees to meet both the contract and hiring goals may result in decreased new hiring in connection with Section 3 covered assistance. Commenters recommended only tracking new Section 3 hires employed by Section 3 business concerns relative to a contractor's hiring goals.

One commenter also stated that even though the proposed rule provides a mechanism for PHAs to continue documenting compliance through a “new hire” metric, this proposed definition would still require PHAs to analyze a business's labor hours in order to determine whether a business could qualify as a Section 3 business concern.

One commenter noted the new burden would affect businesses who may not meet the new markers and might reevaluate the benefits of working with PHAs given the increased work to track labor hours. The commenter noted in an environment where getting bids is already difficult this would further dissuade them from doing business with PHAs. Other commenters suggested focusing on long-term employment goals for employees, developing benchmarks for growth of Section 3 business concerns, providing micro-business support, and targeting capital construction projects for mentorship and sub-contracting with Section 3 business concerns.

Some commenters stated that the definition of a Section 3 business concern should remain defined in part as a business where at least 30% of the permanent, full-time workforce are currently Section 3 residents, or were Section 3 residents within three years of the date of first employment at the business concern.

Commenters stated that this proposed amendment would render most Section 3 business concern owners in the commenter's city ineligible, as over 50% qualified by meeting the existing standard for the makeup of their workforce (30% full time permanent employees who are Section 3 residents). The result will be fewer Section 3 business concerns maintaining and/or seeking certification and will further compound the challenges of helping low-income workers access jobs. Most Section 3 business concerns do not



possess the infrastructure to support tracking this information. A commenter stated that 75 percent of labor hours is too high as a standard for determining Section 3 business concern eligibility. A smaller percentage would be more appropriate, or perhaps HUD could allow businesses to qualify either by labor hours or percentage of staff. Commenters stated that the 75 percent criterion would defeat important purposes of the Section 3 program which include encouraging business creation and increasing contract opportunities for businesses that employ a substantial number of low-income residents.

One commenter stated that it would significantly increase compliance costs, and that HUD appears to assume that every project will be tracking employee hours worked due to the applicability of federal prevailing wage requirements, but this is not the case. This commenter's program includes projects that are not subject to prevailing wage requirements, but that are subject to Section 3. Another commenter stated that the new definitions could pose significant challenges to businesses as they will have to first determine which employees are considered low- and very low-income persons, and then have to calculate if their labor hours are over 75 percent.

One commenter agreed that reporting on business concerns should not be an aggregate of dollars spent. The commenter recommended that HUD keep the self-certification tool and website resource and incentivize Section 3 contractors to register to make this resource as useful as possible. The commenter observed a review of the website shows that some states do not have any Section 3 contractors listed.

Commenters stated that the change from 30 percent of full-time employees to 75 percent of labor hours performed will limit Section 3 business concerns only to those lower-skilled businesses (cleaning companies, moving companies, perhaps landscaping or painting companies) that hire an overwhelming majority of their workers as low-income.

One commenter stated that the proposal will not have the intended impact of increasing access to opportunity. This change would look backwards rather than measuring opportunities provided as a direct result of the contract award. In practice, this change would significantly impact administrative efforts, would adversely affect other qualified Section 3 business concerns, and potentially limit employment opportunities available to the targeted population.

One commenter stated that the rule should keep the threshold at 30% but change it to hours worked rather than new hires and retain other elements of the current definition. The commenter recommended that HUD only count the hours worked by Section 3 residents toward the percentage goals of hours worked by Section 3 residents (not all employees of the Section 3 business concern). The commenter believes the 30% benchmark creates an incentive for established businesses to create a professional development component to their project approach, while 75% is much too high for most businesses to pursue.

One commenter recommended the definition be modified to include more than 75 percent of the labor hours worked at the business are performed by public housing, Section 8, Section 811, or Section 202 residents or persons who, immediately prior to the date of hire, were low- or very low-income, particularly women. Commenters suggested removing the 75 percent labor hour portion all together. If HUD proceeds with this definition, it should consider a transition period so existing Section 3 business concerns can adjust to the new definition.

HUD Response: HUD believes that the refined definition continues to reflect the language and intent of the Section 3 statute, defining Section 3 business concerns in a way that furthers economic opportunities for low- and very low-income persons. HUD recognizes that 75% is a higher number than the prior new hire standard but believes that Section 3 business concerns should be either majority owned by low- or very low-income persons or should primarily employ such individuals. HUD believes that the prior 30% standard does not ensure that a sufficiently substantial number of low- or very-low-income persons benefit from the priority contracting status that the Section 3 statute and regulation provide. Section 3 business concern employees are counted as Targeted Section 3 workers, giving HUD funding recipients and Section 3 projects an incentive to hire them to meet their Targeted Section 3 Benchmark numbers. HUD acknowledges that the revised definition of Section 3 business concerns may result in a decrease in firms qualifying for the designation, but the benefits of qualification will be more directly targeted to low- and very-low-income persons. HUD notes that the safe harbor benchmarks can be adjusted by notice periodically, which is intended to allow HUD to modify the benchmarks to accommodate geographies where the initially proposed benchmarks cannot

be met due to the unavailability of Section 3 workers and Section 3 business concerns. HUD amended this provision to clarify that the 75% of labor hours should be determined based on looking back over the last 3 months of work performed for the business. The determination as a Section 3 business concern is made at the time the contract or subcontract is executed, so that the program participants have certainty in their Section 3 strategies. However, the final rule also provides flexibility to establish Section 3 business concern status during the Section 3 covered activity, to provide further incentive to employ Section 3 workers. If the business performed multiple projects, all of the hours on the projects over the prior three-month period should be considered for making the determination.

HUD notes the comment that observed a Section 3 business concern might need to track labor hours to be qualified, even if the federal funding recipient is reporting new hires. By eliminating the new hire alternative reporting metric, HUD anticipates that this dimension of documenting qualification as a Section 3 business concern will be mitigated. HUD further notes that businesses do not need to track labor hours precisely. HUD is not presuming the applicability of prevailing wage requirements, but rather is presuming that all employers paying an hourly wage will have some method to tabulate the number of hours worked, and for those that do not have a tracking mechanism in place, the final rule permits them to rely on a good faith assessment. An objective of Section 3 is to provide employment opportunities for public housing and low-income residents, which can lead to a focus on long-term employment goals. Other activities identified by the commenters are better suited for business development and therefore are outside the scope of this rule.

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. The definition has been modified to clarify this framework and to reduce the potential incentive to maintain workers at lower salaries simply to qualify as a Section 3 business concern. HUD also acknowledges that many entry-level opportunities for low-wage workers are in businesses and industries with a high percentage of low-wage employment possibilities. HUD determined not to implement a transition period, although contracts with Section 3 business concerns entered into under the regulations in place prior to the final rule's compliance date will continue to be considered Section 3 business concerns.

(1)(iii) at least 25 percent owned by current public housing residents or Section 8 residents

One commenter stated that the revised definition of at least 25 percent owned by current public housing residents, or residents who currently live in Section 8 assisted housing, will be easier to justify than evidence of a commitment to subcontract 25 percent or more of the dollar amount to all subcontracts. Other commenters stated that the third option for defining "Section 3 business concern" should be modified to require that the business have 51% ownership by public housing or Section 8 residents. These commenters warned that unless residents have majority control there is a danger of the business being a front for owners who might not represent residents' interests.

Further, the statute defines a Section 3 business concern as one with Section 3 residents having a controlling interest, or the business employs a substantial number of Section 3 residents. The commenter does not believe that this new proposed criterion is appropriate. Commenters also thought it would be inconsistent with the Congressional statutory intent that economic opportunities be provided to business concerns that are *majority owned and controlled* by low- and very low-income people and/or residents of government assisted housing. (12 U.S.C. 1701u(b)). Commenters further argued reducing the required ownership percentage would also be inconsistent with HUD's public housing regulations at 24 CFR part 963, which defines resident-owned business as one "(1) which is at least 51% owned by one or more public housing residents and, (2) whose management and daily business operations are controlled by one or more such individuals." Commenters felt reducing the required ownership percentage would invite

manipulation and abuse, the prevention of which would require a significant administrative burden. Commenters recommended the Section 3 regulations should be designed to encourage entrepreneurial development, not a passive ownership interest.

HUD Response: HUD agrees with commenters that the 25% ownership language may create the risk of unscrupulous business practices. Therefore, HUD revised the final rule to require a Section 3 business concern seeking to meet this third test be 51% owned and controlled by PHA residents and Section 8 residents, in place of the 25% test contained in the proposed rule. This number is also more consistent with HUD's current contracting provision for PHA resident owned businesses in 24 CFR part 963.

Wages

Commenters stated that businesses should not be rewarded for paying low wages; businesses should not receive a contracting preference by virtue of the fact that they pay their employees low wages. The commenters asserted Section 3 regulations should be designed to reward businesses that provide economic opportunities to low-income persons so that they have a chance to work their way out of poverty, and the income determination must be made immediately prior to the date of hire. According to the commenters, HUD's regulations should also reward employers who provide decent-paying jobs so that their employees no longer need to depend on HUD assistance to make ends meet. Commenters observed that by determining the low-income status of employees at the time of contract award (the labor hours "are performed by low- or very low-income persons") the definition inadvertently restricts eligibility to businesses whose employees are currently low-income. For these reasons, the commenters proposed that the definition of "Section 3 business concern" be changed to "Over 75 percent of the labor hours performed for the business are performed by persons who were low- or very low-income immediately prior to the date of hire and whose current wage is equal to or greater than 80 percent of the area median income."

HUD Response: The Section 3 regulations are designed to provide jobs for low-income persons. As these individuals gain experience, HUD anticipates wages will increase, and the individuals should be able to work their way out of poverty. The definition has been modified to clarify this framework by including a three-month documentation period and to reduce the

potential incentive to maintain workers at lower salaries simply to qualify as a Section 3 business concern.

Contract Requirement

One commenter expressed concern over the elimination of Section 3 business concern contracting requirements because the commenter's agency spends a lot of resources on outreach, but recognized many housing authorities lack the resources or diverse vendor marketplaces to do the same.

HUD Response: HUD recognizes that not all PHAs will have the same resources to outreach to Section 3 business concerns. HUD believes, however, that counting the Section 3 business concern employees as Targeted Section 3 workers will incentivize PHAs to target Section 3 business concerns to help meet their Targeted Section 3 worker benchmark. HUD will continue to have a Section 3 business concern directory as well to make it easy for PHAs and other entities to identify Section 3 business concerns in their jurisdiction. HUD also believes that making the definition consistent with the PHA resident-owned businesses definition in 24 CFR part 963 will also provide another avenue for finding Section 3 business concerns.

Alternative Suggestions for the Definition of Section 3 Business Concern

One commenter recommended that HUD extend Section 3 business concern status to businesses funded through the Opportunity Zone program.⁵ Commenters suggested defining a Section 3 business concern as meeting one of the following categories, in the following priority order: (1) Businesses owned 100% by Section 3 persons; (2) businesses owned and operated at a minimum 51% by Section 3 Persons; (3) Businesses whose total employees consist of a minimum of 75% Section 3 persons who reside within the project area; (4) Businesses whose total contract specific staffing (not back office administration unless the opportunity created is a back office position) has more than 50% Section 3 persons residing in the project area; (5) businesses owned by persons providing a negotiated employment level greater than 30% of total project staffing to Section 3 persons; (6) businesses who commit to directly conduct or to subcontract professional employment readiness and employment trade skills training related to the project work or other in-demand employment

⁵ See HUD, *Opportunity Now*, [Hud.gov, https://opportunityzones.hud.gov/](https://opportunityzones.hud.gov/).



disciplines, at a minimum of 10% of their total contract award, plus or minus change orders, to Section 3 persons. Under (1), (2), (5), and (6), there is a priority order for the Section 3 persons as well: (A) Public housing assisted persons at the property where the work is being executed. When a contract is issued for service work covering multiple properties of the PHA, any public housing person from that PHA's portfolio shall compete equally for any opportunities created as a direct result of the expenditure. (B) When the service contract only covers one public housing property, the persons from that property will receive first priority for opportunities and then persons from other properties of the PHA's public housing portfolio will be secondly considered. (C) Housing Choice Voucher holders of that specific housing authority that administers that voucher will be third priority. (D) Persons residing in any project-based Section 8 property owned in whole or in part by that PHA. (E) Current YouthBuild participants. (F) All other low- and very low-income persons within the legal boundaries of the service area of the project.

HUD Response: HUD appreciates all the different options provided by commenters. However, HUD believes the final Section 3 business concern definition provided in this final rule provides a balance that is consistent with the statute and ensures that most Section 3 business concerns are in fact aimed at employing low- and very low-income persons. See responses above for additional discussion of the Section 3 business concern definition.

Small PHA Reporting

Support

Some commenters supported reporting flexibility for small PHAs, and especially the removal of the non-construction contract goal of 3 percent of all covered contracts to Section 3 business concerns, which they said is challenging to meet due to the amount of professional service contracts. One commenter suggested that for consistency and clarity, the final rule should exclude all PHAs with 250 or fewer units from reporting on benchmarks, regardless of procurement cost. The commenter also suggested that since the proposed rule exempts Section 8 funding from having to meet Section 3 requirements, the final rule should clarify the definition of a small agency for the purposes of Section 3 reporting to mean an agency with 250 or fewer public housing units. Another commenter recommended defining

“small PHA” in a way that alleviates regulatory burdens for as many agencies as possible and suggested defining small PHA as those having 550 or fewer combined public housing and Section 8 units; or, as Section 8 funding is not covered by Section 3, utilize a 250 unit threshold.

Another commenter supported the small PHA reporting exemption suggesting that HUD should define a small PHA in a way that would maximize the number of agencies exempted from detailed reporting, recommending 550 combined units (consistent with the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 and the Housing and Economic Recovery Act of 2008) or 250 public housing units (as Section 8 assistance is not covered by Section 3).

HUD Response: HUD continues to support the Small PHA reporting provision in the proposed rule. Small PHAs with less than 250 public housing units will not be required to report the number of labor hours and instead will be required to report their qualitative efforts. The final rule does not require a commitment to award at least 3 percent of the total dollar amount of all other Section 3 covered contracts to Section 3 business concerns. HUD currently is also not changing the number of public housing units for determining the Small PHA exception.

All PHAs Should Report for Data Collection and Compliance

Some commenters recommended that all PHAs, regardless of size, should be required to report for data collection and compliance. Other commenters specifically objected to the labor hours reporting exemption for PHAs with fewer than 250 housing units, because inexpensive software is available for PHAs to track and report labor hours. Other commenters suggested removing all exceptions for PHAs. Additional commenters elaborated that reporting requirements should be the same for all entities with no exceptions, noting that every recipient and every dollar should be included in order to guarantee that opportunities reach the poorest and smallest communities.

Commenters noted that small PHAs should not be exempt because they could have significant contractor and subcontractor activity in any given year. Specifically, one commenter noted that the \$200,000 threshold should apply to small PHAs because they have the same opportunity to create jobs as other entities. Another commenter noted that not requiring small PHAs to report creates a loophole that hinders opportunity.

HUD Response: HUD has heard from small PHAs that they do not receive enough funding or have sufficient pools of Section 3 workers to support annual new hire or labor hour reporting. Close to one-half of small PHAs with less than 250 public housing units receive less than the \$200,000 project threshold applicable to Section 3 projects that receive other HUD assistance such as CDBG and HOME funding. Due to Operating Fund shortfalls, small PHAs can take advantage of the authority under section 9(g)(2) of the United States Housing Act of 1937 to use its Operating and Capital Funds flexibly to fund any eligible activities under either funding stream. Some small PHAs compensate by promoting economic opportunities through referrals of residents to employers and job fairs, providing training facilities and offerings, and other local efforts. To recognize these other activities and the generally low amount of funds available or used for capital projects, small PHAs will report qualitatively on their efforts.

No Good Faith Assessment for Small PHAs

Some commenters objected to allowing small PHAs to supply a “good faith” assessment of hours worked because doing so would invite those entities to bypass important tracking requirements, suggesting that HUD should require quarterly, instead of annual reporting.

HUD Response: The small carve out for good faith assessment is not limited to small PHAs. As stated in the proposed rule, it is a limited exception where PHAs and other recipients of public housing financial assistance could use the reporting of a good faith assessment of the labor hours of a full-time or part-time employee from contractors and subcontractors that have not been subject to requirements specifying time and attendance reporting, and do not have systems already in place to track labor hours. This is to address employers that do not already track labor hours without making changes in time and attendance or payroll. It is not a permanent exception and if in the future the contractor or subcontractor is required to track labor hours under some other authority, or begins to voluntarily track labor hours, the exception would no longer apply.

Qualitative Reporting

Another commenter noted that the rule lacks information on what qualitative reporting will be required of small PHAs to substantiate the claim that such reporting will be less



burdensome and recommended that small PHAs have the option to track labor hours or do qualitative reporting.

HUD Response: The rule seeks not to be too prescriptive on qualitative reporting to provide small PHAs with the flexibility to report on a range of activities. HUD is considering some of the following to signify qualitative efforts: Outreach efforts to generate job applicants who are Targeted Section 3 workers; direct on-the-job training (including apprenticeships); indirect training such as arranging for, contracting for, or paying tuition for, off-site training technical assistance to help Section 3 workers; and outreach efforts to identify and secure bids from Section 3 business concerns. HUD plans to create a form for tracking and reporting qualitative efforts, to ease burden on recipients. HUD agrees that small PHAs should have the option of conforming to the more quantitative reporting standards and has modified the text to permit such option.

Dollar Threshold for Small PHAs

A few commenters also recommended use of a dollar threshold for public housing assistance similar to that used for other HUD assistance as a means to reduce reporting burdens on small agencies. One commenter suggested that using a dollar threshold, rather than a threshold based on number of public housing units, is a more practical and effective means of identifying those smaller projects that are less likely to generate significant Section 3 employment opportunities. Another commenter further suggested that thresholds established in the proposed rule for Community Planning and Development (CPD) should be applied across the board to all programs and noted that using a per-project or per-recipient threshold would more accurately exclude or include small PHAs based on funding. This commenter also suggested establishing a threshold for work-able non-working residents below which small PHAs would not have to report.

HUD Response: HUD continues to maintain that a dollar threshold for public housing financial assistance is not consistent with the statute. Section 3 applies to public housing operating, development, modernization, and management assistance, which covers virtually all housing authority projects and activities. HUD believes that the statute's expansive coverage of public housing projects and activities indicates that any attempt to diminish the coverage would be inconsistent with the statute.

Subcontractors

Several commenters noted that Section 3 requirements should not apply to subcontractors. Commenters stated that extending reporting requirements to subcontractors would discourage participation in PHA contracting opportunities, adversely impacting competition in the market, driving up construction costs and limiting economic opportunities. Other commenters added that HUD should consider ways to reduce administrative requirements on subcontractors wherever possible, echoing concerns that regulatory burdens which do not acknowledge subcontractor's practical limitations will discourage private sector partners from working with PHAs.

The commenters also suggested that regulatory relief for subcontractors could be achieved in a number of different ways, which range from exempting small subcontractors, excluding subcontractors from Section 3 obligations if their contracts are below a certain dollar threshold or below a percentage of the total covered funding on the Section 3 project. Commenters also suggested HUD consider limiting Section 3 obligations to the recipient, general contractor and immediate subcontractor(s), noting that relieving some or all Section 3 obligations on subcontractors may attract more high-quality tradespeople to affordable housing construction projects and possibly also lower the construction costs on Low Income Housing Tax Credit (LIHTC) and other affordable housing projects with covered HOME or CDBG funds.

Other commenters who expressed concerns about the reporting requirements for grantees and subcontractors also suggested thresholds for subcontractor reporting. Some commenters suggested retaining the existing \$100,000 threshold, though one commenter recommended a reduced compliance level, allowing subcontractors to track Section 3 employees instead of labor hours, to reduce the administrative burden on small entities who lack the capacity to track hours. Some commenters suggested a reporting requirement threshold of \$250,000 to align with the OMB procurement threshold, one of whom recommended this threshold also apply to contractors and offered the \$10,000 micro purchase threshold as an alternative. Other commenters suggested a compliance threshold of \$200,000.

A number of commenters supported reporting requirements for both contractors and subcontractors. One

commenter recommended excluding second tier and below subcontractors from requirements, noting that large PHAs are more likely to award or fund multimillion-dollar projects that have more than 25 first-tier subcontractors. Two commenters mentioned the role of contractors simplifying the reporting mechanism for subcontractors and encouraging subcontractors to comply with requirements. One commenter also suggested that the funding recipient should be allowed to decide the extent of the Section 3 reporting requirements for subcontractors.

One commenter requested clarification as to how Section 3 requirements "flow down" to contractors and subcontractors for housing and community development financial assistance, noting the current regulation includes references to recipients as well as contractors and subcontractors when describing numerical goals and hiring/contracting preferences. The commenter went on to state that Subpart C of the Proposed Rule references only the recipient when describing the employment, training and contracting requirements and safe harbors, and removes the \$100,000 contractor and subcontractor threshold in the current regulation for triggering Section 3 requirements. The commenter noted that while the Proposed Rule does mandate that each recipient "require subrecipients, contractors, and subcontractors" to meet the hiring/contracting requirements, they would propose a clarification on the extent to which contractors, subcontractors and subrecipients on Section 3 projects are bound by the requirements.

HUD Response: HUD is sensitive to the potential burden that Section 3 compliance may impose and has focused on outcomes, allowing the recipient to direct where the recipient's efforts, and its contractors' and subcontractors' efforts, will have maximum effect.

In the statute, the sections addressing public housing programs specifically include "contractors and subcontractors" in Section 3 requirements. In contrast, the statute does not reference "subcontractors" in the sections addressing other covered housing and community development assistance. Section 3's applicability to subcontractors as set forth in this final rule closely tracks the statute's requirements. The reporting requirements, however, focus on outcomes, deferring to the recipient to focus their efforts for maximum impact with respect to Section 3, and aligning the contractual obligations the recipient imposes on contractors and



subcontractors accordingly. Unlike the current rule, which applies Section 3 compliance to all subcontractors in excess of a \$100,000 contract threshold, the final rule does not apply specific Section 3 reporting obligations to any subcontractor and instead such requirements would stem from the recipient. See § 135.3(a)(3)(ii)(B). The proposal to reinstate the \$100,000 contract size threshold or any alternative threshold would limit the recipient's flexibility to determine how to achieve the "greatest extent feasible" standard most effectively. Similarly, subcontractors are excluded from the contract language provisions in Section 75.27(a), but subcontractors are still required to meet Section 3 requirements in Section 75.19, which provides the recipient flexibility to achieve the goal. The rule implements the suggestion provided in the comments that the recipient be allowed to decide on the extent of the Section 3 reporting requirements for subcontractors where the statute does not constrain HUD from providing this flexibility.

Definition for "neighborhood" or "service area"

Some commenters supported the proposed definition, stating that the definitions are reasonable and will simplify compliance. Other commenters accepted only the one-mile radius definition of "service area" or "neighborhood," but suggested that HUD eliminate the population requirement given the impact on rural areas.

Some commenters disagreed with the proposed definition, stating that metrics will be skewed based on close proximity to more affluent areas. Another commenter thought the definition is inconsistent with the statutory intent to encourage employment opportunities among low- and very low-income persons, noting a single definition cannot capture the expansive geographic areas. Another commenter noted the definition will actually limit mobility and the long-term success of resident programs because contracts will not provide opportunities to residents in successive projects in different neighborhoods. Some commenters wrote that the definition limits businesses in diverse economies and in high-cost cities that need more flexibility to recruit. One commenter wrote that this new definition would significantly reduce the labor pool of eligible Section 3 new hires, making it difficult to achieve benchmarks. Other commenters wrote that it may exclude local public housing or Section 8 residents. Another commenter thought

that it would add challenges for contractors in identifying and prioritizing eligible workers.

Other commenters noted that the restriction does not account for Section 3 covered projects in areas that are not low-income, such as some CDBG expenditures. In addition, commenters noted that such a limitation could have the unintended consequence of excluding large groups of people from the pool of potential employees, especially in cities that are combatting racial segregation. Another commenter stated that the requirements are too geographically limited as to whom and where recipients/contractors must provide opportunities. Additionally, it does not account for opportunities that are accessible beyond the prescribed radii by using mass transit and other commuting opportunities.

Some commenters noted that a new definition would add unnecessary administrative burdens which increases the cost of program management and compliance. One commenter wrote that determining how to meet a 5,000-person radius would be burdensome. Other commenters wrote that completing data analysis of employee home locations and certification would be administratively burdensome and could be covered under state and local data privacy laws. In addition, a commenter stated that the definition may limit PHAs' abilities to hire individuals in their communities who would otherwise qualify as a Section 3 worker and stated that entities receiving community development funds are better at determining which individuals would benefit most from Section 3 employment.

Several commenters suggested that HUD retain the definition of "service area" as it exists in the current rule at 24 CFR 135.5. Another commenter supported Section 3 and encouraged the retention of flexible approaches to compliance, such as those outlined in 24 CFR 135.30. Any proposed rule changes should consider geographical and service population differences. The commenter supported maintaining the rule as is, noting it provides flexibility for compliance through training, hiring, or contracting. Similarly, another commenter noted that there should be flexibility and factors other than hours worked and earned to provide Section 3 credit.

HUD Response: HUD notes that the neighborhood or service area requirement applies to the prioritization of effort with respect to housing and community development financial assistance, not public housing funds. The hiring prioritization is different for

this category of funding, and pursuant to the statute is focused on residents of the geographic area in which the work is being done, not on the rent-assisted status of the workers. Consequently, in this context, HUD is not adjusting the regulatory text to acknowledge the availability of transit or to prioritize employment of low- and very-low-income people from a broader geography.

The rule seeks not to limit the labor pool available within specific geographic areas, but to allow flexibility for smaller and more rural areas through the definition. HUD believes counting individuals who live within one mile of the worksite and within an expandable circle centered around the worksite that encompasses 5,000 people provides a definitive means of determining who counts as a Targeted Section 3 worker within the service area or the project neighborhood. Where the one-mile radius circle centered around the worksite has less than 5,000 people, the radius would be expanded outwardly to achieve the desired population of 5,000 people. This expansion would address many of the commenters' concerns regarding smaller communities or rural areas. For the benefit of densely settled urban areas, HUD recognizes there may be more than 5,000 people, but will hold at the one-mile geographic diameter.

HUD believes this final rule does take into consideration geographical and service population differences and retains flexibility for compliance through training, hiring, or contracting. Additionally, the rule is meant to streamline the Section 3 process to make it consistent with the statute and easier to implement. Compliance can be evaluated qualitatively if the labor hours benchmark cannot be met. Under this rule, both measurements are permissible, and the requirements for qualitative evaluation are laid out in the rule. In addition, HUD intends to create a web-based tool to support recipients, subrecipients, contractors, and subcontractors in determining the geographic area encompassing Targeted Section 3 workers.

Allow Grantees To Define "Neighborhood" or "Service Area"

Commenters recommended that grantees be given the ability to define "service area" for themselves. Another commenter urged HUD to adopt something other than a "one-size-fits-all" approach so that small rural counties would not have difficulty utilizing federal funding. One commenter noted for example that in New Orleans, there are clearly defined



neighborhoods that most residents and officials understand and recognize, some having a larger area than a one-mile radius. The commenter stated that allowing for a more localized definition of 'project area,' rather than using HUD's definition of a one-mile radius or 5,000 person population guideline, increases local participation in projects that impact those individuals and their immediate surroundings and makes the most sense for their community. This commenter stated that recipients should be able to define their geographic size for purposes of how they focus their priorities regarding low-income persons residing within the service area or neighborhood in which the project is located, and communicate their determination to sub-recipients, contractors and subcontractors. Another suggestion was to have localities work with their local HUD office to define service area based on the locality's characteristics.

Commenters suggested that HUD allow residents and businesses from anywhere in the state to receive priority consideration or to give state recipients deference in establishing areas for purposes of meeting Section 3 requirements. Additionally, one commenter stated that service area may change based on project type, some serving entire communities while others serve smaller sections of a community, rendering the one-mile radius inapplicable depending on the project's scope of impact.

The commenters noted that limiting preference to a certain "service area" may have the unintended consequence of excluding large groups of people from the pool of potential employees. The commenters proposed allowing localities to either target job opportunities to low-income hires from anywhere within the locality, or work with their local HUD offices to define appropriate service areas based on the characteristics of the locality. One commenter wrote that the one-mile radius is too limiting and that residents within the community should be considered.

Some commenters suggested that HUD define service area to be "the area within or contiguous to a PHA's jurisdictional boundaries." Other commenters suggested that HUD define "service area" or "neighborhood" in the following tiered manner: (1) PHA residents in project area; (2) Section 3 residents in project area; (3) extremely low-income or homeless individuals in project area; (3) YouthBuild in project area; and (5) next closest PHA in project area.

One commenter suggested that HUD should give preference to eligible residents of the neighborhood surrounding the PHA before other residents of the metropolitan area and should utilize the language in Subpart C § 75.19 reading "Section 3 workers residing within the service area or the neighborhood of the project." One commenter stated that Section 3 Employment Priorities, as written, is very clear as to the order of Section 3 applicant priorities, starting with residents in closest proximity to the construction project, but disagreed that the one mile and 5,000 population radius is an appropriate geographic, using two PHA examples of Cayce Place and Edgehill to show that these metrics would be skewed based upon the close proximity to those earning twice the AMI and with property values in the hundreds of thousands of dollars.

HUD Response: As noted above, the neighborhood or service area requirement applies to the prioritization of effort with respect to housing and community development financial assistance, not public housing funds, and the focus in this context is on residents of the geographic area in which the work is being done. HUD believes that its proposed framework of counting individuals who live within one mile of the worksite and within an expandable circle centered around the worksite that encompasses 5,000 people provides a definitive means of determining who counts as a Targeted Section 3 worker within the service area or the neighborhood of the project. HUD believes the proposed Section 3 regulation takes the varied geographical areas into account and provides a streamlined framework that more specifically determines who might benefit from employment and training opportunities available within the area surrounding a Section 3 project. Where the radius or circle centered around the worksite has less than 5,000 people, the radius would be expanded outwardly to achieve the desired population of 5,000 people. All Targeted Section 3 workers identified by the geographic radius must also qualify as Section 3 workers, so this would not include higher-income workers within the neighborhood or service area.

Rural Areas and Contractors

Several commenters noted concerns about the effect of the proposed "service area" definition on Section 3 implementation in rural areas. One commenter stated it would be unrealistic and burdensome for employers in rural areas to administer and monitor the one-mile radius, and

that it does not reflect the realities of construction employment in small rural states where the service area is the entire state. One commenter also stated that in areas of low population density, there often will not be sufficient residents or businesses that are capable of performing the work required for housing and community development projects. Other commenters wrote that, given chronic and widespread labor shortages, it is inadvisable to have such a small geographic restriction on the labor pool of Section 3 workers.

Other commenters accepted the one-mile radius definition of "service area" or "neighborhood," but stated the 5,000-person population radius is too large for rural areas. Another commenter noted that the population threshold could increase the service area size exponentially in cities and counties where the population is less than 5,000.

One commenter in Utah opposed the proposed definition, arguing that changing the definition of "neighborhood" to 5,000 people would not work because of the state's very large rural geographic area. The commenter stated HUD's determination that most (77%) current CPD projects had a population of 5,000 people within one mile of the project site is not applicable in Utah, which has only 29 counties. The commenter detailed that 70% of Utah's population resides in its 4 urban counties, and Utah's CDBG projects are part of the 23% that do not have 5,000 people within a one-mile radius of a project site.

One commenter mentioned the impact of the proposed definition on small contractors or those outside the immediate service area, noting that CDBG and HOME funds are often financing projects completed by small contractors who need to travel outside of a service area to complete work on a project. Another commenter rejected the proposed definition, suggesting that for small town jurisdictions, the "service area" or "neighborhood" should apply within the recipient's jurisdiction, which may be an entire county. One commenter mentioned that finding Section 3 contractors or businesses is already challenging and should not be limited by a "service area" or "neighborhood" definition.

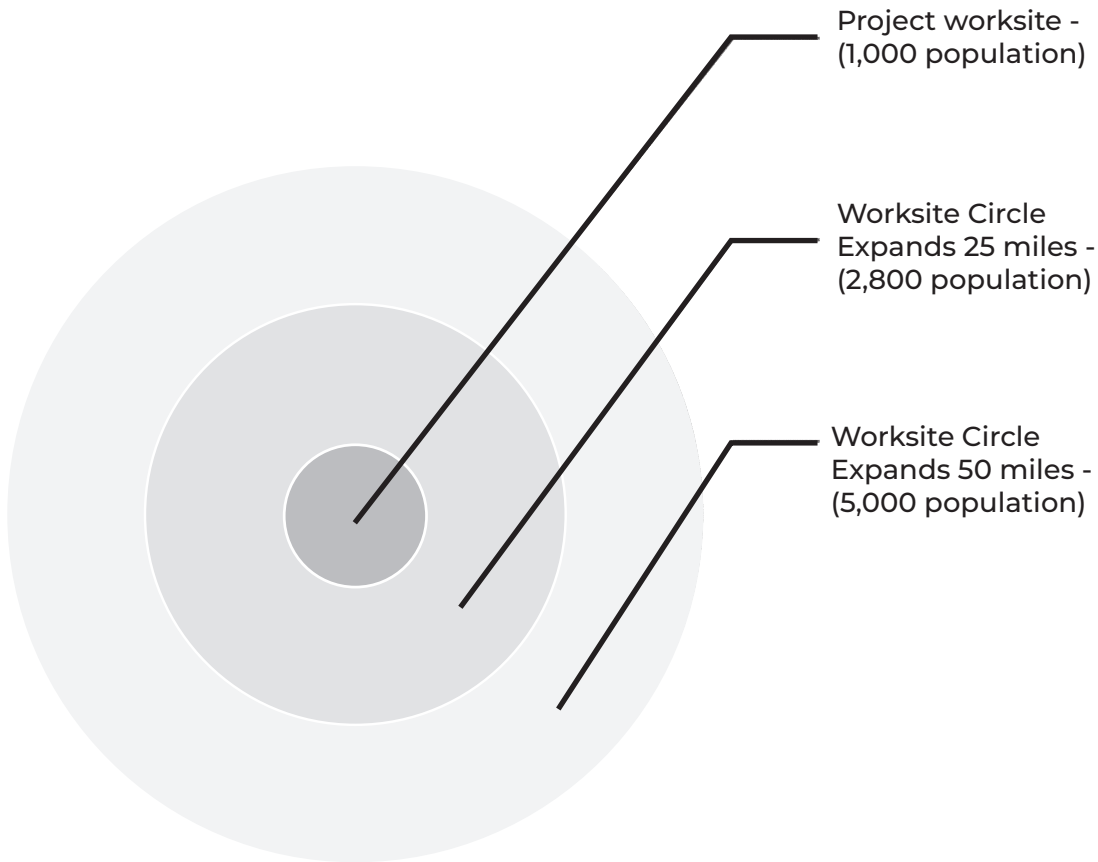
HUD Response: HUD acknowledges and has carefully considered the concerns of commenters representing small and rural areas regarding the proposed definition of neighborhood/service area. As previously stated, HUD supports the proposed framework of counting individuals who live within one mile of the worksite and within an expandable circle centered around the



worksite that encompasses 5,000 people. This concept was designed specifically to address the unique needs and challenges facing rural and small

communities. The graphic provides an example on how a circle centered around a worksite with fewer than 5,000 people may be expanded until the

desired population goal of 5,000 people is met or eligible Targeted Section 3 workers are counted.



Above: Graphic depiction showing how the one-mile radius can be expanded where there are fewer than 5,000 people until the 5,000-person population is found.

The text as written will provide a definitive means of determining who counts as a Targeted Section 3 worker within the service area or the neighborhood of the project. HUD believes the proposed Section 3 regulation takes the varied geographical areas into account and provides a streamlined framework that more specifically determines who might benefit from employment and training opportunities available within the area surrounding a Section 3 project. HUD also notes that over time, as outcome results are reported to HUD, the benchmarks may be tailored to certain types of projects and geographies by notice, with the explicit intention that it may be appropriate to set different benchmarks for rural areas given the

availability of labor and the patterns of contracting work in rural areas.

Web Tool

Some commenters noted that HUD’s proposal to provide a web tool to aid in the process of determining a geographic service area would be helpful. One commenter urged HUD to provide the proposed web tool that will help determine the geographic area that encompasses Targeted Section 3 workers before it proceeds with the current definition and finalizes the rule. Commenters requested that HUD provide it to state and local recipients, sub-recipients, contractors, and subcontractors for testing before implementation. Though encouraged by the prospect of a web tool to help determine the geographic area that

encompasses Targeted Section 3 workers, some commenters still argued for a broader definition and geographic areas that define Targeted Section 3 workers. Some commenters thought the web tool would not alleviate burden from the contractor that would still need to determine if a worker meets the requirements to be in the geographically defined area.

HUD Response: HUD agrees with the suggestion to provide a web tool to aid in the process of determining a geographic neighborhood/service area. As stated in the proposed rule, HUD will create and provide this tool at the issuance of the final rule to aid recipients, subrecipients, contractors, and subcontractors to determine the geographic area that encompasses Targeted Section 3 workers under this



definition. HUD will also explore the option of creating a mobile tool to help recipients with monitoring and compliance determinations.

Exceptions

Commenters suggested the proposed definition should not apply to Puerto Rico considering its geographic composition.

HUD Response: HUD has decided to retain the proposed definition for all recipients, including Puerto Rico. HUD believes the proposed regulation takes the varied geographical areas into account and provides a streamlined framework that will enable eligible workers to benefit from employment and training opportunities available within the area surrounding a Section 3 project.

YouthBuild Participants

Some commenters were in favor of or not opposed to expanding the definition to include previous YouthBuild workers that are under 24 years of age and those who are still eligible to participate in YouthBuild but may have graduated out of the program. One commenter was opposed to expanding the definition on the grounds that it would require onerous and complex background checks and research to determine whether a participant meets the alternate definition. One commenter recommended that the definition be changed to include previous YouthBuild workers who successfully graduated from the program and are either under age 24 or are otherwise still eligible for YouthBuild programs. Other commenters proposed that the definition of YouthBuild participant should be as broad as possible, regardless of age, while other commenters proposed the definition to include other programs which teach relevant skills, such as Service and Conservation Corps participants and graduates, participants/graduates of “pre-apprenticeship” training programs, participants/graduates of “youth corps,” VFW Local Program participants, and AmeriCorps participants.

HUD Response: HUD appreciates the commenters’ support of the YouthBuild program, and after careful deliberation, has decided to keep the definition consistent with the current regulations and current YouthBuild participants. See 29 U.S.C. 3226; 24 CFR 135.5. HUD determined that given the work required to certify current YouthBuild workers, that adding a longer-term duration would create an additional paperwork requirement on both the person claiming the status and the entity reporting the status. It may also cause

confusion using a certain period of time. Additionally, a YouthBuild worker can still qualify for 5 years if they are employed at the end of their YouthBuild experience.

Applicability and Scope

One commenter supported the rule’s change to applicability. Another commenter supported Section 3 as an important mechanism to strengthen communities, reduce poverty, and increase residents’ economic self-sufficiency. One commenter proposed that these rules should apply to all developers, contractors, and sub-contractors; all professional, skilled, unskilled, technical, and consulting service contracts compensated partially or fully by HUD funds—no exceptions. Another commenter suggested these rules shall be applicable to all professional, skilled, unskilled, technical, and consulting service contracts line items.

Other commenters suggested that HUD should clarify that owners and managers of HOPE VI, Choice Neighborhoods and Mixed-Financed Developments are subject to Section 3 Hiring and Contracting requirements in their own operations and should extend this requirement to Rental Assistance Demonstration (RAD) converted projects. One commenter supported HUD’s separation of PHA requirements from non-PHA requirements because it did not make sense for non-PHAs to follow regulations intended for PHAs.

A commenter supported HUD’s clarification regarding Section 3 applicability to projects receiving HUD assistance of \$200,000 or greater. Another commenter warned that this rule states that Section 3 will apply when the amount of HUD assistance is greater than \$200,000 on a per-project basis, which would potentially exempt projects where the HUD funding is less than \$200,000, even though the combined total funding is much higher, leading to a decrease in number of projects subject to Section 3.

One commenter suggested that PBV and PBRA contracts should be exempt from Section 3 compliance. Another commenter suggested that, rather than a per-project basis, it would be simpler to apply Section 3 to individual contracts for housing and public construction funded with HUD assistance.

HUD Response: HUD shares the view that Section 3 is an important mechanism to strengthen communities, reduce poverty, and increase economic self-sufficiency. HUD seeks to focus Section 3’s applicability where it can have a real impact, and to exempt from Section 3 those cases where

applicability imposes burdens not commensurate with outcomes. HUD has concluded that in certain circumstances, particularly professional services, there are very few opportunities for Section 3 outcomes. The proposed definitions defined the scope of programs subject to Section 3 requirements but did not expand such coverage beyond what HUD’s existing regulations already required for compliance. HUD proposed the \$200,000 threshold for housing rehabilitation, housing construction and other public construction projects because work below that amount would likely not trigger long-term employment opportunities for which the recipient could show measurable labor hours. HUD disagrees that Section 3 should be applied to all types of work, without exception, and reaffirms in the final rule the exception for professional services. The proposed rule does, however, give credit in the reporting for opportunities that are created in the professional services context by including professional services labor hours in the numerator, and not in the denominator, of the reported outcome ratios. The final rule applies Section 3 in a manner consistent with the statute. HUD has determined that monthly rental assistance payments, such as those provided under Section 8 project-based voucher or project-based rental assistance housing assistance payment contracts, are not covered by the statute. Properties converted to Section 8 rental assistance through the RAD are covered by the rules applicable to Section 8. However, the RAD governing notice does apply Section 3 requirements to those activities occurring after the date of the RAD conversion which are contractually obligated as part of the RAD conversion.

Employment Priorities § 75.9 / § 75.19

Some commenters supported separating the agencies which fund Section 3 projects from PHAs and mirroring the statute. Other commenters felt that the priorities should be the same for both Section 3 projects and PHA financial assistance. Other commenters suggested that HUD give preferences to certain groups, while other commenters thought HUD should consider adding geographic considerations into the definition. One commenter suggested that the last priority level should be expanded to any person if the PHA can reasonably demonstrate there are not sufficient Section 3 residents with the requisite job skills within a project’s geographic area. Commenters also asked HUD to clarify that otherwise eligible workers of PHAs, even if under private



management, are included in this category, as well as recipients of Section 8 assistance or voucher assistance residing in properties managed by other entities. One commenter suggested HUD change the regulatory language to insert the word “priority” in § 75.19 to clarify the requirement and make the sections consistent with § 75.9.

HUD Response: HUD appreciates the comments that supported the employment prioritizations. These prioritizations follow the statutory prioritizations, and HUD is including that language for clarity for recipients implementing the regulations. HUD has rephrased § 75.19 to include the word “priority,” consistent with the language of the statute. While HUD appreciates the alternative suggestions, these regulations are meant to streamline the Section 3 process to make it consistent with the statute and easier to implement. HUD believes that the existing regulatory text does that and is making no changes to this section. HUD, however, encourages the HUD financial assistance recipients to consider all the diverse suggestions provided when working on outreach to persons who are low- and very low-income persons to meet the Section 3 benchmarks including residents of PHAs under private management such as those residing in a mixed-finance development project.

Reporting § 75.15 / § 75.25

Consolidated Plan Regulations

A commenter recommended that the Consolidated Plan regulations at 24 CFR 91.520(a) be amended to specifically include Section 3 reporting; PIH will need to develop a Section 3 reporting format.

HUD Response: HUD will review Department-level strategies on how to effectively incorporate Section 3 reporting into current systems and data collection tools, including the Consolidated Plan. As a result, HUD will issue sub-regulatory guidance on reporting per program area and provide technical assistance to recipients for Section 3 compliance.

Systems

A commenter warned that HUD will need to modify IDIS to allow CDBG and HOME recipients to report on their Section 3 actions annually because CDBG and HOME recipients will report on their Section 3 actions in IDIS using a similar form as HUD Form 60002 that has been modified to capture labor hours worked. This commenter stated that this move will eliminate

redundancy and ease the administrative burden for grantees.

HUD Response: HUD agrees that the Integrated Disbursement and Information System (IDIS) and DRGR should be modified to ensure accurate Section 3 compliance reporting for CDBG and HOME recipients. HUD will also adjust our data collection systems as necessary to ease administrative burden for grantees and to eliminate redundancy.

Report Through Action Plan and/or CAPER and Effective Date

A commenter supported HUD’s effort and recommended reporting through the Action Plan and/or the Consolidated Annual Performance Evaluation Report (CAPER), only on completed projects. One commenter recommended that the final rule be effective for funds granted in the next Federal fiscal year after publication of the final rule so there is time for contracts/written agreements with sub-awardees to be amended, and in order to avoid having CAPER reporting requirements from annual federal years with two separate program requirements.

HUD Response: HUD supports efficient and effective Section 3 compliance reporting through current mechanisms, such as the Annual Action Plan and/or CAPER, for applicable HUD programs. As stated in the proposed rule, HUD believes that requiring reporting annually, but consistent with timeframes that PHAs and other recipients of other housing financial assistance are already using to submit documents to HUD, will relieve existing burden. HUD may also look into reporting into other existing systems rather than requiring PHAs and other recipients to log into and report under a separate system, such as the existing SPEARS.

Double Counting

A commenter stated that reporting responsibilities when multiple government agencies provide HUD CPD funds are unclear and requested HUD determine whether agencies will be responsible for reporting outcomes for each federal investment or whether HUD will prevent double counting by limiting reporting to one funding agency per Section 3 project.

HUD Response: Section 75.29(b) specifies that when there is funding from multiple programs that exceed the threshold in § 75.3(a)(2), the recipient will report to the applicable HUD program office. Some HUD systems allow for indicating when there are multiple HUD funds so that reporting can be limited to one system. However,

not all HUD systems provide for that type of designation. HUD will provide additional guidance to recipients that have multiple funding sources on the proper process for reporting Section 3 project completion.

Separate Reporting by Funding Source

One commenter requested HUD clarify whether PHAs will still be required to report separately by funding source (e.g., Operating Funds and Capital Funds) or whether the hires report will be aggregated to report only on PHA total funds. This decision will impact how PHAs currently collect and track Section 3 hires. A commenter supported elimination of separate reporting on contracting with Section 3 business concerns. Other commenters stated that the reporting and monitoring required to remove professional services labor hours from overall labor hours would add additional administrative burden to PHAs and could prove challenging in the overall reporting process.

HUD Response: Under the final rule, for non-MTW agencies, reporting initially will remain at the grant or individual program level, but HUD may explore agency-level reporting where possible to streamline and simplify. PHAs will still be required to report by separate funding source or in the aggregate for MTW agencies. For ease in administration, the rule will provide separate definitions for these types of funding and separate subparts relating to: (1) Public housing financial assistance, which covers (a) development assistance provided pursuant to Section 5 of the United States Housing Act of 1937 (the 1937 Act), (b) operations and management assistance provided pursuant to Section 9(e) of the 1937 Act (Operating Fund), and (c) development, modernization, and management assistance provided pursuant to Section 9(d) of the 1937 Act (Capital Fund); and (2) Section 3 projects, which means housing rehabilitation, housing construction and other public construction projects assisted with HUD housing and community development assistance when the amount of the assistance to the project exceeds \$200,000, or \$100,000 where the assistance is from HUD’s Lead Hazard Control and Healthy Homes programs. There are no current plans to aggregate the information or eliminate reporting on contracting with Section 3 business concerns. Small PHAs with less than 250 public housing units will be permitted to report qualitatively. HUD is exploring how best to implement qualitative reporting for small PHAs, and as indicated above



may study whether other reporting methods should be contemplated in the future. As stated in the final rule, HUD believes that tracking labor hours consistent with existing tracking for prevailing wage requirements would reduce burden on recipients. HUD also believes that tracking labor hours will better allow HUD to determine if long-term employment opportunities are being generated.

Exempt Commodity Purchases, Non-Construction, and Professional Services

Commenters strongly agreed with the change to exempt both commodities purchases (material supply contracts) as well as professional services (contracts for legal, accounting, financial consulting, environmental assessment, A&E services and other professional services) from the calculation of contract dollars and new hires for reporting. One commenter supported exclusion of Section 3 requirements on non-construction professional services (e.g., legal, accounting, and engineering) but has concerns that not all Section 3 workers want careers in the construction field and some employment is generated in non-construction contracts.

HUD Response: The final rule maintains the exemption of material supply contracts and maintains the structure presented in the proposed rule which does not require separate reporting of contracting with Section 3 business concerns. HUD is providing clarification on the exemption for professional services in the definition of “professional services” in this final rule, by defining professional as services that require an advanced degree or professional licensing.

HUD acknowledges that many low-income workers seek employment in jobs other than construction. However, data indicate that there are relatively few opportunities for Section 3 hiring in professional services fields such as legal services and civil engineering. Many of the positions within these professional services fields require specialized degrees and in many cases the hiring is not directly tracked to a specific federally funded project or activity. The reporting structure in the rule allows a recipient to count as Section 3 labor hours and as Targeted Section 3 labor hours any work performed by a Section 3 worker or a Targeted Section 3 worker (i.e., in the numerator of the calculation), even when the professional services as a whole are not counted in the baseline reporting (i.e., in the denominator of the calculation). The effect of this reporting structure is to give a recipient a bonus if they are able

to report Section 3 hires in the professional services context.

Frequency of Reporting

Commenters stated that annual reporting does not facilitate capture and correcting of non-compliance. Some commenters recommended all PHAs should provide Section 3 reports quarterly instead of at the end of the fiscal year. Another commenter recommended that reporting should be done on a monthly basis.

One commenter strongly supported a return to annual reporting and integration of reporting with other funding program reporting requirements. Another commenter supported annual reporting for reducing administrative burden of more frequent reporting. Another commenter supported the proposed change to annual reporting on projects completed within the reporting year.

HUD Response: The reporting requirements represents a balance between frequent reporting, effective reporting, and administrative burden. Frequent reporting allows HUD to keep a closer eye on compliance, and early oversight can result in identification of non-compliant actors when there is still opportunity to influence change. Frequent reporting also risks identifying as non-compliant those endeavors where the Section 3 opportunities are sequenced later in the effort’s timeline, resulting in ineffective reporting. This is often the case in construction efforts that begin with heavy machinery work and end with trades where Section 3 opportunities are more commonly created. Additionally, there is an administrative burden for the reporting entity, and an oversight responsibility for HUD, each time Section 3 reports must be submitted. HUD notes the variety of opinion represented in the comments, with suggestions of monthly, quarterly, and annual reporting, as well as the project-based reporting permitted in the proposed rule. HUD has determined not to revise the rule. As a result, reporting is on an annual basis for ongoing endeavors such as PHA operations or multi-year infrastructure or disaster recovery efforts. For discrete projects such as development of a singular multifamily apartment building, the reporting is on a project basis, and reported to HUD in the recipient’s annual report corresponding to the year of the project’s completion. Acknowledging the value of early intervention, the final rule also shifts oversight of Section 3 from a centralized HUD office, which typically does not have visibility into whether the funding recipient is embracing and effectively

implementing its Section 3 obligations, to the program office which is in regular communication with the funding recipient. Part of HUD’s intention with respect to this shift in oversight is to integrate discussions of Section 3 compliance into regular oversight discussions so that there are opportunities to influence improvement in Section 3 performance on an ongoing basis.

Submission Timing

Commenters recommended that HUD should provide further guidance on how and when annual reports will be submitted and stated that meeting the current January 10th deadline is a challenge for PHAs because end-of-year hires may be undercounted because paperwork may still be in process in January. Commenters stated that if the new regulations require reporting consistent with the timeframes that PHAs are already using, it will assist PHAs in providing the most accurate and up-to-date information. The commenters recommended that HUD refine the proposed reporting frequency regulations to read: “recipients must report annually after the end of their reporting year to HUD . . .” and HUD should provide PHAs 90 days from the end of their reporting year to have sufficient time to collect and aggregate data.

Another commenter noted that MTW PHAs provide annual reports based on the past fiscal year and updating the system to include such Section 3 reporting would be easier to use. This commenter also noted that it needs to be clarified how the reporting would deal with differing timelines for annual reporting versus the duration of projects with funds triggering Section 3 reporting.

HUD Response: As noted above, HUD will issue sub-regulatory guidance on reporting by program area. HUD anticipates that it may be able to integrate Section 3 reporting into the funding recipients’ other, programmatic, reporting structures, which already have existing time frames for submission of reports. The rule does specify that reporting is based on the recipient’s fiscal year, which language has not been changed. Section 3 requirements may not be waived by MTW agencies. MTW only provides flexibility for requirements promulgated under the 1937 Act, while Section 3 is a provision of the Housing and Urban Development (HUD) Act of 1968. Since HUD has a specific online system to collect Section 3 data—SPEARS—all PHAs, including MTW agencies, should report into that system. HUD will consider providing



training specific to MTW agencies, in addition to training for a more general audience, on how to use the SPEARS system.

Major Construction Project Administrative Burdens

Commenters warned that large workforces and the use of multiple subcontractors on major construction projects would lead to heavy administrative burdens which may discourage subrecipients or contractors from bidding. These commenters recommended contractors be allowed to self-certify to relieve administrative burdens.

HUD Response: HUD appreciates the commenters' concerns but determined that self-certification would not provide HUD with an adequate compliance oversight mechanism. There is no provision in the rule for self-certification of meeting the benchmark requirements.

Increasing Costs

One commenter stated that the requirements are already burdensome to their local governments, administrators, contractors and sub-contractors and the proposed rule would increase the burden, leading to fewer contractors willing to participate in CDBG projects, driving up costs, and leading to smaller projects and fewer beneficiaries. One commenter supported keeping reporting requirements to a minimum because both PHAs and HUD staff have limited capacity for reporting and providing constructive feedback.

One commenter stated the ability to identify workers individually rather than relying on the business concern to meet Section 3 definitions provides additional opportunity to demonstrate Section 3 compliance where there was none before, but this creates an additional burden to document safe harbor, particularly for Lead Hazard and Healthy Homes projects where a lower project dollar threshold is imposed. The commenter went on to suggest HUD consider providing additional funding for contractors to meet the financial impact of the paperwork burden of documenting compliance. Similarly, other commenters noted that under the previous rule the dollar threshold is zero, whereas under the proposed rule, despite the type of HUD funds received, every penny contracted, invested, or applied to any contract project, regardless of ownership, would have triggered full Section 3 compliance.

Commenters also expressed concern for the burden on contractors to meet hourly benchmarks while working through a pool of unskilled new hires

and potential costs to the owner if a new hire fails to meet job requirements. One commenter stated that a significant increase in Federal funding would be required to fund the increased administrative burden of the proposed rule. Other commenters stated that due to the lack of resources many PHAs have, HUD should ask for increased funding for public housing so that PHAs can sufficiently meet Section 3's intended goals. Commenters suggested HUD consider creating Section 3 technical assistance funding that can be used to build PHAs' technical knowledge and capacity.

HUD Response: HUD will continue to look for ways to reduce the impact of Section 3 reporting requirements using existing reporting and compliance systems that decrease administrative burden on recipients. HUD believes the use of labor hours, rather than new hires, will reduce costs as many construction contractors already track labor hours to meet prevailing wage requirements. This practice is proposed to provide a consistent labor hour tracking mechanism that will make compliance with Section 3 easier not only for recipients of HUD assistance, but also for contractors and subcontractors. HUD anticipates a reduction in reporting and recordkeeping burdens equal to approximately 64,270 hours, or \$2.4 million annually. This rule will not have any impact on the level of funding for covered HUD programs. Funding is determined independently by Congressional appropriations, authorizing statutes and regulatory formulas that set the amounts of Federal financial assistance provided by HUD grants. HUD is exploring ways to build upon ongoing Section 3 technical assistance and capacity building activities for recipients.

Disaster Recovery

A commenter warned that additional reporting requirements will be problematic for those managing disaster recovery and requested additional guidance for flexibility with the CDBG-DR program. Another commenter recommended HUD provide outreach and guidance on using CDBG-DR funds for job training and hiring initiatives during rebuilding efforts.

HUD Response: Reporting requirements already exist for reporting Section 3 compliance for CDBG-DR program activities. The proposed Section 3 rule will change the reporting scope, such as reporting hours instead of new hires. The rule, however, does not create additional reporting requirements. Like current practice, the

size of a grant award and project scope will dictate the length of time it takes to complete reporting. Technical assistance on using CDBG-DR funds for job training and hiring initiatives during rebuilding efforts, as well as other Section 3 topics, will be provided to grantees upon request and as part of the ongoing grant management process.

Reporting Should Be on Projects Underway

One commenter recommended CPD project reporting should be based on projects underway, not only those projects completed during the program year. The rule is unclear on how Safe Harbor is met for Section 3 projects, though Reporting § 75.25 states HUD requires a compilation of data through the recipient's fiscal year. Commenter recommends Section 3 compliance be measured by combining all workers for all Section 3 projects. If percentages of Section 3 workers and Targeted Section 3 workers are met, this will show intent to comply.

HUD Response: HUD believes that CPD project reporting should be based on those projects completed during a program year. HUD anticipates that CPD programs will continue to report on Section 3 through CPD's current data collection mechanism. At minimum, CPD programs are required to report annually, but many programs update status more frequently during a recipient's fiscal year. HUD intends to issue guidance on the Section 3 requirements and provide technical assistance on a program-by-program basis.

Special Oversight Role of States in State Programs

One commenter recommended that the proposed Section 3 rule be amended to acknowledge the special oversight role of states in State programs. The current Section 3 regulation provides guidance on this point, while the proposed rule fails to include such guidance. Any final rule should include such guidance. See 24 CFR 135.32(f) and 24 CFR 570.

HUD Response: HUD supports retaining the current proposed rule's language. HUD believes the proposed language does fully address the roles and responsibilities of Section 3 recipients and provides adequate guidance to implement, monitor, and enforce Section 3 requirements.

Qualitative Form

One commenter recommended that HUD should provide the form for qualitative reporting required of small



PHAs to allow commenters to provide informed feedback.

HUD Response: HUD will provide a form for Small PHAs and others to use for qualitative reporting when an entity does not meet the benchmark. The form will be issued consistent with Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and HUD will provide the opportunity for the public to provide comments on the form.

Recordkeeping (§ 75.31)

One commenter recommended moving § 75.31 to Subpart A where it would have general applicability to all recipients.

HUD Response: Subpart A and Subpart D provisions apply across the board. The rule is structured so that Section 3's general requirements are in Subpart A. Subpart B and C only apply depending on funding source. Other detailed requirements that apply across the board, such as recordkeeping and compliance, are in Subpart D. HUD believes this structure makes sense and is consistent with other rule structures.

Administrative and Compliance Costs

According to one commenter, this section implies the responsibility for ensuring workers meet the defined requirements in § 75.5, such as Census tract designation and annualized wage calculations, for CDBG Section 3 projects will lie with contractors, which will therefore be costly for contractors who lack the capacity or are already burdened by paperwork. The commenter suggested it may be easier to have recipients bear this burden.

In contrast, one commenter noted contractors would have to provide a personnel profile that includes, at a minimum, income, current address, address at time of hire, and YouthBuild status to establish whether an employee of a non-Section 3 business concern meets any of these criteria. Contractors and employees may balk at a request for this type of personal information, which may become public record. The additional administrative burden placed on otherwise qualified contractors may reduce contractor participation, thereby increasing costs and lessening the impact of Section 3 covered programs on their intended beneficiaries.

HUD Response: HUD believes the rule will not impose additional administrative and/or compliance costs for contractors. Administrative and compliance costs associated with Section 3 requirements should be properly resourced within a contractor's bid for a project and are already required for confirming compliance

with existing Section 3 requirements. Contrary to the comments, contractors do not have to provide a personnel profile or any sort of personally identifiable information. HUD has never requested this detailed information and this rule does not change that; the data is only reported in aggregate, and records are maintained for verification only. Recipients may, but are not required to, assist contractors who lack capacity to adequately implement the Section 3 requirements.

Contracting Provision § 75.17 and § 75.27

Commenters urged HUD to retain standard Section 3 language to be included in contracts because the use of consistent language makes it easier for contractors to be certain of their obligations, limits the possibility of confusion for contractors working on multiple projects, and decreases administrative burden for agencies. Other commenters expressed concern about whether the Voluntary Compliance Agreement clause will continue to exist in contracts and who will enforce it.

HUD Response: HUD considered commenters' requests for standard contract language; however, the contract language must be customized depending upon the contract and the program. HUD anticipates providing sample language and/or discussion of contracting best practices but determined that the recipient is in the best position to determine what contract language is appropriate in each context.

Multiple Funding Sources/ Recordkeeping for Multiple Funding § 75.29 / § 75.31

Clear Standards and Secure Online Tool

Other commenters recommended that there should be clear standards for reporting on Section 3 regardless of the funding source to reduce the possibility of errors and to eliminate the need to report in different formats. These commenters suggested that if HUD defers to localities, the agency that is the primary recipient of HUD funding should determine which option of reporting should be used by subrecipients to allow for consistency in reporting approach. These commenters also recommended that public housing financial assistance guidelines should dictate reporting requirements for PHAs administering projects with multiple funding sources. For projects that are mix-funded with PHA and other HUD funding, § 75.29(a) says that the other HUD funding stream (e.g. CDBG) may report using the PHA criteria.

Commenters recommended that compliance documentation be accessible in a secure online tool or standard form which would measure new hires, hours percentages and training persons and hours. These commenters went on to suggest developing a form for contractors or subcontractors to complete to confirm workers' Section 3 eligibility, which would ease administration and will foster consistency. With respect to the self-certifications discussed in proposed § 75.31, it would be helpful if HUD were to provide a form for this purpose.

HUD Response: HUD thanks the commenters for their recommendation and notes that there will be a standard set of data reporting regardless of which system is used for reporting. The same data will be collected across programs for consistency; the only difference will be how it looks when reported.

Benchmarks for Section 3 Workers and Targeted Section 3 Workers

Many commenters supported including benchmarks for Section 3 workers and Targeted Section 3 workers. Some commenters supported HUD's initial benchmarks, as a starting point, and focus on labor hours. Additional commenters supported using both benchmarks stating that limiting the benchmark to only Targeted Section 3 workers would fail to encourage hiring of other Section 3 workers. Another commenter supported elimination of the 3% goal for non-construction contracts to be Section 3 business concerns. Other commenters supported the benchmarks with the caveat that HUD retain the new hire framework for PHAs or the tracking of the labor hours if they do not have an hour tracking system already in place. These commenters suggested evaluating the efficacy of this approach and revising as necessary if data indicates the change is not supporting sustained employment.

Other commenters stated that HUD's benchmark that Targeted Section 3 workers make up 5 percent of the total number of labor hours is too low. The commenters proposed that at least 15 percent of labor hours worked be the benchmark for Targeted Section 3 workers. The commenters stated that the Section 3 statute clearly prioritizes employment for residents of public housing and other HUD-assisted housing programs.

Some commenters noted that the benchmark for labor hours is too ambitious and unreasonable. Commenters cited to the fact that low-income workers are not necessarily qualified for construction jobs, even those jobs at the lower end of the



construction pay scale, and finding low-income workers who are both qualified for the positions and willing to work in construction is much harder than identifying the number of potentially eligible low-wage workers. Commenters also noted that many low-income persons have childcare and transportation challenges and many contractors do not have open positions to fill by low-income persons.

Another comment opposed the 5% Targeted Section 3 goal, stating it was unrealistic given most PHA residents are seniors, have some form of disability, or already work. Commenters also noted that the benchmarks will be especially difficult to achieve in rural locations.

One commenter opposed the two categories of Section 3 workers, noting the pool of workers is already small, and makes achievement of benchmarks challenging. While the additional categorization provides data collection value, it creates additional burden and goes beyond the statute's requirement. The commenter noted that the benchmark fails to recognize many other initiatives to assist residents to work towards long-term employment and self-sufficiency (such as Family Self-Sufficiency (FSS) programs).

Commenters also noted the current benchmarks have been difficult to meet, and that the new bar would likely require that all positions engaged, rather than only new hires, go to Section 3 workers. The commenter recommends that in an environment of under-funding and over-regulating that HUD establish a modest benchmark that recognizes training and adjust upward later, if necessary. The commenter noted the current recommendation is extremely aggressive and unreasonable; and would result in few agencies meeting the mark. Additionally, it would fail to reduce reporting burdens, align regulations with standard business practices, or increase Section 3 successes.

Other commenters focused on the Targeted Section 3 worker benchmark, noting that the category complicates tracking and decreases the likelihood of meeting benchmarks. The commenter suggested taking an alternate approach to tracking Targeted Section 3 workers without establishing a separate benchmark. One commenter stated that the benefits and goals of the Section 3 statute would be difficult to measure by tracking only Targeted Section 3 workers in that it would fail to represent the value of providing economic opportunities to individuals who are low-income but may live outside the immediate project area, who otherwise still qualify for Section 3 preference.

Other commenters stated that for Subpart C, HUD should only measure compliance of Section 3 with overall Section 3 worker tracking and should not apply Targeted Section 3 workers metrics or benchmarks. The commenters stated support for retaining the existing 30 percent benchmark for all Section 3 new hires but that it should not be required to be disaggregated between Section 3 and Targeted Section 3 workers. The commenters stated that this approach would keep the benchmarks in line with the goals of Section 3 while providing contractors and administering agencies with the ability to tailor implementation depending on the composition of the local workforce and specific project needs.

A commenter noted that they ran numbers with the new metric, along with other PHAs, and they all reported much lower percentages, in most cases half of the proposed numbers. The commenter raised a concern with employee displacement if contractors are required to meet this new ratio, which is inconsistent with the goal of Section 3 to create new jobs rather than displace existing employees or inflate project costs. The commenter noted that recipients hiring contractors instead of replacing or hiring more employees could game the system or add significant costs by hiring additional but unnecessary Section 3 workers for the project life.

HUD Response: The statute requires Section 3 prioritization and this rule's goal is to ensure statutory adherence and streamlined reporting. HUD created the Targeted Section 3 worker category to include both the statutory priorities and policy priorities, for example, tracking the hiring of public housing residents where public housing assistance is involved and tracking the residents of the neighborhood or service area when other housing and community development assistance is used. Prioritization is meaningless without the categorical distinction and HUD believes that technology enables better tracking compared to at the statute's inception. As for the benchmarks, HUD will establish the benchmarks via Federal Register Notices which will allow them to change over time, as data is reported and gathered. HUD believes 5% is a reasonable estimate from the Office of Policy Development and Research (PD&R) data. Additionally, compliance can be evaluated qualitatively if the hours benchmark cannot be met. Under this rule, both measurements are permissible, and the requirements for qualitative evaluation are laid out in the

rule. HUD believes this flexibility will deter any incentive to hire unnecessary Section 3 workers.

Qualitative Measurement

One commenter supported changes to reporting requirements and appreciated the ability to report qualitative efforts if benchmarks are not met. One commenter stated that compliance should be evaluated qualitatively rather than using hours as a benchmark. Commenters stated that the proposed certification related to prioritization of Section 3 hiring efforts would be burdensome to agencies and contractors. The commenter wrote that HUD should require agencies to certify what efforts they have implemented to achieve the goals of the Section 3 program to be considered in compliance. This approach would maintain the benefits and incentives of the program and provide HUD with a tool for accountability.

HUD Response: The statute requires agencies and contractors to prioritize their hiring efforts according to the statute's terms. The rule requires funding recipients to certify that they have acted in compliance with the statute, and to report on the quantitative outcomes of their efforts relative to the benchmarks. HUD does not consider it burdensome for a recipient of HUD funding to certify that they have acted in compliance with the statute. Furthermore, compliance can be evaluated qualitatively if the hours benchmark cannot be met. Under this rule, both measurements are permissible, and the requirements for qualitative evaluation are laid out in the rule. If reporting is above the benchmark, then HUD will presume compliance with the regulatory requirements; HUD wants to see actual positive outcomes rather than just a recipient's inputs. HUD appreciates the request for additional compliance tools but believes that requiring such reporting for all agencies would be overly burdensome.

Safe Harbor

Commenters stated that the proposed rule is not clear on how Safe Harbor would be met for Section 3 projects. The commenters questioned what type of data collection would be used to assure accurate reporting and how to meet the percentages of Section 3 and Targeted Section 3 workers. The commenters asked whether there would be a tool to assist with this data collection.

HUD Response: HUD will issue sub-regulatory guidance and provide technical assistance on a program-by-program basis to assist recipients with



clearly understanding the Section 3 safe harbor parameters. Recipients will provide data regarding Section 3 and Targeted Section 3 workers through existing HUD information systems, as defined by each covered program. HUD will not impose additional data collection burdens on recipients because of the rule.

Small PHAs Should Have a Separate Benchmark

One commenter recommended that Safe Harbor benchmarks should be established for small PHAs and suggested HUD establish a minimum threshold of work-able and non-working residents. Another commenter stated that some smaller businesses do not usually track labor hours performed on specific projects, and it can be a struggle for them to learn how to do so. On Davis-Bacon projects, contractors are required to submit certified payroll; however, some projects may be subject to Section 3 that are not subject to Davis-Bacon and related acts. The commenter stated that requiring the tracking and reporting of labor hours could pose a significant additional burden to small contractors.

HUD Response: One of HUD's goals through this rule is to ensure that employment and other economic opportunities generated by Federal financial assistance for housing and community development programs are, to the greatest extent feasible, directed toward low- and very low-income persons, particularly (though not exclusively) those who receive government assistance for housing. HUD believes that it is essential to achieving this goal that small PHAs report on their efforts to comply with Section 3 but acknowledges that small PHAs may have more difficulty achieving the quantitative benchmarks and consequently has permitted a qualitative reporting alternative for small PHAs. HUD is considering further ways to streamline and ease qualitative reporting by creating a tracking form and timing submission deadlines consistently with timeframes that PHAs and other recipients of public housing financial assistance are already using to submit documents to HUD. HUD has established that small PHAs with less than 250 public housing units will not be required to report labor hours or meet benchmarks, but instead will be permitted to submit qualitative reports on their efforts to involve residents in job-seeking and training endeavors. HUD recognizes the challenge when small PHAs have very few work-able, non-working residents that would make meeting benchmarks very difficult.

Alternatives

One commenter suggested limiting the benchmark to only Targeted Section 3 workers in order to provide a more streamlined approach to reporting. The commenter stated that if the benchmark is narrowed to Targeted Section 3 workers, then tracking data for Section 3 workers should not be required. Other commenters recommended removing the Targeted Section 3 worker benchmark. One commenter stated that if labor hours are tracked, the requirement should be limited to Section 3 workers in general and that the benefits of adding the Targeted Section 3 worker subcategory are not apparent enough to outweigh the complications. One commenter supported giving PHAs and entities using housing and community development assistance a choice to use either targeted Section 3 workers or Section 3 workers as their benchmark.

Other commenters recommended other benchmarking alternatives. Some commenters recommended that the benchmark include a focus on Section 3 business concerns, such that 3% of all contracts are for Section 3 business concerns. One commenter stated benchmarks should ensure that local jobs are provided to local persons to reduce commute times and recommended using geographically determined numbers. The commenter noted that many factors can affect regions and a national number can skew the worker availability distribution. One commenter suggested that such regional benchmarks allow HUD to forecast how many PHAs and Section 3 projects could meet the benchmarks assuming agencies are using their "best efforts" to hire Section 3 workers and Section 3 projects are hiring and contracting with Section 3 workers and business concerns to the "greatest extent feasible." According to comments, regional benchmarks can help account for uneven distribution of potential Section 3 workers throughout the country. Geographic standards may also help address differences between union and non-union states. If HUD were to set regional standards, there should be a national level appeals process. Commenters also suggested allowing use of local adjustment factors and economic data when establishing compliance benchmarks, especially unemployment rates which affect the ability to meet benchmarks.

One commenter stated the benchmark does not ensure Section 3 workers are engaged in a mix of job categories or trades, or opportunities for upward mobility; 30% of hours worked should

be measured for each job category/trade and protected classes. Other commenters suggested HUD consider the type of public housing financial assistance or other variables. The commenter recommended that in addition to different types of benchmarks HUD should maintain a ceiling for these benchmarks. The commenter noted a goal of 80% of entities meeting the benchmarks would be appropriate.

Other commenters stated that in order to fulfill the statutory objectives of Section 3 to direct the financial opportunities to low- and very low-income persons and recipients of housing assistance, the final rule must: (1) Set benchmarks in a way that actually prioritizes HUD tenants; and (2) employ a definition of Section 3 worker and Targeted Section 3 worker that includes exclusively low-income individuals. Commenters also proposed separate benchmarks for public housing projects and non-public housing projects and provided a specific hierarchy of workers. Other commenters noted proposed benchmarks for PHAs should reflect the law's emphasis on providing opportunities for public and assisted housing recipients.

Commenters suggested an alternative approach for workforce utilization setting goals for all construction and other blue-collar employment, such as landscaping and janitorial. The commenters suggested that labor hours also consider demographics, length of project, geography, and size of contractors.

One commenter recommended that the determination of Section 3 compliance be measured by combining all workers for all Section 3 projects to get an overall picture of the number of low-income workers being paid with these federal dollars. If the percentages of Section 3 and Targeted Section 3 workers are met, this better shows intent to comply with the spirit of Section 3.

HUD Response: HUD appreciates the suggestions and has considered multiple benchmarking options. Creating separate benchmarks would make projects with co-funding difficult; the commenter's suggestions increase both complexity and the burden of reporting. HUD believes the current benchmark is a good starting place and notes that the regulation permits adjusting the benchmarks via **Federal Register** publication. HUD program staff will evaluate the level of effort expended by those recipients that fail to meet the benchmark safe harbor, and thus will ensure that the statutory terms are being properly enforced. HUD is most interested in strong outcomes for



Section 3 employees. In addition, HUD has no programs that align with specific regions and intends to see reporting data before making any additional distinctions, if appropriate.

Compliance (§ 75.33)

General

A comment stated HUD needs to strike a balance between the limits of state and local agency resources and Section 3's goals to provide more effective resources to foster compliance. Similarly, another comment suggested HUD utilize Community Compass technical assistance funds to create best practice resources and employ contractors to provide Section 3 compliance support to those jurisdictions and PHAs without designated staff for this purpose. Another comment recommended HUD simplify the compliance requirements by establishing a "presumed eligibility" criteria for businesses or residents located in HUD-approved Neighborhood Revitalization Strategy Areas, Choice Neighborhood target areas, Promise Zones, Empowerment Zones and Enterprise Communities, Opportunity Zones and other areas defined at 24 CFR part 570.208(a)(1)(vii).

A commenter suggested states and entitlement communities be required to develop Section 3 Plans that become part of the 5-year Consolidated Plan to allow time for compliance with the labor hours percentages while requiring demonstrated improvement over time. The plan should track Section 3 performance and demonstrate labor partnerships, construction, and training programs to target and find workers and an environment that promotes Section 3 goals. HUD should describe the plan's components, including how to notify the public of opportunities for involvement in designing the plan, how and when to notify the public when Section 3 employment and bidding opportunities arise, how to inform workers of their rights, and complaint processes. Commenters recommended HUD establish ethics standards for organizations who have a fiduciary responsibility over Section 3 funds. Other commenters suggested compliance failures to adhere to Section 3 business concern criteria should be cured within two payroll periods or be terminated; terminated contractors should be banned from receiving HUD funds for 3 years from the termination date; and that persons found to have falsified their residence to qualify as a Section 3 worker should be suspended from participation for 3 years.

Commenters stated HUD should: provide greater clarity on the obligations created by § 75.33(a), especially since the preceding section, § 75.31, imposes highly specific recordkeeping requirements; explain whether the recordkeeping obligation in § 75.33 is a restatement of the recordkeeping obligations set forth in § 75.31, or whether additional records are required to demonstrate compliance; and HUD should provide guidance on documentation and recordkeeping related to "best efforts" or "greatest extent feasible" efforts.

HUD Response: This rule is intended to strike a balance and foster compliance with Section 3's goals and will result in a reporting and recordkeeping burden reduction. 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. HUD will review Department-level strategies on how to effectively incorporate Section 3 reporting into current systems and data collection tools, including the Consolidated Plan. HUD will issue sub-regulatory guidance on reporting by program area and provide technical assistance to recipients for Section 3 compliance. HUD appreciates the suggestions and notes that there will be standardized compliance procedures across programs, and this will include ethics standards. Section 75.33 is a reaffirmation of the recordkeeping requirement set forth in § 75.31, as recipients of HUD funding will need to have the records described in § 75.31 available if HUD needs to do a compliance review of a recipient's Section 3 performance. HUD determined not to define the difference between "best efforts" or "greatest extent feasible," but rather to increase the emphasis on outcomes as a result of these efforts. Please see the "Best efforts" and "greatest extent feasible" section above. A recipient's reported results will be compared to the outcome metrics defined in the benchmark Notice. HUD program staff will evaluate the level of effort expended by those recipients that fail to meet the benchmark safe harbor, and thus will ensure that the statutory terms are being properly enforced.

Complaints and Monitoring

Commenters stated each HUD program should have a detailed complaint process. A commenter supported the integration of Section 3 into each program area but noted the

lack of detailed complaint provisions, and suggested the final rule require each HUD program to have a detailed complaint process, with enforcement assigned to Davis-Bacon and Labor Relations (DBLR), Office of Field Policy and Management (FPM), or the Office of Fair Housing and Equal Opportunity (FHEO).

Commenters supported removing Section 3 enforcement from FHEO but strongly suggested HUD identify an office independent of the program offices to monitor and enforce Section 3 requirements, such as FPM, or a new Section 3 office fully funded and trained to work on Section 3. Giving responsibility for Section 3 compliance to the program that is responsible for funding that triggers Section 3 obligations is problematic because (1) HUD program staff have in the past referred to PHAs and jurisdictions, not the residents who are supposed to benefit from HUD programs, as their "constituents," (2) there is currently no process for accepting and reviewing complaints in the proposed rule, (3) significant training and resources will be required to prepare program staff to oversee Section 3 compliance since they are not currently engaged in it. HUD should require that Section 3 policies, plans, procedures, and complaints are made publicly available by both the recipient and on HUD's website.

Other commenters agreed with the proposed shift of oversight from FHEO to program offices and believed this will improve oversight because program offices already monitor recipients on a day-to-day basis, thus Section 3 monitoring will become part of normal overall monitoring. Another commenter stated transferring oversight and compliance from FHEO to program offices is an appropriate change on the condition that oversight practices are standardized across program offices. Another commenter was concerned about the Section 3 complaint process for residents; HUD program areas do not have detailed provisions for residents to file complaints on the part of PHAs or jurisdictions that do not meet program requirements. At a minimum, if HUD defers to grantees to field complaints from individuals, the process should require a grantee to inform HUD of the resolution of each complaint much like CPD does with CDBG-DR complaints.

A further commenter stated it is not clear how the public will make complaints if the current complaint process is removed and asked how they will know which program office to contact. Other commenters suggested the final rule require a detailed complaint process identical or similar to



what is in the current rule. Further commenters expressed that HUD should keep the existing complaint process until it adopts a new one after public review and comment. Other commenters were concerned about the 958 Complaint Form's elimination and the impact on residents who will be left without protections or a process for monitoring and overseeing contractors who are violating Section 3 requirements. One commenter felt that to move the review process from FHEO to local HUD CPD would be disastrous.

A commenter noted that HOME and CDBG recipients do not seem to understand the importance of Section 3 and the compliance enforcement—appropriate remedies are not in place. According to one commenter, the promise of Section 3 has not yet been realized, largely due to the fact that none of the entities responsible for its administration—HUD, state and local governments, PHAs—have been sufficiently resourced to implement, monitor, and enforce Section 3 requirements. The HUD program offices responsible for funding all are currently under-resourced and could better fulfill their obligations in monitoring and enforcing Section 3 with dedicated staff.

One commenter had concerns about moving Section 3 regulations from 24 CFR part 135 under FHEO to the new part 75 under the Office of the Secretary; the commenter assumed Office of Field Policy and Management would have oversight of Section 3 under the proposed rule amendment and expressed concern over FPM's lack of capacity and technical knowledge to oversee monitoring and enforcement of Section 3. The commenter argued HUD has never seriously monitored and enforced the statute and that HUD program staff treat PHAs and jurisdictions as their constituents, not the residents who are the intended beneficiaries. Additionally, alternative procurement provisions should be created to help Section 3 business concerns compete with larger more established businesses.

One commenter was concerned about different program offices providing conflicting information and hoped HUD would provide standardization and clear guidance; others suggested HUD request adequate funding to hire the necessary headquarters and field office staff to provide Section 3 technical assistance and to robustly monitor and enforce Section 3, as well as seeking adequate funding so that all jurisdictions and PHAs can hire and retain staff to serve as Section 3 coordinators and to monitor and enforce Section 3 obligations. A commenter has

received conflicting guidance from different program offices, resulting in findings and fines on several occasions.

HUD should provide further detail as to what standards each program office would be using to provide oversight and what procedures are in place to ensure that PHAs receive consistent oversight across offices. Further clarification is also needed as to how the responsible program office would be designated for oversight when a project uses multiple funding sources and triggers oversight from multiple program offices.

A commenter recommended HUD strengthen its compliance practices to incentivize performance while recognizing legitimate constraints. The commenter also recommends stating in the rule that HUD will deduct points in relevant HUD program Notices to applicants for competitive HUD funding who have not achieved Section 3 benchmarks and allowing applicants the ability to provide justifications for failure to meet benchmarks despite good faith efforts. The commenter also recommended allowing program offices to incentivize Section 3 compliance in funding Notices but have a Department-wide entity focus on all aspect of compliance (reporting, analysis, and information technology systems).

HUD Response: HUD took the concerns about the complaint process under advisement, and § 75.33(b) has been amended to include “or local HUD field office.” HUD believes Section 3's objectives will be better achieved by moving Section 3 oversight into the program offices so that HUD staff who are actively engaged with recipients in their program planning and activities will bring Section 3 concerns and considerations into their routine interactions with the recipients. HUD will provide external and internal technical guidance on complaint handling and routing. The Office of Field Policy and Management (FPM) will be taking a greater role at the field level by filtering complaints to the corresponding office, rather than every HUD program office having its own complaint process. The local HUD field office is part of the FPM organizational structure, and also provides individuals with a complaint venue when the complainant does not know which program office would be responsible. There will be variation in what guidance and/or compliance looks like for each program office, but HUD will provide support to the extent it is standardized across program offices.

Enforcement

Commenters stated any contractor or Section 3 resident found to falsify data

in order to receive benefits from HUD funded training, contracting, and employment should be immediately removed and/or barred from participation in Section 3 programs for ten years. Violations should be posted and made available to the public for review. Every PHA should have a written Section 3 Plan-Policy in place and attached to any Request for Proposals for bids.

HUD Response: HUD believes that recipients should have the flexibility to determine how to implement Section 3. HUD also believes this new regulation will make such implementation easier. While the final rule does not require recipients to have Section 3 plans or policies, HUD views having them as a best practice that will aid recipients in achieving the Section 3 benchmarks. As for the concern about potential fraud, program offices will continue to monitor compliance with Section 3 requirements through evaluation of qualitative or quantitative reporting, complaint review, and program audits, if appropriate.

General Comments

One commenter said all policies should be expressed in “simple” terms for all stakeholders, especially residents, to understand. Commenters stated there is little point in creating policies and programs that produce only six-week or six-month jobs, or jobs that do not lead workers out of poverty. HUD recipients have difficulty in assisting residents in obtaining and maintaining any jobs, let alone high-wage jobs that will lead to careers and help residents leave poverty behind.

A commenter expressed the Section 3 rule is “of great benefit to have in effect and keep up to date.” Section 3 funding recipients should be mandated to actively seek employment at all times to the best of their ability and report an employment log to track job applications.

One commenter indicated many of the proposed changes do not reflect the construction trade's current realities and would impose costly new obligations on PHAs without a funding source to pay for those requirements. Another commenter argued Section 3 is “just another burdensome regulation” that “doesn't produce a positive outcome.” One commenter stated the proposed rule would have an adverse impact on the Section 3 participation that HUD desires, whereas others supported the proposed rule amendments.

One commenter stated public housing living conditions are poor; Section 3 programs are practically non-existent in the commenter's area; and the way that



public housing residents' income is calculated is problematic.

A commenter stated Section 3 is one of HUD's most important responsibilities since it creates the standards for employment, training, and contracting opportunities generated from HUD financial assistance. This commenter felt a stronger Section 3 rule can lead to increased hiring and contracting opportunities; overall the proposed rule has many merits and is an improvement. Similarly, another commenter stated the potential benefits of Section 3 have never been realized; the improvements to the rule have potential to improve outcomes.

According to one comment, the proposed rule amendments try to address Section 3 program implementation difficulties but still present incongruities; HUD should consider methods to enact preferences or incentives. A commenter stated it is difficult to find Section 3 employers in some jurisdictions, and some jurisdictions have no active YouthBuild program. Commenters noted most HUD households are headed by or include females, minorities, or female minorities. Section 3 regulations should be designed to give low- and very low-income people (particularly recipients of Federal housing assistance) a pathway out of poverty, and PHAs should be required to work with organizations that have a proven track record of successfully recruiting, training, and retaining women and minorities in the construction industry. A commenter recommended HUD work directly with the National Task Force on Tradeswomen's Issues.

HUD Response: HUD thanks the commenters for their responses. This rule is intended to strike a balance and foster compliance with Section 3's goals and will result in a reduction of reporting and recordkeeping burdens. 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. HUD agrees that this regulation is designed to give low- and very low-income people (particularly recipients of Federal housing assistance) a pathway out of poverty. There is no mandate in the rule for Section 3 funding recipients to constantly apply for new jobs, nor are there requirements for PHAs to work with certain organizations.

Other Programs

Commenters noted opportunity discrimination is unconstitutional; all citizens have a right to wealth and prosperity. States can support and invest in their cities' workforce through equity and management but should first complete a local needs assessment. One commenter referred to Perkins V (the Strengthening Career and Technical Education for the 21st Century Act) requirements for eligible recipients to conduct a comprehensive local needs assessment every two years. One commenter suggested creating a Section 3 Score Card for public information to capture grantee compliance and ensure that contractor compliance with Section 3 requirements are considered for future employment and contracting opportunities, and improving the effectiveness of the program will enhance compliance to realistically measure targeted outcomes.

A commenter recommended HUD consider developing an annual recognition program for PHAs, subrecipients, contractors, and subcontractors for excellence in Section 3 performance, rather than redesigning the tracking and reporting requirements.

HUD Response: HUD thanks the commenters for their responses. HUD affirms that discrimination based on protected classes is unconstitutional. The Perkins programs noted in the comment are administered by the U.S. Department of Education and there are no requirements for eligible recipients to conduct a comprehensive local needs assessment every two years in the rule. There are no provisions to create a public Section 3 Score Card or an annual PHA recognition program at this time.

Technical Fix

One commenter noted in the amendment to 24 CFR 93.407(d), the proposed rule still references 24 CFR part 35 instead of 24 CFR part 75. The commenter recommended that HUD change the citation to reflect 24 CFR part 75.

HUD Response: Thank you for your comment, but HUD declines to change the citation. The amendment referred to is a technical amendment to the regulations unrelated to the Section 3 regulations. The cross-reference to 24 CFR part 35 is in reference to records demonstrating compliance with lead-based paint requirements, which continue to be covered by 24 CFR part 35.

HUD Program Collaboration

Commenters stated that funding for Section 3 coordinators, and technical

assistance or written guidance on coordination with other self-sufficiency programs such as FSS would allow for Section 3 to more effectively meet its goals. One commenter opposed changes to the rule stating that HUD should not scale back its existing operations and rule. The commenter also recommended that HUD and other agencies ensure coordination with benefit planners so that people with disabilities are involved in planning neighborhoods and community opportunities for work.

HUD Response: HUD appreciates the suggestion for more funding for Section 3 coordinators. HUD believes that this rule will streamline the Section 3 regulations to create additional incentives and streamline reporting requirements, thereby offsetting the need for more funding. HUD notes that by conducting in-service trainings and proactively engaging with appropriate partners in the Social Security Administration (Work Incentives Planning Assistance), Department of Labor (ETA & ODEP) and Health and Human Services (CMS, ACF & ACL) to identify best practices and model approaches, FPM will make the appropriate decisions regarding potential coordination with FSS, other self-sufficiency programs, and/or programs for people with disabilities. HUD continues to encourage PHAs and recipients of HUD funds to coordinate with other agencies and local communities to assist in hiring Section 3 workers. This rule does not change that. Moving the oversight of the rule to FPM and the program offices will not scale back HUD's role in ensuring compliance with Section 3 requirements. HUD believes that the move will actually ensure better compliance given the new location of oversight and the new tracking mechanisms.

Title VI

One commenter suggested the Section 3 rule should include information that Title VI of the Civil Rights Act also applies to Section 3, prohibits against discrimination, and requires language assistance.

HUD Response: Title VI applies to any program or activity receiving Federal financial assistance from HUD. Section 3 is a requirement, not a program that receives HUD funding.

Extend Comment Period

One commenter recommended HUD extend the comment period for affordable housing developers to suggest more effective changes.

HUD Response: HUD believes that the 60-day comment period provided ample



opportunity for affordable housing developers and other members of the public to suggest changes to this rule.

Outside the Rulemaking Scope

One commenter, a stakeholder in a major metropolitan area PHA that is being monitored by a “Federal Monitor” as a result of a 958 Complaint, stated that the appointed Federal Monitor has no housing experience and that all parties involved have missed the most important purpose of Section 3, which is economic empowerment for low and very low-income persons residing in local communities for HUD invested projects.

One commenter proposed defining an execution fee as a “percentage of bidder’s final submitted price added by the recipient or general contractor because the contractor/subcontractor provided no Section 3 benefit.”

One commenter stated concern about the lack of focus on higher level training as a vehicle for individuals to develop skills and build a better future. The commenter stated that the proposed benchmarks and guidelines provide no framework for differentiating training or skilled work classifications from general labor, so there would be no incentive for creating higher level opportunities. The commenter requested that HUD provide guidance on how to encourage this sort of activity under the new benchmarks.

HUD Response: HUD thanks the commenters for their suggestions, however, these comments are outside the scope of this rulemaking.

Miscellaneous

Impact on Rural Areas and States

Commenters stated it is difficult to comply with Section 3 requirements in rural areas. The goals of Section 3 are more feasible in densely populated urban areas. The proposed rule does not improve this circumstance. Section 3 eligible individuals cannot take advantage of Section 3 opportunities in rural areas because they are nonexistent. There are not ample conditions to facilitate Section 3 in small communities and rural areas. Rural areas have less availability of contractors and employees and there needs to be flexibility to engage people outside their service area to complete projects. One commenter noted benchmarking methodology seems strongly skewed toward large urban centers and overlooks geographically large states with relatively small rural populations, and asked HUD to make exceptions for jurisdictions with smaller and more rural populations. Some commenters noted that contractors in

rural states rarely need to hire new employees because the projects are small, the contractors have limited growth potential, or the employers have tenured staff. The commenter further stated that the new hire’s length of employment coincides with the project and terminates at project completion.

Commenters noted Section 3 is particularly difficult for states to administer. Another commenter explained that as a state, it does not hire the contractors for the CDBG projects. The local jurisdictions do that. It has no opportunity to promote the hiring of Section 3 business concerns. The very small communities with which it works have implemented procurement policies that award contracts to the lowest responsible bidder. They will not award a contract to a higher bidder just because the bidder is a Section 3 business concern. The commenter stated that the Section 3 regulation should apply to the CDBG Entitlement program and not the Small Cities program. One commenter suggested that state CDBG recipients should have the same flexibility in reporting as small PHAs.

HUD Response: HUD acknowledges that implementing Section 3 in various geographic areas presents different challenges for rural areas versus densely populated urban areas. HUD believes this has been addressed within the proposed Section 3 regulation by using a circle centered around the worksite that expands until it reaches a population of at least 5,000. HUD further acknowledges that, in particularly remote areas, the expandable circle may reach a size that may be impracticable to match those benefiting from the project with the Section 3 benchmark. If the recipient is unable to meet the Section 3 benchmark described in § 75.11, it will be required to report in a form prescribed by HUD on the qualitative nature of its activities or those of its contractors and subcontractors. This will allow the recipient to explain in qualitative means why it was unable to meet the Section 3 benchmark. HUD is sympathetic to the issues raised for rural areas and will watch implementation carefully as it progresses, allowing for updates as deemed necessary. HUD will also provide sub-regulatory guidance on the submission of qualitative reports to enable smoother implementation of the requirement.

Coordination With Nonprofit Organizations and Other Agencies

Commenters suggested HUD require PHAs and other recipients to work with organizations with a proven record of accomplishment of success in the

recruitment, training, and retention of women and minorities in the construction industry and other blue-collar occupations. The Department of Labor is already working with many of these organizations and has a list of apprenticeship training and technical assistance providers to help with the recruitment of Section 3 residents, pre-apprenticeship training and ongoing support. Commenters also suggested that HUD work directly with the many tradeswomen organizations, and other nonprofits already providing construction readiness training programs (also called pre-apprenticeship training) and the National Task Force on Tradeswomen’s Issues. In 2018, women made up only 3.4% of construction workers. While this figure represents progress, it demonstrates the need for HUD and its recipients to partner with tradeswomen and other organizations who have expertise in successfully getting women and minorities into the construction trades, and, more importantly, creating a real opportunity for careers in the construction industry. One commenter recommended forging closer ties with the Tribal Employment Rights Offices and directing the HOME and CDBG programs to consider this approach to ensure tribal communities’ benefit from HUD program projects nearby. Other commenters suggested planning grants to form or strengthen partnerships with Workforce Investment Boards or inter-agency collaborations with workforce programs within the Department of Labor.

HUD Response: HUD concurs that building strong collaborations between and among several Federal, state, and local partners will aid Section 3’s goals. HUD will consult with the Departments of Labor, Health and Human Services, Commerce, Small Business Administration, and other agencies as determined by the HUD Secretary to meet the Section 3 statute’s mandate at 12 U.S.C. 1701u(f). HUD will also take the comments provided under consideration as it looks for ways to conduct successful outreach and technical assistance strategies for Section 3 implementation.

Outreach and Training

Commenters recommended that HUD facilitate the competition for Section 3 excellence among developers and contractors by developing an online database of completed Section 3 covered projects that includes the names of the developer and general contractor, the nature and size of the project, and the Section 3 employment, contracting, training and retention outcomes



achieved. Commenters urged HUD to create a national database of Section 3 outcomes and to facilitate the inclusion of training and retention programs in bid materials by collecting and sharing best procurement practices.

One commenter suggested HUD should explicitly require PHAs and CDBG recipients to make reasonable efforts to connect Section 3 workers and Targeted Section 3 workers with local workforce development and career and technical education training. Another commenter recommended that the rule should give emphasis to training opportunities as is emphasized in the Section 3 statute because training is a potential response for recipients who are submitting qualitative reports for failure to meet Section 3 benchmarks.

One commenter stated there are no provisions in the rule regarding training. Similarly, another commenter noted the benchmark fails to recognize the statutory reference to training and employment opportunities. Likewise, commenters requested HUD clarify whether it is proposing new ways to track or report on Section 3 training. In the discussion of proposed §§ 75.15 and 75.25, HUD states that one of the qualitative measures a locality could use is paying for apprenticeship programs and/or offsite job training. One commenter welcomes any opportunity to expand these programs and recommends that HUD make job training an economic development activity instead of public service under the CDBG regulations. Alternatively, HUD could consider raising the public service cap for CDBG funds in order to accommodate additional job training programs.

A commenter recommended HUD provide outreach on training, employment and asset building programs to HUD assisted residents, including Family Self Sufficiency, Jobs Plus, and the Resident Opportunity and Self-Sufficiency programs. HUD should create resource guides on how CDBG has been used to support effective job training programs. A commenter suggested HUD should design a Section 3 worker's rights poster with input from HOME and CDBG grantees. Commenters noted changes to Section 3 reporting and tracking requirements may require additional resources for administering agencies, particularly PHAs in receipt of public housing assistance funds. HUD funding for the implementation of an IT system to enhance the current system and integrate with contractors would be particularly welcome to ease Section 3 monitoring and reporting for all parties. Having dedicated funding for the overall program, including support for resident

training, IT system enhancements, and other related measures, would help to further Section 3 goals while limiting potential administrative burdens.

One commenter stated PHAs noted they are most successful in helping residents find employment when they can offer employment services and trainings to help them gain the skills necessary to access jobs. However, additional funding is needed for programs like Family Self Sufficiency, Resident Opportunities and Self-Sufficiency, Jobs-Plus Initiative, and the Public Housing Operating Fund. One commenter recommended that HUD provide recipients the addresses of all public housing, PBRA projects, and Housing Choice Voucher projects by counties to assist in matching workers' addresses and automatically designating them as Section 3 workers; that HUD assist Section 3 workers in housing assistance; that Section 3 workers receive a living wage; that HUD help provide life skills such as budget counseling; and that HUD be proactive in supporting and developing (in conjunction with the Department of Labor) apprenticeship and other training programs for assisted housing residents and other low-income people.

One commenter recommended that HUD incentivize widespread replication of successful mentorship programs; create regional programs patterned after successful mentorship programs that smaller PHAs can access cooperatively; ensure the program allows for a tiered approach that allows Section 3 contractors to gain vital experience on smaller projects then graduate up to increased responsibility; and ensure that the Section 3 program continues to allow PHAs to use Section 3 contractors to complete work at all levels, including very small projects. One commenter suggested HUD request that the President's Budget include adequate funding to enable HUD to hire the necessary headquarters and field office staff to provide Section 3 technical assistance and to robustly monitor and enforce Section 3. Also, the President's Budget should seek adequate funding so that all jurisdictions and PHAs can hire and retain staff to serve as Section 3 coordinators and to monitor and enforce Section 3 obligations.

HUD Response: HUD thanks the commenters for their suggestions; as HUD updates its systems, HUD will take the suggestions under advisement. HUD encourages CDBG recipients to collaborate with local workforce development boards and training providers to create effective connections between them and Section 3 and Targeted Section 3 workers. HUD will

also provide sub-regulatory guidance and technical assistance promoting career and technical education training. HUD believes tracking labor hours provides a picture as to the success of providing job opportunities with HUD financial assistance, but as noted in the proposed rule the qualitative reporting will consider training. Reporting entities may consider training to help meet its employment goals and provide such information if goals are not met and entities are required to respond qualitatively. HUD will not provide a separate funding source; however, HUD will build on this final rule by providing technical assistance guidance for all HUD Section 3 programs. HUD will consider such guidance in creating materials for use by grantees. PHAs should already be tracking labor hours for Davis-Bacon or wage requirements and should not be doing anything more than what they did before to verify Section 3 workers as new hires. This rule just lays out the process for such verification. Once a PHA determines a Section 3 worker or Targeted Section 3 worker is hired or currently employed, the PHA would just report those hours as the numerator over the total labor hours funded with Operating and Capital Funds as the denominator.

HUD appreciates the input on ways HUD can help residents and is continuing to look at ways to make programs like Family Self Sufficiency, Resident Opportunities and Self-Sufficiency, Jobs-Plus Initiative more effective. HUD will be sure to consider those recommendations in future rulemaking. Section 3, however, is focused on how to provide job opportunities created by HUD federal financial assistance and does not have funding directly associated with it that can be used for those programs. Reporting entities may consider training to help meet their employment goals and provide such information if goals are not met and entities are required to respond qualitatively. HUD does not think it is appropriate to provide access to a list of all public housing, PBRA projects and Housing Choice Voucher residents to the public; such data sharing would implicate privacy concerns. Additionally, the PHA would have that information for seeking to hire such persons as Targeted Section 3 workers for public housing assistance.

HUD appreciates the suggestions and will consider them in providing guidance and technical assistance by both FPM and the program offices. HUD believes that there will be adequate funding for Section 3 technical assistance and monitoring in FPM. The FY2020 President's Budget Request



Congressional Justification specifically requested: “\$51.5 million to support 334 FTEs, consistent with the estimated 2019 Annualized CR level. Resources will support ongoing community engagement, monitoring and technical assistance pertaining to Section 3, compliance with the Davis-Bacon and Related Acts, enhancement of the overall customer experience and disaster recovery responsiveness at the state and local levels for clients and customers.”⁶ Federal financial assistance recipients should make their own determinations about staffing levels necessary to implement the assistance received.

Rental Assistance Demonstration (RAD)

Commenters recommended the RAD Notice should be amended to indicate that Section 3 obligations be extended post-conversion to PBV because currently Section 3 no longer applies unless additional Federal financial assistance is later used for rehabilitation. Commenters also asked for further clarification regarding RAD conversion applicability during and after construction. Eliminating RAD projects from Section 3 applicability will reduce contract awards that can provide opportunities to Section 3 residents. HUD should revise the rule to expand the definition of Targeted Section 3 worker to cover RAD and other HUD assisted tenants, and should require owners and managers of RAD-converted projects to hire, train, and contract with Section 3 residents to the greatest extent feasible in their own operations.

HUD Response: The Section 3 statute does not apply to properties that are recipients of Section 8 rental assistance unless they are recipients of other Federal funding covered by the Section 3 statute. A RAD transaction is a conversion at a moment in time and, subsequent to the conversion, the property is governed by the Section 8 requirements. HUD has administratively applied Section 3 during the RAD-related construction period even though not required by the RAD statute or the Section 3 statute. *See* RAD Notice Revision 4 and RAD program documents.⁷ HUD has 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 has defined “Targeted

Section 3 workers” to include residents of public housing and Section 8 housing, which means that HUD funding recipients must report on hiring of these types of HUD-assisted tenants, which includes tenants of RAD-converted Section 8 properties.

Notice of Funding Availability (NOFA)

One commenter wrote in support of the NOFA certification’s removal. Several commenters supported the current requirement that NOFA applicants submit a certification of intent to comply with Section 3 requirements along with a statement of their proposed Section 3 activities. Commenters noted that performance among PHAs, developers, and contractors varies greatly when it comes to meeting Section 3 requirements. One commenter gave an example where a contractor might merely hold a job fair and interview any qualified Section 3 residents who apply, while another might make Section 3 hiring a condition of all major subcontract awards, contract with a community organization to conduct outreach and referral services, establish a pre-construction and/or on-the-job training program, provide job coaching and other supports, and retain Section 3 workers after completion of the Section 3 project. Commenters went on to state that using a bidder’s past Section 3 performance and the quality of their proposed Section 3 plan can have a profound effect on the quality of economic opportunities provided to Section 3 residents.

HUD Response: HUD decided to continue with the change in the proposed rule and to omit specific requirements for Notices of Funding Availability (NOFA) in the final rule; however, the final rule will require that all NOFAs issued by HUD that announce the availability of funding covered by section 75.3 will include notice that part 75 is applicable to the funding and may include, as appropriate for specific NOFAs, points or bonus points for Section 3 plans. Where Section 3 is applicable, the inclusion of specific requirements in the regulation regarding the NOFA does not change the recipient’s obligation to have a compliant Section 3 implementation strategy. Similarly, where Section 3 is not applicable, the regulatory language would not apply. The presence or absence of the NOFA clause in the regulation has no effect on applicability of Section 3. HUD anticipates that program offices will include scoring for Section 3 plans where relevant and exclude Section 3 scoring where the nature of the grant being awarded is incompatible with Section 3 endeavors

(such as funding for sweat-equity homeownership initiatives). HUD is in the process of developing improved databases to inform program offices, funding recipients, and the public-at-large regarding Section 3-covered projects and the outcomes achieved. HUD hopes that these databases, plus anticipated technical assistance to disseminate information regarding Section 3 best practices, will provide a foundation for more impactful implementation of Section 3 over time.

Professional Services Exclusion

Commenters stated HUD should retain the 3% benchmark for professional services contracts, as it is not uncommon for professional services companies to meet the qualifications of a Section 3 business concern. It helps businesses who employ workers who were low-income when they were hires or businesses who were started by low-income or public housing residents that have grown professionally to provide employment opportunities to other low-income people.

Other commenters noted excluding professional services positions—typically higher paying, higher career growth—would effectively limit Section 3 workers to construction services, diminishing the potential positive impact of the statute. Ultimately, it will not provide HUD with adequate data on positive or negative impacts of Section 3’s intended goals. The intended goal of the Section 3 statute is to positively impact the lives of HUD assisted residents through meaningful job placement and training that will ultimately lead to greater self-sufficiency. The current rule includes a goal of 30% of new hires in management and administrative jobs, technical, professional, building trades, and non-construction jobs and all levels. Professional service jobs include accounting, legal services, financial consulting, architectural and engineering services. The proposed rule indicates that professional services will be excluded from benchmarking requirements, but HUD will allow voluntary reporting of these workers. A commenter suggested maintaining the current rule’s requirement of reporting on professional services but moving to total labor hours worked in both construction and non-construction services, and better tracking this data through streamlined reporting systems.

Other commenters supported excluding professional services from benchmarking requirements while allowing voluntary reporting of such workers; excluding certain types of contracts such as material and supply,

⁶ HUD’s FY2020 Congressional Justification for President’s Budget, <https://www.hud.gov/sites/dfiles/CFO/documents/2020HUDCongressionalJustifications4-2-19.pdf>.

⁷ Rental Assistance Demonstration—Final Implementation, Revision 4 Notice H-2019-09 PIH-2019-23 (HA), issued September 5, 2019.



and professional service; and excluding professional services from covered activities and suggested adding a benchmark for training activities. One commenter noted it experienced the same challenges as other HUD partners in meeting Section 3 goals when working with professional service vendors. However, the commenter noticed that in some cases vendors can carve out small segments of highly skilled work or training for low-income residents (e.g., providing an internship or hiring a recent graduate to perform a small scope of work.) While the rule allows voluntary participation of professional service vendors, commenter suggests that HUD give discretion to recipients to mandate Section 3 participation by these partners, without necessarily holding them to specific benchmarks like contractors.

HUD Response: HUD acknowledges that there are occasions when employers can create opportunities for Section 3 employment in the professional services context, and HUD lauds these efforts. At the same time, data indicate that there are relatively few such opportunities for Section 3 hiring in professional services fields such as legal services and civil engineering. Many of the positions within these professional services fields require specialized degrees and in many cases the hiring is not directly tracked to a specific Federally funded project or activity. To ensure that the carve-out for professional services is relatively narrow, however, HUD has revised the definition of professional services. While keeping the modified exclusion for professional services in the final rule, HUD notes that the reporting structure in the proposed rule allows a recipient to count as Section 3 labor hours and as Targeted Section 3 labor hours any work performed by a Section 3 worker or a Targeted Section 3 worker (i.e., in the numerator of the calculation), even when the professional services as a whole are not counted in the baseline reporting (i.e., in the denominator of the calculation). The effect of this reporting structure is to give a recipient a bonus if they are able to report Section 3 hours in the professional services context. As referenced in the comments, vendors can sometimes create opportunities in the professional services context, and HUD seeks to reward this behavior. In addition, recipients are provided significant discretion in how they seek to implement their Section 3 obligations. A recipient could elect to require, at the local level, additional Section 3 obligations with respect to

professional services through the terms of the funding contract.

V. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This rule was determined to be a “significant regulatory action” as defined in Section 3(f) of the order (although not an economically significant regulatory action under the order). Consistent with Executive Order 13563, this rule creates new part 75 regulations that would replace the part 135 regulations, with the intention to make compliance with Section 3 more effective and less burdensome, and therefore, help to contribute to job creation for low- and very low-income persons. HUD has prepared a Regulatory Impact Analysis (RIA) that addresses the rule’s costs and benefits. HUD’s RIA is part of the docket file for this rule.

The docket file is available for public inspection in the Regulations Division, Office of the General Counsel, Room 10276, 451 7th Street SW, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at toll-free 800-877-8339.

Environmental Impact

The final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new

construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This proposed rule does not impose a Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As has been discussed in this preamble, this rule updates HUD’s Section 3 regulations and replace them with a new 24 CFR part 75, for which the objective is to increase employment opportunities for low- and very low-income persons and businesses that are owned by or employ such persons. These entities generally are small and therefore strengthening the requirements of Section 3 should benefit small businesses that are Section 3 business concerns. This rule also considers the burden on small public housing agencies (PHAs), defined in this rule as a PHA that manages or operates fewer than 250 public housing units, and reduces the burden on them through a new streamlined reporting process that would not require them to report labor hours or new hires. There are approximately 2,950 PHAs, of which approximately 2,250 are small.

As more fully discussed in the accompanying RIA, the number of economic opportunities generated for Section 3 residents and businesses will not increase to the degree that this rule would have a significant economic impact on a substantial number of small entities. In addition, for those small entities that must comply with this rule, the changes made by this proposed rule are designed to reduce burden on them, as well as all recipients. The current recordkeeping and reporting requirements for Section 3 is 90,180



hours with a cost of \$1,817,000. HUD estimated that this new rule will reduce the number of hours by 68 percent to 25,910 hours. The biggest reduction will be for small PHAs that will no longer need to do quantitative analysis with a total estimated time saving of 12,375 hours with a cost of \$281,036, or approximately \$125 for small PHAs. HUD also anticipates an across the board savings in recordkeeping given the time savings resulting from less time reporting new hires as a separate metric. For these reasons, HUD has determined that this rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of Section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt state law within the meaning of the Executive Order.

Paperwork Reduction Act

Currently, 24 CFR part 135 requires that all recipients track and report Section 3 information to HUD, includes prescriptive contractual language, requires compliance by contractors of the Section 3 requirements, contains reporting and recordkeeping requirements, and provides for the filing of Section 3 complaints. SPEARS is the main site in which HUD captures the number of Section 3 residents hired and the number of contracts awarded to Section 3 business concerns. The existing information collection requirement for these requirements has

been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2529–0043.

The rule would change the existing reporting requirement to decrease qualitatively those who need to report, excluding small PHAs and recipients of Section 3 projects under the \$200,000 threshold, and require reporting only once a year by recipients of completed projects. HUD provides in §§ 75.15 and 75.25 that recipients would be required to submit reports to HUD annually either in a qualitative form or quantitative form. HUD includes all the large PHAs in the § 75.15(a) reporting number for reporting on the Section 3 benchmarks and estimates 2 hours to track and report annually given the amount of funds handled by these PHAs. HUD also estimates that a PHA will employ approximately seven contractors or subcontractors each fiscal year that would need to track and report up to the PHA, each at one-half an hour for reporting time. Lastly, HUD estimates that 5 percent of the 700 large PHAs may fail the Section 3 benchmarks and would need to report on their qualitative efforts along with the 2,250 small PHAs and estimates that such reporting would take one-half an hour.

As for § 75.25(a), HUD estimates that 66 percent of most program recipients would complete projects in a fiscal year that need to be reported except that for the HOME program, HUD estimates that 90 percent of HOME recipients would complete projects in a fiscal year, at an estimate of 3,600 recipients. Given these projects are more diverse in size, HUD estimates that the average time to report on the Section 3 benchmarks for recipients would be 1 hour. HUD also estimates that a Section 3 project will engage approximately five contractors or subcontractors each fiscal year that would also need to track and report up to the Section 3 project recipient, each

at one-half an hour for reporting time. Lastly, HUD estimates that 5 percent of the 3,600 recipients may fail the Section 3 benchmarks and would need to report on their qualitative efforts and estimates that such reporting would take one-half an hour.

HUD also notes that the rule no longer requires the inclusion of prescriptive contractual language. See §§ 75.17 and 75.27. HUD believes that this change will result in a de minimis upfront burden related to updating contracts, if recipients, subrecipients, and contractors chose to do so, but that removing the requirement will actually reduce burden on recipients, subrecipients, and contractors on a sustained basis by giving them flexibility to use alternative or existing contractual language. HUD also provides for recordkeeping requirements at § 75.31 and believes that the maintaining of records by recipients will take a recipient approximately 2 hours. However, HUD notes that some programs, such as HOME, already have recordkeeping requirements that are part of existing approved Information Collection Requests and, thus, excludes those programs from the burden matrix. Lastly, HUD maintains the option for individuals to file complaints and retains the frequency number that was in the existing Section 3 reporting burden.

In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number. The current recordkeeping requirements for Section 3 is 90,180 hours with a cost of \$1,817,000. HUD estimates that this new rule will reduce the number of hours by 68 percent to 25,910 hours for a total cost savings of approximately \$1.2 million. The overall reporting and recordkeeping burden is estimated as follows:

Information collection	Number of respondents	Frequency of response per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
§ 75.15(a) Labor Hour or New Hire Reporting for PHA	700	1	2	1,400	\$22.71	\$31,794.00
§ 75.15(a) Labor Hour or New Hire Reporting for Contractors or Subcontractors of PHAs	4,900	1	0.5	2,450	22.71	55,639.50
§ 75.15(b)–(d) Qualitative Reporting for PHAs	2,300	1	0.5	1,150	22.71	26,116.50
§ 75.25(a) Labor Hour Reporting for Section 3 Projects	3,600	1	1	3,600	22.71	81,756.00
§ 75.25(a) Labor Hour Reporting for Contractors and Subcontractors on Section 3 Projects	10,800	1	0.5	5,400	22.71	122,634.00



Information collection	Number of respondents	Frequency of response per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
§ 75.25(b) Qualitative Reporting for Section 3 Projects	180	1	0.5	90	22.71	2,043.90
§ 75.31 Recordkeeping	5,900	1	2	11,800	22.71	267,978.00
§ 75.33 Complaints	20	1	1	20	10.00	200.00
Total				25,910		588,161.90

HUD will update the appropriate OMB control number 2529-0043 to reflect this reduction in burden.
Congressional Review of Final Rules

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Public Law 104-121, sec. 251, 110 Stat. 868, 873 (codified at 5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low- and moderate-income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 14

Claims, Equal access to justice, Lawyers, Reporting and recordkeeping requirements.

24 CFR Part 75

Administrative practice and procedure, Community development, Government contracts, Grant programs—housing and community development, Housing, Loan programs—housing and community development, Reporting and recordkeeping requirements, Small businesses.

24 CFR Part 91

Aged, Grant programs-housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Low- and moderate-income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs-housing and community development, Low- and moderate-income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 135

Administrative practice and procedure, Community development, Equal employment opportunity, Government contracts, Grant programs—housing and community development, Housing, Loan programs—housing and community development, Reporting and recordkeeping requirements, Small businesses.

24 CFR Part 266

Intergovernmental relations, Low- and moderate-income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs-education, Grant programs-housing and community development, Guam, Indians, Loan programs-housing and community development, Low- and moderate-income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 576

Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 578

Community development, Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 905

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 964

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs-housing and community development, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 1000

Aged, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, under the authority 12 U.S.C. 1701u; 42 U.S.C. 3535(d), HUD amends 24 CFR parts 5, 14, 75, 91, 92, 93, 135, 266, 570, 576, 578, 905, 964, 983, and 1000 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority for part 5 is revised to read as follows:

Authority: 12 U.S.C. 1701u and 1701x; 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109-115, 119 Stat. 2936; Sec. 607, Pub. L. 109-115, 119 Stat.



3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13559, 75 FR 71319, 3 CFR 2010 Comp., p. 273.

§ 5.105 [Amended]

■ 2. Amend § 5.105(a) by removing “; section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and implementing regulations at 24 CFR part 135.”

PART 14—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN ADMINISTRATIVE PROCEEDINGS

■ 3. The authority for part 14 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1); 42 U.S.C. 3535(d).

§ 14.115 [Amended]

■ 4. Amend § 14.115 by removing and reserving paragraph (a)(5).

■ 5. Add part 75 to read as follows:

PART 75—ECONOMIC OPPORTUNITIES FOR LOW- AND VERY LOW-INCOME PERSONS

Subpart A—General Provisions

Sec.

- 75.1 Purpose.
- 75.3 Applicability.
- 75.5 Definitions.
- 75.7 Requirements applicable to HUD NOFAs for Section 3 covered programs.

Subpart B—Additional Provisions for Public Housing Financial Assistance

- 75.9 Requirements.
- 75.11 Targeted Section 3 worker for public housing financial assistance.
- 75.13 Section 3 safe harbor.
- 75.15 Reporting.
- 75.17 Contract provisions.

Subpart C—Additional Provisions for Housing and Community Development Financial Assistance

- 75.19 Requirements.
- 75.21 Targeted Section 3 worker for housing and community development financial assistance.
- 75.23 Section 3 safe harbor.
- 75.25 Reporting.
- 75.27 Contract provisions.

Subpart D—Provisions for Multiple Funding Sources, Recordkeeping and Compliance

- 75.29 Multiple funding sources.
- 75.31 Recordkeeping.
- 75.33 Compliance.

Authority: 12 U.S.C. 1701u; 42 U.S.C. 3535(d).

Subpart A—General Provisions

§ 75.1 Purpose.

This part establishes the requirements to be followed to ensure the objectives of Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C.

1701u) (Section 3) are met. The purpose of Section 3 is to ensure that economic opportunities, most importantly employment, generated by certain HUD financial assistance shall be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing or residents of the community in which the Federal assistance is spent.

§ 75.3 Applicability.

(a) *General applicability.* Section 3 applies to public housing financial assistance and Section 3 projects, as follows:

(1) *Public housing financial assistance.* Public housing financial assistance means:

(i) Development assistance provided pursuant to section 5 of the United States Housing Act of 1937 (the 1937 Act);

(ii) Operations and management assistance provided pursuant to section 9(e) of the 1937 Act;

(iii) Development, modernization, and management assistance provided pursuant to section 9(d) of the 1937 Act; and

(iv) The entirety of a mixed-finance development project as described in 24 CFR 905.604, regardless of whether the project is fully or partially assisted with public housing financial assistance as defined in paragraphs (a)(1)(i) through (iii) of this section.

(2) *Section 3 projects.* (i) Section 3 projects means housing rehabilitation, housing construction, and other public construction projects assisted under HUD programs that provide housing and community development financial assistance when the total amount of assistance to the project exceeds a threshold of \$200,000. The threshold is \$100,000 where the assistance is from the Lead Hazard Control and Healthy Homes programs, as authorized by Sections 501 or 502 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1701z–1 or 1701z–2), the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 *et seq.*); and the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851 *et seq.*). The project is the site or sites together with any building(s) and improvements located on the site(s) that are under common ownership, management, and financing.

(ii) The Secretary must update the thresholds provided in paragraph (a)(2)(i) of this section not less than once every 5 years based on a national construction cost inflation factor through **Federal Register** notice not subject to public comment. When the Secretary finds it is warranted to ensure

compliance with Section 3, the Secretary may adjust, regardless of the national construction cost factor, such thresholds through **Federal Register** notice, subject to public comment.

(iii) The requirements in this part apply to an entire Section 3 project, regardless of whether the project is fully or partially assisted under HUD programs that provide housing and community development financial assistance.

(b) *Contracts for materials.* Section 3 requirements do not apply to material supply contracts.

(c) *Indian and Tribal preferences.* Contracts, subcontracts, grants, or subgrants subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5307(b)) or subject to tribal preference requirements as authorized under 101(k) of the Native American Housing Assistance and Self-Determination Act (25 U.S.C. 4111(k)) must provide preferences in employment, training, and business opportunities to Indians and Indian organizations, and are therefore not subject to the requirements of this part.

(d) *Other HUD assistance and other Federal assistance.* Recipients that are not subject to Section 3 are encouraged to consider ways to support the purpose of Section 3.

§ 75.5 Definitions.

The terms *HUD*, *Public housing*, and *Public Housing Agency (PHA)* are defined in 24 CFR part 5. The following definitions also apply to this part:

1937 Act means the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*

Contractor means any entity entering into a contract with:

(1) A recipient to perform work in connection with the expenditure of public housing financial assistance or for work in connection with a Section 3 project; or

(2) A subrecipient for work in connection with a Section 3 project.

Labor hours means the number of paid hours worked by persons on a Section 3 project or by persons employed with funds that include public housing financial assistance.

Low-income person means a person as defined in Section 3(b)(2) of the 1937 Act.

Material supply contracts means contracts for the purchase of products and materials, including, but not limited to, lumber, drywall, wiring, concrete, pipes, toilets, sinks, carpets, and office supplies.

Professional services means non-construction services that require an



advanced degree or professional licensing, including, but not limited to, contracts for legal services, financial consulting, accounting services, environmental assessment, architectural services, and civil engineering services.

Public housing financial assistance means assistance as defined in § 75.3(a)(1).

Public housing project is defined in 24 CFR 905.108.

Recipient means any entity that receives directly from HUD public housing financial assistance or housing and community development assistance that funds Section 3 projects, including, but not limited to, any State, local government, instrumentality, PHA, or other public agency, public or private nonprofit organization.

Section 3 means Section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u).

Section 3 business concern means:

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

(i) It is at least 51 percent owned and controlled by low- or very low-income persons;

(ii) Over 75 percent 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 percent owned and controlled by current public housing residents or residents who currently live in Section 8-assisted housing.

(2) The status of a Section 3 business concern shall not be negatively affected by a prior arrest or conviction of its owner(s) or employees.

(3) Nothing in this part shall be construed to require the contracting or subcontracting of a Section 3 business concern. Section 3 business concerns are not exempt from meeting the specifications of the contract.

Section 3 project means a project defined in § 75.3(a)(2).

Section 3 worker means:

(1) Any worker who currently fits or when hired within the past five years fit at least one of the following categories, as documented:

(i) The worker's income for the previous or annualized calendar year is below the income limit established by HUD.

(ii) The worker is employed by a Section 3 business concern.

(iii) The worker is a YouthBuild participant.

(2) The status of a Section 3 worker shall not be negatively affected by a prior arrest or conviction.

(3) Nothing in this part shall be construed to require the employment of

someone who meets this definition of a Section 3 worker. Section 3 workers are not exempt from meeting the qualifications of the position to be filled.

Section 8-assisted housing refers to housing receiving project-based rental assistance or tenant-based assistance under Section 8 of the 1937 Act.

Service area or the neighborhood of the project means an area within one mile of the Section 3 project or, if fewer than 5,000 people live within one mile of a Section 3 project, within a circle centered on the Section 3 project that is sufficient to encompass a population of 5,000 people according to the most recent U.S. Census.

Small PHA means a public housing authority that manages or operates fewer than 250 public housing units.

Subcontractor means any entity that has a contract with a contractor to undertake a portion of the contractor's obligation to perform work in connection with the expenditure of public housing financial assistance or for a Section 3 project.

Subrecipient has the meaning provided in the applicable program regulations or in 2 CFR 200.93.

Targeted Section 3 worker has the meanings provided in §§ 75.11, 75.21, or 75.29, and does not exclude an individual that has a prior arrest or conviction.

Very low-income person means the definition for this term set forth in section 3(b)(2) of the 1937 Act.

YouthBuild programs refers to YouthBuild programs receiving assistance under the Workforce Innovation and Opportunity Act (29 U.S.C. 3226).

§ 75.7 Requirements applicable to HUD NOFAs for Section 3 covered programs.

All notices of funding availability (NOFAs) issued by HUD that announce the availability of funding covered by § 75.3 will include notice that this part is applicable to the funding and may include, as appropriate for the specific NOFA, points or bonus points for the quality of Section 3 plans.

Subpart B—Additional Provisions for Public Housing Financial Assistance

§ 75.9 Requirements.

(a) *Employment and training.* (1) Consistent with existing Federal, state, and local laws and regulations, PHAs or other recipients receiving public housing financial assistance, and their contractors and subcontractors, must make their best efforts to provide employment and training opportunities generated by the public housing

financial assistance to Section 3 workers.

(2) PHAs or other recipients, and their contractors and subcontractors, must make their best efforts described in paragraph (a)(1) of this section in the following order of priority:

(i) To residents of the public housing projects for which the public housing financial assistance is expended;

(ii) To residents of other public housing projects managed by the PHA that is providing the assistance or for residents of Section 8-assisted housing managed by the PHA;

(iii) To participants in YouthBuild programs; and

(iv) To low- and very low-income persons residing within the metropolitan area (or nonmetropolitan county) in which the assistance is expended.

(b) *Contracting.* (1) Consistent with existing Federal, state, and local laws and regulations, PHAs and other recipients of public housing financial assistance, and their contractors and subcontractors, must make their best efforts to award contracts and subcontracts to business concerns that provide economic opportunities to Section 3 workers.

(2) PHAs and other recipients, and their contractors and subcontractors, must make their best efforts described in paragraph (b)(1) of this section in the following order of priority:

(i) To Section 3 business concerns that provide economic opportunities for residents of the public housing projects for which the assistance is provided;

(ii) To Section 3 business concerns that provide economic opportunities for residents of other public housing projects or Section-8 assisted housing managed by the PHA that is providing the assistance;

(iii) To YouthBuild programs; and

(iv) To Section 3 business concerns that provide economic opportunities to Section 3 workers residing within the metropolitan area (or nonmetropolitan county) in which the assistance is provided.

§ 75.11 Targeted Section 3 worker for public housing financial assistance.

(a) *Targeted Section 3 worker.* A Targeted Section 3 worker for public housing financial assistance means a Section 3 worker who is:

(1) A worker employed by a Section 3 business concern; 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 public housing or Section 8-assisted housing;



(ii) A resident of other public housing projects or Section 8-assisted housing managed by the PHA that is providing the assistance; or

(iii) A YouthBuild participant.

(b) [Reserved]

§ 75.13 Section 3 safe harbor.

(a) *General.* PHAs and other recipients will be considered to have complied with requirements in this part, in the absence of evidence to the contrary, if they:

(1) Certify that they have followed the prioritization of effort in § 75.9; and

(2) Meet or exceed the applicable Section 3 benchmarks as described in paragraph (b) of this section.

(b) *Establishing benchmarks.* (1) HUD will establish Section 3 benchmarks for Section 3 workers or Targeted Section 3 workers or both through a document published in the **Federal Register**. HUD may establish a single nationwide benchmark for Section 3 workers and a single nationwide benchmark for Targeted Section 3 workers, or may establish multiple benchmarks based on geography, the type of public housing financial assistance, or other variables. HUD will update the benchmarks through a document published in the **Federal Register**, subject to public comment, not less frequently than once every 3 years. Such notice shall include aggregate data on labor hours and the proportion of PHAs and other recipients meeting benchmarks, as well as other metrics reported pursuant to § 75.15 as deemed appropriate by HUD, for the 3 most recent reporting years.

(2) In establishing the Section 3 benchmarks, HUD may consider the industry averages for labor hours worked by specific categories of workers or in different localities or regions; averages for labor hours worked by Section 3 workers and Targeted Section 3 workers as reported by recipients pursuant to this section; and any other factors HUD deems important. In establishing the Section 3 benchmarks, HUD will exclude professional services from the total number of labor hours as such hours are excluded from the total number of labor hours to be reported per § 75.15(a)(4).

(3) Section 3 benchmarks will consist of the following two ratios:

(i) The number of labor hours worked by Section 3 workers divided by the total number of labor hours worked by all workers funded by public housing financial assistance in the PHA's or other recipient's fiscal year.

(ii) The number of labor hours worked by Targeted Section 3 workers, as defined in § 75.11(a), divided by the total number of labor hours worked by

all workers funded by public housing financial assistance in the PHA's or other recipient's fiscal year.

§ 75.15 Reporting.

(a) *Reporting of labor hours.* (1) For public housing financial assistance, PHAs and other recipients must report in a manner prescribed by HUD:

(i) The total number of labor hours worked;

(ii) The total number of labor hours worked by Section 3 workers; and

(iii) The total number of labor hours worked by Targeted Section 3 workers.

(2) 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 pursuant to § 75.31.

(3) The labor hours reported under paragraph (a)(1) of this section must include the total number of labor hours worked with public housing financial assistance in the fiscal year of the PHA or other recipient, including labor hours worked by any contractors and subcontractors that the PHA or other recipient is required, or elects pursuant to paragraph (a)(4) of this section, to report.

(4) PHAs and other recipients reporting under this section, as well as contractors and subcontractors who report to PHAs and recipients, may report labor hours by Section 3 workers, under paragraph (a)(1)(ii) of this section, and labor hours by Targeted Section 3 workers, under paragraph (a)(1)(iii) of this section, from professional services without including labor hours from professional services in the total number of labor hours worked under paragraph (a)(1)(i) of this section. If a contract covers both professional services and other work and the PHA, other recipient, contractor, or subcontractor chooses not to report labor hours from professional services, the labor hours under the contract that are not from professional services must still be reported.

(5) PHAs and other recipients may report on the labor hours of the PHA, the recipient, a contractor, or a subcontractor based on the employer's good faith assessment of the labor hours of a full-time or part-time employee informed by the employer's existing salary or time and attendance based payroll systems, unless the project or activity is otherwise subject to requirements specifying time and attendance reporting.

(b) *Additional reporting if Section 3 benchmarks are not met.* If the PHA's or other recipient's reporting under paragraph (a) of this section indicates

that the PHA or other recipient has not met the Section 3 benchmarks described in § 75.13, the PHA or other recipient must report in a form prescribed by HUD on the qualitative nature of its Section 3 compliance activities and those of its contractors and subcontractors. Such qualitative efforts may, for example, include but are not limited to the following:

(1) Engaged in outreach efforts to generate job applicants who are Targeted Section 3 workers.

(2) Provided training or apprenticeship opportunities.

(3) Provided technical assistance to help Section 3 workers compete for jobs (e.g., resume assistance, coaching).

(4) Provided or connected Section 3 workers with assistance in seeking employment including: drafting resumes, preparing for interviews, and finding job opportunities connecting residents to job placement services.

(5) Held one or more job fairs.

(6) Provided or referred Section 3 workers to services supporting work readiness and retention (e.g., work readiness activities, interview clothing, test fees, transportation, child care).

(7) Provided assistance to apply for/attend community college, a four-year educational institution, or vocational/technical training.

(8) Assisted Section 3 workers to obtain financial literacy training and/or coaching.

(9) Engaged in outreach efforts to identify and secure bids from Section 3 business concerns.

(10) Provided technical assistance to help Section 3 business concerns understand and bid on contracts.

(11) Divided contracts into smaller jobs to facilitate participation by Section 3 business concerns.

(12) Provided bonding assistance, guaranties, or other efforts to support viable bids from Section 3 business concerns.

(13) Promoted use of business registries designed to create opportunities for disadvantaged and small businesses.

(14) Outreach, engagement, or referrals with the state one-stop system as defined in Section 121(e)(2) of the Workforce Innovation and Opportunity Act.

(c) *Reporting frequency.* Unless otherwise provided, PHAs or other recipients must report annually to HUD under paragraph (a) of this section, and, where required, under paragraph (b) of this section, in a manner consistent with reporting requirements for the applicable HUD program.

(d) *Reporting by Small PHAs.* Small PHAs may elect not to report under



paragraph (a) of this section. Small PHAs that make such election are required to report on their qualitative efforts, as described in paragraph (b) of this section, in a manner consistent with reporting requirements for the applicable HUD program.

§ 75.17 Contract provisions.

(a) PHAs or other recipients must include language in any agreement or contract to apply Section 3 to contractors.

(b) PHAs or other recipients must require contractors to include language in any contract or agreement to apply Section 3 to subcontractors.

(c) PHAs or other recipients must require all contractors and subcontractors to meet the requirements of § 75.9, regardless of whether Section 3 language is included in contracts.

Subpart C—Additional Provisions for Housing and Community Development Financial Assistance

§ 75.19 Requirements.

(a) *Employment and training.* (1) To the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, recipients covered by this subpart shall ensure that employment and training opportunities arising in connection with Section 3 projects are provided to Section 3 workers within the metropolitan area (or nonmetropolitan county) in which the project is located.

(2) Where feasible, priority for opportunities and training described in paragraph (a)(1) of this section should be given to:

(i) Section 3 workers residing within the service area or the neighborhood of the project, and

(ii) Participants in YouthBuild programs.

(b) *Contracting.* (1) To the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, recipients covered by this subpart shall ensure contracts for work awarded in connection with Section 3 projects are provided to business concerns that provide economic opportunities to Section 3 workers residing within the metropolitan area (or nonmetropolitan county) in which the project is located.

(2) Where feasible, priority for contracting opportunities described in paragraph (b)(1) of this section should be given to:

(i) Section 3 business concerns that provide economic opportunities to Section 3 workers residing within the service area or the neighborhood of the project, and

(ii) YouthBuild programs.

§ 75.21 Targeted Section 3 worker for housing and community development financial assistance.

(a) *Targeted Section 3 worker.* A Targeted Section 3 worker for housing and community development financial assistance means a Section 3 worker who is:

(1) A worker employed by a Section 3 business concern; 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 within the service area or the neighborhood of the project, as defined in § 75.5; or

(ii) A YouthBuild participant.

(b) [Reserved]

§ 75.23 Section 3 safe harbor.

(a) *General.* Recipients will be considered to have complied with requirements in this part, in the absence of evidence to the contrary if they:

(1) Certify that they have followed the prioritization of effort in § 75.19; and

(2) Meet or exceed the applicable Section 3 benchmark as described in paragraph (b) of this section.

(b) *Establishing benchmarks.* (1) HUD will establish Section 3 benchmarks for Section 3 workers or Targeted Section 3 workers or both through a document published in the **Federal Register**. HUD may establish a single nationwide benchmark for Section 3 workers and a single nationwide benchmark for Targeted Section 3 workers, or may establish multiple benchmarks based on geography, the nature of the Section 3 project, or other variables. HUD will update the benchmarks through a document published in the **Federal Register**, subject to public comment, not less frequently than once every 3 years. Such notice shall include aggregate data on labor hours and the proportion of recipients meeting benchmarks, as well as other metrics reported pursuant to § 75.25 as deemed appropriate by HUD, for the 3 most recent reporting years.

(2) In establishing the Section 3 benchmarks, HUD may consider the industry averages for labor hours worked by specific categories of workers or in different localities or regions; averages for labor hours worked by Section 3 workers and Targeted Section 3 workers as reported by recipients pursuant to this section; and any other factors HUD deems important. In establishing the Section 3 benchmarks, HUD will exclude professional services from the total number of labor hours as such hours are excluded from the total number of labor hours to be reported per § 75.25(a)(4).

(3) Section 3 benchmarks will consist of the following two ratios:

(i) The number of labor hours worked by Section 3 workers divided by the total number of labor hours worked by all workers on a Section 3 project in the recipient's program year.

(ii) The number of labor hours worked by Targeted Section 3 workers as defined in § 75.21(a), divided by the total number of labor hours worked by all workers on a Section 3 project in the recipient's program year.

§ 75.25 Reporting.

(a) *Reporting of labor hours.* (1) For Section 3 projects, recipients must report in a manner prescribed by HUD:

(i) The total number of labor hours worked;

(ii) The total number of labor hours worked by Section 3 workers; and

(iii) The total number of labor hours worked by Targeted Section 3 workers.

(2) 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 pursuant to § 75.31.

(3) The labor hours reported under paragraph (a)(1) of this section must include the total number of labor hours worked on a Section 3 project, including labor hours worked by any subrecipients, contractors and subcontractors that the recipient is required, or elects pursuant to paragraph (a)(4) of this section, to report.

(4) Recipients reporting under this section, as well as subrecipients, contractors and subcontractors who report to recipients, may report labor hours by Section 3 workers, under paragraph (a)(1)(ii) of this section, and labor hours by Targeted Section 3 workers, under paragraph (a)(1)(iii) of this section, from professional services without including labor hours from professional services in the total number of labor hours worked under paragraph (a)(1)(i) of this section. If a contract covers both professional services and other work and the recipient or contractor or subcontractor chooses not to report labor hours from professional services, the labor hours under the contract that are not from professional services must still be reported.

(5) Recipients may report their own labor hours or that of a subrecipient, contractor, or subcontractor based on the employer's good faith assessment of the labor hours of a full-time or part-time employee informed by the employer's existing salary or time and attendance based payroll systems, unless the project or activity is



otherwise subject to requirements specifying time and attendance reporting.

(b) *Additional reporting if Section 3 benchmarks are not met.* If the recipient's reporting under paragraph (a) of this section indicates that the recipient has not met the Section 3 benchmarks described in § 75.23, the recipient must report in a form prescribed by HUD on the qualitative nature of its activities and those its contractors and subcontractors pursued. Such qualitative efforts may, for example, include but are not limited to the following:

(1) Engaged in outreach efforts to generate job applicants who are Targeted Section 3 workers.

(2) Provided training or apprenticeship opportunities.

(3) Provided technical assistance to help Section 3 workers compete for jobs (e.g., resume assistance, coaching).

(4) Provided or connected Section 3 workers with assistance in seeking employment including: drafting resumes, preparing for interviews, and finding job opportunities connecting residents to job placement services.

(5) Held one or more job fairs.

(6) Provided or referred Section 3 workers to services supporting work readiness and retention (e.g., work readiness activities, interview clothing, test fees, transportation, child care).

(7) Provided assistance to apply for/or attend community college, a four-year educational institution, or vocational/technical training.

(8) Assisted Section 3 workers to obtain financial literacy training and/or coaching.

(9) Engaged in outreach efforts to identify and secure bids from Section 3 business concerns.

(10) Provided technical assistance to help Section 3 business concerns understand and bid on contracts.

(11) Divided contracts into smaller jobs to facilitate participation by Section 3 business concerns.

(12) Provided bonding assistance, guarantees, or other efforts to support viable bids from Section 3 business concerns.

(13) Promoted use of business registries designed to create opportunities for disadvantaged and small businesses.

(14) Outreach, engagement, or referrals with the state one-stop system as defined in Section 121(e)(2) of the Workforce Innovation and Opportunity Act.

(c) *Reporting frequency.* Unless otherwise provided, recipients must report annually to HUD under paragraph (a) of this section, and, where

required, under paragraph (b) of this section, on all projects completed within the reporting year in a manner consistent with reporting requirements for the applicable HUD program.

§ 75.27 Contract provisions.

(a) Recipients must include language applying Section 3 requirements in any subrecipient agreement or contract for a Section 3 project.

(b) Recipients of Section 3 funding must require subrecipients, contractors, and subcontractors to meet the requirements of § 75.19, regardless of whether Section 3 language is included in recipient or subrecipient agreements, program regulatory agreements, or contracts.

Subpart D—Provisions for Multiple Funding Sources, Recordkeeping, and Compliance

§ 75.29 Multiple funding sources.

(a) If a housing rehabilitation, housing construction or other public construction project is subject to Section 3 pursuant to § 75.3(a)(1) and (2), the recipient must follow subpart B of this part for the public housing financial assistance and may follow either subpart B or C of this part for the housing and community development financial assistance. For such a project, the following applies:

(1) For housing and community development financial assistance, a Targeted Section 3 worker is any worker who meets the definition of a Targeted Section 3 worker in either subpart B or C of this part; and

(2) The recipients of both sources of funding shall report on the housing rehabilitation, housing construction, or other public construction project as a whole and shall identify the multiple associated recipients. PHAs and other recipients must report the following information:

(i) The total number of labor hours worked on the project;

(ii) The total number of labor hours worked by Section 3 workers on the project; and

(iii) The total number of labor hours worked by Targeted Section 3 workers on the project.

(b) If a housing rehabilitation, housing construction, or other public construction project is subject to Section 3 because the project is assisted with funding from multiple sources of housing and community development assistance that exceed the thresholds in § 75.3(a)(2), the recipient or recipients must follow subpart C of this part, and must report to the applicable HUD program office, as prescribed by HUD.

§ 75.31 Recordkeeping.

(a) HUD shall have access to all records, reports, and other documents or items of the recipient that are maintained to demonstrate compliance with the requirements of this part, or that are maintained in accordance with the regulations governing the specific HUD program by which the Section 3 project is governed, or the public housing financial assistance is provided or otherwise made available to the recipient, subrecipient, contractor, or subcontractor.

(b) Recipients must maintain documentation, or ensure that a subrecipient, contractor, or subcontractor that employs the worker maintains documentation, 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, as follows:

(1) For a worker to qualify as a Section 3 worker, one of the following must be maintained:

(i) A worker's self-certification that their income is below the income limit from the prior calendar year;

(ii) A worker's self-certification of participation in a means-tested program such as public housing or Section 8-assisted housing;

(iii) Certification from a PHA, or the owner or property manager of project-based Section 8-assisted housing, or the administrator of tenant-based Section 8-assisted housing that the worker is a participant in one of their programs;

(iv) An employer's certification that the worker's income from that employer is below the income limit when based on an employer's calculation of what the worker's wage rate would translate to if annualized on a full-time basis; or

(v) An employer's certification that the worker is employed by a Section 3 business concern.

(2) For a worker to qualify as a Targeted Section 3 worker, one of the following must be maintained:

(i) For a worker to qualify as a Targeted Section 3 worker under subpart B of this part:

(A) A worker's self-certification of participation in public housing or Section 8-assisted housing programs;

(B) Certification from a PHA, or the owner or property manager of project-based Section 8-assisted housing, or the administrator of tenant-based Section 8-assisted housing that the worker is a participant in one of their programs;

(C) An employer's certification that the worker is employed by a Section 3 business concern; or

(D) A worker's certification that the worker is a YouthBuild participant.



(ii) For a worker to qualify as a Targeted Section 3 worker under subpart C of this part:

(A) An employer's confirmation that a worker's residence is within one mile of the work site or, if fewer than 5,000 people live within one mile of a work site, within a circle centered on the work site that is sufficient to encompass a population of 5,000 people according to the most recent U.S. Census;

(B) An employer's certification that the worker is employed by a Section 3 business concern; or

(C) A worker's self-certification that the worker is a YouthBuild participant.

(c) The documentation described in paragraph (b) of this section must be maintained for the time period required for record retentions in accordance with applicable program regulations or, in the absence of applicable program regulations, in accordance with 2 CFR part 200.

(d) A PHA or recipient may report on Section 3 workers and Targeted Section 3 workers for five years from when their certification as a Section 3 worker or Targeted Section 3 worker is established.

§ 75.33 Compliance.

(a) *Records of compliance.* Each recipient shall maintain adequate records demonstrating compliance with this part, consistent with other recordkeeping requirements in 2 CFR part 200.

(b) *Complaints.* Complaints alleging failure of compliance with this part may be reported to the HUD program office responsible for the public housing financial assistance or the Section 3 project, or to the local HUD field office.

(c) *Monitoring.* HUD will monitor compliance with the requirements of this part. The applicable HUD program office will determine appropriate methods by which to oversee Section 3 compliance. HUD may impose appropriate remedies and sanctions in accordance with the laws and regulations for the program under which the violation was found.

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 6. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

§ 91.215 [Amended]

■ 7. Amend § 91.215(j) by removing “24 CFR part 135” and adding, in its place “24 CFR part 75”.

§ 91.225 [Amended]

■ 8. Amend § 91.225(a)(7) by removing “24 CFR part 135” and adding, in its place “24 CFR part 75”.

§ 91.325 [Amended]

■ 9. Amend § 91.325(a)(7) by removing “24 CFR part 135” and adding, in its place “24 CFR part 75”.

§ 91.425 [Amended]

■ 10. Amend § 91.425(a)(1)(vii) by removing “24 CFR part 135” and adding, in its place “24 CFR part 75”.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 11. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

■ 12. Amend § 92.508 as follows:

- a. Remove paragraph (a)(7)(i)(B);
- b. Redesignate paragraph (a)(7)(i)(C) as (a)(7)(i)(B); and
- c. Add paragraph (a)(7)(xi).
The addition reads as follows:

§ 92.508 Recordkeeping.

- (a) * * *
- (7) * * *

(xi) Documentation of actions undertaken to meet the requirements of 24 CFR part 75 which implements section 3 of the Housing Development Act of 1968, as amended (12 U.S.C. 1701u).

* * * * *

PART 93—HOUSING TRUST FUND

■ 13. The authority citation for part 93 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

- 14. Amend § 93.407 as follows:
 - a. Redesignate paragraphs (a)(5)(ii) through (ix) as paragraphs (a)(5)(iii) through (x);
 - b. Remove paragraph (a)(5)(i)(B);
 - c. Redesignate paragraph (a)(5)(i)(A) as paragraph (a)(5)(ii);
 - d. In newly redesignated paragraph (a)(5)(iv), remove “24 part 35” and add in its place “24 CFR part 35”; and
 - e. Add paragraph (a)(5)(xi).
The addition reads as follows:

§ 93.407 Recordkeeping.

- (a) * * *
- (5) * * *

(xi) Documentation of actions undertaken to meet the requirements of 24 CFR part 75, which implements section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u).

* * * * *

CHAPTER I—OFFICE OF ASSISTANT SECRETARY FOR EQUAL OPPORTUNITY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT [AMENDED]

■ 15. Under the authority of 42 U.S.C. 3535(d), in chapter I, remove designated subchapter headings A and B.

PART 135 —[REMOVED]

■ 16. Remove part 135.

PART 266—HOUSING FINANCE AGENCY RISK-SHARING PROGRAM FOR INSURED AFFORDABLE MULTIFAMILY PROJECT LOANS

■ 17. The authority citation for part 266 continues to read as follows:

Authority: 12 U.S.C. 1707; 42 U.S.C. 3535(d).

§ 266.220 [Amended]

■ 18. Amend § 266.220(c) by removing “; section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), as implemented by 24 CFR part 135”.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 19. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

§ 570.487 [Amended]

■ 20. Amend § 570.487(d) by removing “24 CFR part 135” and adding in its place “24 CFR part 75”.

§ 570.607 [Amended]

■ 21. Amend § 570.607(b) by removing “24 CFR part 135” and adding in its place “24 CFR part 75”.

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 22. The authority citation for part 574 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

§ 574.600 [Amended]

■ 23. Amend § 574.600 by adding “and part 75” after the phrase “24 CFR part 5”.

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

■ 24. The authority citation for part 576 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 11371 *et seq.*, 42 U.S.C. 3535(d).



§ 576.407 [Amended]

- 25. Amend § 576.407(a) by removing “24 CFR part 135” and adding in its place “24 CFR part 75”.

PART 578—CONTINUUM OF CARE PROGRAM

- 26. The authority citation for part 578 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 11381 *et seq.*, 42 U.S.C. 3535(d).

§ 578.99 [Amended]

- 27. Amend § 578.99 by removing “federal” in the section heading and adding in its place “Federal” and removing “24 CFR part 135” in paragraph (i) and adding in its place “24 CFR part 75”.

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

- 28. The authority citation for part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g, 42 U.S.C. 1437z-2, 42 U.S.C. 1437z-7, and 3535(d).

§ 905.308 [Amended]

- 29. Amend § 905.308(b)(10) by removing “24 CFR part 135” and adding in its place “24 CFR part 75”.

PART 964—TENANT PARTICIPATION AND TENANT OPPORTUNITIES IN PUBLIC HOUSING

- 30. The authority citation for part 964 continues to read as follows:

Authority: 42 U.S.C. 1437d, 1437g, 1437r, 3535(d).

- 31. Revise § 964.320 to read as follows:

§ 964.320 HUD Policy on training, employment, contracting and subcontracting of public housing residents.

In accordance with Section 3 of the Housing and Urban Development Act of 1968 and the implementing regulations at 24 CFR part 75, PHAs, their contractors and subcontractors shall make best efforts, consistent with existing Federal, State, and local laws and regulations, to give low and very low-income persons the training and employment opportunities generated by Section 3 covered assistance (as this term is defined in 24 CFR 75.3) and to give Section 3 business concerns the contracting opportunities generated by Section 3 covered assistance.

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

- 32. The authority citation for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

§ 983.4 [Amended]

- 33. Amend § 983.4 by removing the definition of “Section 3—Training, employment and contracting opportunities in development”.

§ 983.154 [Amended]

- 34. Amend § 983.154 by removing (c) introductory text and paragraph (c)(1) and redesignating paragraph (c)(2) as paragraph (c).

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

- 35. The authority citation for part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

- 36. Revise § 1000.42 to read as follows:

§ 1000.42 Are the requirements of Section 3 of the Housing and Urban Development Act of 1968 applicable?

No. Recipients shall comply with Indian preference requirements of Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5307(b)), or employment and contract preference laws adopted by the recipient’s tribe in accordance with Section 101(k) of NAHASDA.

Benjamin S. Carson, Sr.,

Secretary.

[FR Doc. 2020–19185 Filed 9–28–20; 8:45 am]

BILLING CODE 4210-67-P





EXECUTIVE ORDER
CITY CONTRACTORS' PAY OR PLAY PROGRAM

EO No.	EO 1-7
Effective Date:	Upon Approval

1. AUTHORITY

Article VI, Section 7a, of the City Charter of the City of Houston; and City of Houston Code of Ordinance, Chapter 15.

2. BACKGROUND

- 2.1. Contractors that do not provide healthcare benefits for their workforce impose a burden on the public and private agencies that provide this care to uninsured persons in the City of Houston, Harris County, and to individuals and businesses whose health insurance premiums increase because of the shifting of costs onto those payers.
- 2.2. The provision of health benefits is instrumental in attracting and retaining a good workforce and is a characteristic of a responsible contractor.
- 2.3. The City intends to enhance fairness in the competition for contracts between bidders that choose to offer a health benefit to their workforce and those that do not.


3. PURPOSE

The purpose of this Executive Order is to:

- 3.1. require certain contractors to provide to certain employees a minimum level of healthcare benefits or to contribute a designated amount to be used to offset the costs of providing healthcare to uninsured people in the Houston/Harris County area;
- 3.2. establish the Pay or Play Program (Program) and the procedures for the administration thereof;
- 3.3. authorize studies to evaluate the effectiveness and impact of the Program on contracting firms and the City;
- 3.4. provide funding to the Office of Business Opportunity (OBO) to pay the actual costs of implementing, auditing, and monitoring compliance with this Order and related mandates; and
- 3.5. augment and enhance the goals and purposes of Chapter 15 of the City's Code of Ordinances by supplementing the measures authorized and/or required therein with the Program to enhance fairness in competition for City contracts. No provision of this Executive Order shall be construed to excuse compliance with any law or any procedure authorized by law.

4. SCOPE

- 4.1. The Program applies to:
 - 4.1.1. Contracts for services in which the total expenditure by the City, including contingencies, amendments, supplemental terms and/or change orders, equals or exceeds \$100,000.

Approved: 	Date Approved: 1/26/2021	Page 1 of 5
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- 4.1.2. Subcontracts for services in which the total value of the subcontract, including contingencies, amendments, supplemental terms and/or change orders, equals or exceeds \$200,000. The contractor is responsible to the City for compliance of covered employees of covered subcontractors.
- 4.2. The Program does not apply to:
 - 4.2.1. Any contract in which the primary purpose (51% or more) is the procurement or purchase of property, leases, goods, supplies, and/or equipment;
 - 4.2.2. An intergovernmental contract, interlocal agreement, bulk purchasing or purchasing cooperative.
 - 4.2.3. Any contract for which the City of Houston has not expended funds, regardless of funding source.
- 4.3. This Executive Order applies to any advertised procurements, sole source procurements, any bids or for services or construction.
- 4.4. This Executive Order applies to all On-Call, Work Order and Job Order solicitations and contracts.
- 4.5. This Executive Order applies to all departments within the City of Houston.
- 4.6. This Executive Order will prospectively apply to all contracts that exceed \$100,000 and/or all subcontracts that exceed \$200,000 throughout the life of the contract.
- 4.7. This Executive Order applies to employees of a covered contractor or subcontractor, including contract labor, who are over age 18, work at least 30 hours per week with any amount of time worked on the covered City contract or subcontract.
- 4.8. No later than thirty (30) days after the effective date of the Executive Order, the City's Chief Procurement Officer and departments with delegated authority shall make best efforts to:
 - 4.8.1. Incorporate the requirements of this Executive Order into all formal competitive procurements issued after the effective date of this Executive Order and resulting contracts for which contract negotiations begin after the effective date of this Executive Order using the language approved by the Legal Department;
 - 4.8.2. Add to the currently published Terms and Conditions for Purchase Orders (<http://purchasing.houstontx.gov>) the language approved by the Legal Department that requires the contractor to comply with this Executive Order.
- 4.9. No later than thirty (30) days after the effective date of the Executive Order, City Departments shall make best efforts to:
 - 4.9.1. Ensure that City Department staff that administers or manages contracts are aware of this Executive Order.
 - 4.9.2. Incorporate the requirements of this Executive Order into all applicable City Contracts for which contract negotiations begin after the effective date of this Executive Order by using the language approved by the Legal Department;
 - 4.9.3. Encourage contractors that perform work for a department to comply with this Executive Order.

5. PROCEDURES



- 5.1. Prior to the commencement of a covered contract, the contractor must declare its intent to comply with the Program and will submit a plan for compliance in the form and manner prescribed by the Office of Business Opportunity, which shall serve as the Director and/or Designee of the Program.
- 5.2. Contractors will report to the City regarding the identity of covered subcontracts and covered employees working under subcontracts in the form and manner prescribed by the Director and/or Designee.
- 5.3. Pay – If the contractor elects to comply by paying, the contractor will pay to the City \$1 for each hour of work performed by covered employees within a 40-hour work week, including covered employees of covered subcontractors on a City contract. The OBO Director and/or Designee will prescribe the time and form of payment. All payments to the City under this section shall be deposited to the Contractor Responsibility Fund, which shall not be used for any other purpose except to assist in providing health care services to uninsured persons in the Houston area and the Pay or Play program administrative costs, as described in this Order.
- 5.4. Play – If the contractor elects to comply by playing, the contractor will provide documentary proof in a form acceptable to the Director and/or Designee that it provides health benefits to each covered employee, and that covered employees of covered subcontractors are provided health benefits. The health benefits must meet or exceed the following standards:
 - 5.4.1. The employer contributes no less than 75% of the total premium costs per covered employee per month toward the total premium cost; and
 - 5.4.2. The covered employee contributes, if any amount, no greater than 25% of the total monthly premium costs. A contractor is deemed to have complied with this provision with respect to a covered employee who is not provided health benefits if the employee refuses the benefits and provides proof of insurance or an approved Employee Waiver (POP-8) form.
- 5.5. Pay and Play – A contractor may pay on behalf of some covered employees and play on behalf of other covered employees, including subcontractors' covered employees.
- 5.6. Contractors will submit information regarding compliance with the Program in a form and manner prescribed by the Director and/or Designee.
- 5.7. In cooperation with the Director and/or Designee, all City departments shall implement procedures to facilitate the administration of the Program. This shall include, but not be limited to, the development of standards for management of data necessary to monitor the compliance by contractors and the establishment of accounting procedures to ensure accurate accounting for and disbursement of any monies collected from contractors.
- 5.8. In cooperation with the Director and/or Designee, the Legal Department shall develop language for inclusion in contracts that includes the obligation of covered contractors to meet the Program requirements and specifies the right of City personnel, including Controller's Office personnel, to examine the books and records of all contractors and subcontractors that relate to compliance with the Program.

6. IMPLEMENTATION AND OVERSIGHT

- 6.1. A portion of the Contractor Responsibility Fund shall be used to pay the actual costs of implementing the program, including but not limited to paying the salaries and benefits of employees approved by the Mayor to work on the Pay or Play Program and related issues.
- 6.2. In the event the balance of the Fund is insufficient to cover salaries and benefits due to contractors' decisions not to "pay" or the allocation of funds for other purposes, the positions funded by this Order shall be laid off pursuant to section 14-141.4 of the Code of Ordinances.
- 6.3. OBO and the Finance Department shall cooperate in determining the funding for the Program each



fiscal year.

6.4. OBO and the contracting department shall cooperate to enforce compliance and remedy noncompliance by contractors.

6.4.1. The Office of Business Opportunity will audit contracting departments' POP program to determine if the department is in compliance.

6.4.2. OBO may request that the contracting department reassign the POP Liaison responsible for departmental POP compliance, if OBO determines that the department unsatisfactorily enforced the program during the review period.

6.4.3. Pursuant to the terms of the purchase order or Contractor's agreement with the City and to the extent allowed by law, Contractors that have been found to not be in compliance with this Executive Order may be subject to suspension or termination of the relationship with the City if no remedial action is taken in a manner acceptable to the City. .

7. EXCEPTIONS

7.1. The City of Houston will award a contract to a contractor that neither Pays nor Plays if the contractor has received an exemption (POP-4 Prime/Subcontractor Waiver Request Form) from OBO.

7.2. A contract or subcontract is appropriate for an exemption based on the following:

7.2.1. Adverse Impact – Compliance with the Pay or Play Program would cause an unreasonably adverse impact on the City's ability to obtain services or an unreasonably adverse financial impact on the City.

7.2.2. Foreign Company – The contract or subcontract is with a company whose headquarters and/or employees are located outside of the United States of America and provide universal health insurance to employees traveling and working in the United States of America.

7.3. The contracting department must submit to OBO a waiver request and back up documentation to support the waiver request.

8. RELATED DOCUMENTS AND INFORMATION

- Ordinance No. 2009-1293 (Dec. 9, 2009)
- Ordinance No. 2007-534 (May 2, 2007)

9. ATTACHMENTS

9.1. POP FORMS: OBO reserves the right to publish revised POP forms at their discretion, which revision shall not require an amendment to this Executive Order.

Attachment 1 – Form POP-1 Acknowledgement Form
Attachment 2 – Form POP-2 Certification of Compliance
Attachment 3 – Form POP-3 Participating Subcontractors
Attachment 4 – Form POP-4 Prime/Subcontractor Waiver Request
Attachment 5 – Form POP-5 Monthly PAY Option Report
Attachment 6 – Form POP-6 Department Monthly Update
Attachment 7 – Form POP-7 Quarterly Play Option Report
Attachment 8 – Form POP-8 Employee Waiver Request
Attachment 9 – Form POP-9 Self-Insured Contractor Request

10. CONFLICT AND REPEAL



10.1. In the event of a conflict between this Executive Order and any federal or state law, statute, or regulation, the federal or state law, statute or regulation supersedes this Executive Order.

10.2. This Executive Order supersedes Executive Order 1-7, effective January 3, 2012, which shall be of no further force or effect. All other departmental and City policies that are inconsistent with this Executive Order are hereby superseded.

11. POLICY SPONSOR

Department: Office of Business Opportunity

