



## NATIONAL LOW INCOME HOUSING COALITION

### **Detailed Discussion of Seven Key Provisions in Proposed Section 3 Regulations**

On March 27, HUD published the long-anticipated amendments to the 1994 interim Section 3 regulations (see *Memo*, [3/31](#)). The purpose of Section 3 of the Housing and Urban Development Act of 1968 is to ensure that when HUD assists housing and community development projects, preference for some of the new jobs, training, and contracting opportunities that are created go to low income people and to the businesses owned by them or that hire them “to the greatest extent feasible.”

As previously reported (see *Memo*, [3/23](#)), HUD states in the preamble to the proposed rule that the experience with Section 3 since 1994 has revealed features of the interim rule that could be modified to improve effectiveness, and that efforts since 2009 to improve Section 3 oversight without changing the regulations “have not been as successful as HUD hoped.”

NLIHC has prepared a sample comment letter for advocates to consider adapting here [http://nlihc.org/sites/default/files/Sample\\_Section-3-Comment-Letter.pdf](http://nlihc.org/sites/default/files/Sample_Section-3-Comment-Letter.pdf). NLIHC urges advocates to submit comments by the May 26 deadline (midnight ET) at <http://www.regulations.gov/#!submitComment;D=HUD-2015-0026-0001>

This paper provides a more detailed explanation of seven key provisions advocates are encouraged to consider writing comments about.

### **SECTION 3 THRESHOLDS**

#### **NLIHC encourages advocates to support the proposed \$400,000 threshold.**

The proposed rule would change the dollar threshold for cities, counties, and states that directly receive federal housing and community development funds, such as Community Development Block Grant and HOME Investments Partnership funds. Under the current rule, once one of these recipients receives an aggregate amount of \$200,000, Section 3 obligations are triggered when funds are used for housing rehabilitation or construction, or other public construction (such as roads, public facilities, water and sewerage projects).

The text of the current rule is confusing, leading some recipients to incorrectly apply the \$200,000 threshold on a per-project basis rather than on a per-recipient basis. As a result, as advocates have observed, some recipients could avoid Section 3 obligations at a given project that had less than \$200,000 of HUD assistance.

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The proposed rule would establish a new threshold and have unambiguous language. Section 3 requirements would apply to recipients of housing and community development financial assistance that plan to obligate or commit an aggregate amount of \$400,000 or more in Section 3-covered housing financial assistance on projects involving demolition, housing rehabilitation or construction, or other public construction during a given reporting period. HUD comments that while this would exempt 37% of all recipients, those recipients receive less than 5% of all covered federal financial assistance. The proposed rule clearly states that once the \$400,000 threshold is reached, Section 3 obligations apply to all Section 3 projects and activities funded with any amount of HUD housing and community development funds. In addition, the requirements apply to the entire project, regardless of whether the project is partially or fully funded with HUD funds.

The preamble asks the public to comment on the level of the proposed threshold, stating that HUD would not consider a threshold below \$400,000 but would consider a threshold as high as \$1 million. While NLIHC would prefer a threshold lower than \$400,000, we conclude that \$400,000 is a reasonable compromise. A \$1million dollar threshold would exclude 816 cities and counties (59%). Advocates anticipate that cities and counties will comment in favor of the \$1 million threshold. However, a \$1 million threshold would prevent too many local governments from attempting to meet the spirit of the Section 3 law. Therefore, NLIHC encourages advocates to strongly support the \$400,000 threshold and urge HUD not to erode Section 3 opportunities any further.

### **NLIHC encourages advocates to endorse elimination of the \$100,000 threshold for contractors and subcontractors.**

Under the current regulation, contractors and subcontractors do not have to comply with Section 3 if a contract for construction work on a project is less than \$100,000. Consequently, for example, a contractor awarded \$500,000 in HOME funds from a recipient to rehabilitate owner-occupied homes might not have to meet any Section 3 obligations because most owner-occupied housing rehabilitation does not entail \$100,000 per home.

The proposed rule eliminates the \$100,000 threshold for contractors and subcontractors. NLIHC commends HUD for proposing this improvement, which can result in greater employment and subcontracting opportunities for Section 3 residents and businesses.

### ***THE DEFINITION OF "NEW HIRE"***

#### **Proposed Rule Fails to Address Major Employment Loopholes**

The current rule sets a goal of having 30% of "new hires" at a project to be "Section 3 residents," but is silent regarding how long a Section 3 resident ought to be employed. A Section 3 resident is either a public housing resident or a resident whose household income is 80% of the area median income or less.

Advocates have long asserted that the rule's lack of a provision considering duration of employment is a loophole, allowing contractors to hire Section 3 residents for a short period of time. In addition, advocates have asserted that using "new hire" as a measure is another loophole allowing contractors and subcontractors to place any new hires on their non-Section 3 covered projects and thus evade Section 3. HUD's proposed rule insufficiently addresses the first loophole and does not address the second.

The proposed regulation would revise the definition of "new hire." In the preamble to the proposed rule HUD agrees with advocates, proposing to redefine a new hire as someone who works a minimum of 50% of the average number of hours worked for a specific job category for which the person was hired, throughout the duration of time that the work is performed on the project. The preamble offers an example: if a typical painter works 40 hours per week, then a Section 3 new hire must work a minimum of 20 hours per week for as long as a typical painter works at the project.

For years, advocates have been suggesting to HUD that the Section 3 employment goal obligation should not be measured by counting the number of Section 3 workers who are "new hires." Rather, compliance should be assessed by the number of hours worked by Section 3 residents as a percentage of total hours worked by all employees for each job category. In other words, to meet Section 3 goals, Section 3 residents for each job category should be working at least 30% of the total number of hours worked by all employees in that job category.

**NLIHC encourages advocates to recommend that the final rule not use "new hires" and instead measure Section 3 employment compliance based on the total number of hours worked by Section 3 employees as a percentage of total hours worked by all employees for each job category.**

If HUD is not willing to accept this recommendation, HUD's definition of a new hire should at least increase from 50% to 100%, the average number hours worked for a specific job category for which the Section 3 resident was hired. The 50% standard would encourage hiring Section 3 residents for part-time work and render Section 3 employees as second-class employees. In addition, it is likely to hinder skill-building because the employer could rationalize that an Section 3 employee will not be around long enough.

### **ORDER OF PRIORITY FOR SELECTING SECTION 3 EMPLOYEES**

The law requires recipients to follow specific priorities for meeting Section 3 training and employment goals.

For non-housing community development projects, or for housing projects that are not public housing, the current regulations state that "where feasible" Section 3 residents should be selected in the following order:

- 1) People with income less than 80% of the area median income living in the "service area" or neighborhood where the assisted project is located;

- 2) Participants in the federal YouthBuild program;
- 3) Homeless people in the service area or neighborhood if the project receives Continuum of Care Homeless Assistance funds;
- 4) Other people with income less than 80% of the area median income in the metro area (or non-metro county) where the HUD-assisted housing is spent.

Service area is the geographic area where people live who benefit from the project.

Under the current regulations for public housing projects, Section 3 residents should be selected in the following order:

- 1) Residents of the public housing development assisted;
- 2) Residents of other developments managed by the public housing agency;
- 3) Participants in the federal YouthBuild program;
- 4) Other people with income less than 80% of the area median income in the metro area (or non-metro county) where the public housing assistance is spent.

**NLIHC encourages advocates to suggest that HUD refine the order of priority for both community development and housing projects and for PHAs.**

The proposed rule would eliminate the specific priority for homeless people in the priority chain for community development and housing activities that are not public housing. The preamble does not explain the removal, but the provision seems unnecessary as a stand-alone because homeless people are Section 3 residents, by definition. Therefore, NLIHC accepts this proposed change.

However, as proposed, the first priority for community development and housing projects could be people with income less than 80% of the area median income (one of four examples of a Section 3 resident) living in the service area or neighborhood where the assisted project is located.

The proposed rule adds:

Recipients of housing and community development financial assistance may, at their own discretion, provide priority consideration specifically to residents of public housing or recipients of other Federal assistance for housing, including individuals or families receiving Section 8 housing choice vouchers within the neighborhood where work on the Section 3 covered project or activity is located.

NLIHC cites the Section 3 statute, which declares, “It is the policy of the Congress and the purpose of this section to ensure that the employment and other economic activities...shall, to the greatest extent feasible, be directed toward low- and very low-income persons, **particularly those who are recipients of government assistance for housing.**”

Therefore, rather than favor moderate income residents, **NLIHC urges HUD to give first priority to public housing residents, voucher residents, and residents of privately**

**owned Section 8 housing living in the service area or neighborhood of an assisted project.** These households have much lower incomes and are in far greater need of employment and training opportunities. Then the second priority can be for other Section 3 residents living in the neighborhood or service area where the project is located.

HUD's proposed fourth priority would be Section 3 residents living in a neighborhood or service area within the metro area (or non-metro county) that has been "officially identified by HUD." Here again, NLIHC recommends that the fourth priority be **public housing residents, voucher residents, and residents of privately owned Section 8 housing living in the service area or neighborhood within the Section 3 local area that has been officially identified by HUD.** The fifth priority would then be for other Section 3 residents living in a neighborhood or service area within the metro area (or non-metro county) that has been officially identified by HUD.

NLIHC recommends as a sixth level of priority, **public housing residents, voucher residents, and residents of privately owned Section 8 housing living in the metro area (or non-metro county).** The seventh priority would consequently be other Section 3 residents living in the Section 3 local area.

For public housing, the fourth priority should be **voucher residents and residents of privately owned Section 8 housing living in the metro area (or non-metro county).** A fifth priority could be "other Section 3 residents."

The proposed rule for public housing as well as housing and community development projects declares that recipients must give priority consideration to Section 3 residents or businesses when they are equally qualified with other individuals and businesses for the work. NLIHC welcomes this refinement.

#### **COVERING FORMER PUBLIC HOUSING RESIDENTS IN UNITS CONVERTED BY RAD**

In order for residents of public housing units converted under the Rental Assistance Demonstration (RAD) to benefit from economic opportunities generated by RAD conversion, NLIHC recommends:

- a. Revising the definition of "Section 3 covered project or activity" by adding, "including all initial repairs of, or construction to replace, public housing properties identified in the Rental Assistance Demonstration Financing Plan to convert the properties to Section 8 assistance under the Project-Based Voucher (PBV) or Project-Based Rental Assistance (PBRA) programs."
- b. Including PBVs in the definition of "rehabilitation."

#### **PROPOSED RECIPIENT'S OFFICIAL SECTION 3 POLICIES AND PROCEDURES**

##### **Updating Official Section 3 Policies and Procedures**

The proposed rule would require all recipients to develop and adopt official policies and procedures to implement the requirements of the Section 3 regulation. As proposed, the official policies and procedures must describe eight specific actions the recipient will undertake to comply, such as how it will notify Section 3 residents and businesses about economic opportunities, and how it will give priority to Section 3 residents and businesses. The proposed rule states that official policies and procedures shall be updated “as appropriate.”

**NLIHC endorses the new requirement of an official Section 3 set of policies and procedures. NLIHC encourages advocates to suggest that the official policies and procedures be updated, at a minimum every five years when Consolidated Plans (ConPlan) and PHA Plans must be updated.**

If the rule does not specify a minimum synchronicity with a ConPlan or PHA Plan, there is a danger of a recipient failing to review and perhaps update a Section 3 Plan for much longer periods of time. Many jurisdictions did not update their affirmatively furthering fair housing Analysis of Impediments (AIs) to fair housing choice because there were no rules and only weak guidance suggesting updating in concert with ConPlans.

Specifically stating that a Section 3 statement of policies and procedures must be updated at least in concert with a ConPlan or PHA Plan is not out of line because proposed Section 9(a)(3) would require:

(3) Section 3 official policies and procedures shall be incorporated into any strategic and annual plans required of recipients of HUD covered assistance by HUD program regulations.

In addition, for recipients that are not required to submit a ConPlan or PHA Plan, proposed Section 9(a)(3)(ii) would require:

“...the recipients’ official section 3 policies and procedures shall be developed as an independent document at the time that Section 3 covered financial assistance is awarded and updated every 5 years thereafter.”

### **Availability of Official Section 3 Policies and Procedures**

The proposed rule would require official Section 3 policies and procedures to be “available for review by HUD, Section 3 residents and businesses, and the general public upon request.”

**NLIHC recommends reinforcing this provision** by adding that the official Section 3 policies and procedures:

1. Be posted on a recipient’s website on a relevant, easy to find webpage.
2. Be provided without charging for copying to a reasonable number of Section 3 residents and businesses, upon request.

### **AVAILABILITY OF SECTION 3 ANNUAL REPORTS**

The proposed regulations would require “All Section 3 annual reports submitted to HUD...be made available to the public upon request.”

**NLIHC recommends reinforcing this provision** by adding that Section 3 annual reports:

1. Be posted on a recipient’s website on a relevant, easy to find webpage.
2. Be provided without charge for copying to a reasonable number of Section 3 residents and businesses, upon request.

NLIHC also urges HUD to post every recipient’s Section 3 annual report on a webpage of HUD’s Office of Housing and Economic Opportunity.

### **INCREASE TO 10% CONTRACTING GOAL FOR NON-CONSTRUCTION CONTRACTS**

The current rule has a goal of awarding at least 10% of the total dollar amount of construction contracts and at least 3% of non-construction contracts (such as accounting, engineering) to Section 3 businesses. HUD states that there is no statutory basis distinguishing goals for construction and non-construction contracts. In addition, interpreting the goal has been a problem for recipients. Therefore, the proposed rule would replace the 3% goal with a 10% goal regardless of the type of contract. NLIHC endorses this proposal because it could increase opportunities for Section 3 businesses.