



## NATIONAL LOW INCOME HOUSING COALITION

# PUBLIC HOUSING PARTS of the PROPOSED SECTION 3 REGULATION

Ed Gramlich  
Modified April 17, 2019

## INTRODUCTION

On April 4, 2019, HUD published the long-awaited update to the 1994 interim Section 3 rule.

The purpose of Section 3 of the Housing and Urban Development Act of 1968 is to ensure that, when HUD funds are used to assist housing and community development projects, “to the greatest extent feasible” preference for some of the jobs, training, and contracting opportunities that are created go to low-income people and to businesses owned or controlled by low-income people or to businesses that hire them. Public housing agencies (PHAs) and jurisdictions using Community Development Block Grant (CDBG), HOME Investment Partnerships program, and other HUD funds must comply with Section 3 and ensure that contractors and subcontractors comply.

Comments are due June 3.

Page references in this summary refer to the proposed regulation “text” and HUD’s explanation of the text, called the “preamble”, in the large-format version of the proposed rule and preamble at <https://bit.ly/2TTTsCV> and proposed benchmarks at <https://bit.ly/2VqufBK>.

## STRUCTURE OF PROPOSED RULE [page 15 preamble]

The proposed rule would have four subparts:

- Subpart A for general provisions,
- Subpart B for public housing,
- Subpart C for “Section 3 projects”, which are projects funded by other HUD programs such as CDBG and HOME, and
- Subpart D for projects with a mix of public housing and other HUD funds.

## SEVEN KEY CHANGES – A PREVIEW

### Potential Positive Changes

- HUD proposes to use “labor hours worked” instead of using a “new hires” standard.

However, HUD asks PHAs whether they prefer to use “labor hours” or “new hires”. Depending on the PHAs’ comments, HUD states that it will decide whether PHAs can continue to use “new hires” or will be required to switch to “labor hours worked”.

- The proposed rule would create a “Targeted Section 3 worker”, intended to give PHAs and jurisdictions an incentive to focus on reaching workers given priority in the statute and providing contracts to Section 3 businesses that are primarily owned or controlled by low-income people, or that hire a substantial number of low-income people.

However, the Section 3 business option could result in someone who is not low-income being counted as a Section 3 worker.

- HUD would establish “benchmarks” indicating that 30% of all labor hours worked are by Section 3 workers (25%) and Targeted Section 3 workers (5%), replacing the current rule’s 30% employment “goals”.
- Residents with Section 8 vouchers or who live in Section 8 properties with project-based rental assistance are added to the second-level priorities for employment and contracting opportunities.

Section 8 residents would also be included among “Targeted Section 3 workers”.

### Potential Negative Changes

- HUD would remove Section 3 monitoring and enforcement from HUD’s Office of Fair Housing and Equal Opportunity (FHEO), shifting monitoring and enforcement to the Office of Public and Indian Housing (PIH) and to the Office of Community Planning and Development (CPD). However, it appears that a separate HUD office would have overall responsibility for Section 3 – the Office of Field Policy and Management.
- **HUD would eliminate any Section 3-specific complaint process.**
- In place of the interim rule’s term “Section 3 resident”, the proposed rule would create the term “Section 3 worker”.
  - Public housing residents would no longer be specifically identified.
  - There would be three options to determine whether someone was a Section 3 worker, two of the options could result in someone who is not low-income being counted as a Section 3 worker.

## **HUD REMOVES SECTION 3 FROM FHEO** [pages 11 & 15 preamble]

Historically, the Section 3 regulations have been at 24 CFR part 135, which is under the umbrella of the Office of Fair Housing and Equal Opportunity (FHEO). HUD proposes to remove the Section 3 regulations from part 135 and create a new part 75, which is under the umbrella of the Office of the Secretary.

In addition, a potential negative change includes removing monitoring and enforcement of Section 3 from FHEO, transferring responsibility to the HUD program offices responsible for the funding program that triggers Section 3, such as the Office of Public and Indian Housing (PIH), the Office of Community Planning and Development (CPD), and the Office of Recapitalization (for RAD demolition, rehab, or new construction).

- ⇒ *In the past, FHEO Field Office staff have complained that other program offices were not responsive to Section 3 problems. Also, in the past program staff (for example PIH or CPD staff) have declared that their “constituents” are the PHAs or the jurisdictions, failing to include residents who are supposed to benefit from HUD programs.*
- ⇒ *Section 3 monitoring and enforcement should be carried out by HUD staff who are independent of HUD program offices that are too close to the development projects funded by their programs.*
- ⇒ *The proposed rule is issued by the Office of Field Management and Policy (FMP), which is separate from the program offices (PIH and CPD). FMP will probably be in charge of Section 3. Will FMP be that independent arm of HUD for monitoring and enforcement?*

**The proposed rule would eliminate any Section 3-specific complaint process.**

**Instead, it would rely on existing provisions in other HUD program regulations to address resident complaints.**

- ⇒ *The current regulation has an entire section about complaints and compliance [§135 Subpart D]. Included is a section with details for residents to submit complaints [§135.76].*

*Other HUD program areas have less detailed provisions for residents to register failure on the part of a PHA or jurisdiction to meet a program requirement.*

**SWITCH TO “LABOR HOURS WORKED” FROM “NEW HIRES”**, *next page*

## **SWITCH TO “LABOR HOURS WORKED” FROM “NEW HIRES”**

Instead of using a “new hires” standard, HUD proposes to use “labor hours worked”.

⇒ *The 1994 interim rule required PHAs and jurisdictions to have goals of 30% of “new hires” be Section 3 residents.*

- *However, as advocates had long observed, some contractors would hire Section 3 residents for a short time so that they would “count” toward the 30% goal, only to lay them off in short order.*
- *Another abuse observed by advocates was to give a Section 3 new hire only 20 hours or less of work per week.*
- *Some contractors would shift their existing workforce to a Section 3 project so that the contractor could claim that they did not need to hire anyone new for the Section 3 project, while hiring new, non-Section 3 residents at non-Section 3 projects.*

As HUD rightly notes in the preamble, a focus on labor hours worked instead of new hires will measure total actual employment by Section 3 workers (defined on page 6 of this summary) and the proportion of the total work performed by Section 3 workers to the total work performed by all workers on a project.

Using labor hours worked also emphasizes continued employment. As an example, HUD notes that with a new hires standard, hiring five new Section 3 workers for one or two months would be counted as more valuable than hiring one Section 3 worker for a full year. A full-time job kept over a long period provides a Section 3 worker with the potential to gain skills that can lead to greater self-sufficiency. [page 5 preamble]

Another improvement is that the proposed rule would encourage employers to keep a Section 3 worker by allowing the employer to continue counting that worker in the future, even if the employee is no longer a “low- or very-low income” person – someone whose income is greater than a specific program’s income limit or 80% of the area median income (AMI). [page 5 preamble] However, the definition of “Section 3 worker” in the proposed text of the regulation does not clearly state this [§ 75.5 page 64 text].

**WILL PHAs BE ABLE TO CONTINUE TO USE “NEW HIRES”?, next page**

## **WILL PHAs BE ABLE TO CONTINUE TO USE “NEW HIRES”?**

[pages 6 & 16 preamble]

HUD writes in the preamble that some PHAs have said that they prefer using the new hires standard. Therefore, HUD proposes alternative regulatory language for PHAs.

Throughout the draft rule, there are provisions referring to “Alternative 2” for PHAs.

HUD asks PHAs to comment on whether they want to use “labor hours” or “new hires”. Depending on the comments, HUD states that it will decide whether PHAs can continue to use new hires or will be required to switch to labor hours worked.

The proposed rule’s Alternative 2 new hires provisions for PHAs are added at the end of this summary (page 12).

### **SMALL PHAs** [§ 75.15(d) page 72 text, pages 7 & 31 preamble]

Small PHAs are those with fewer than 250 public housing units.

They would not be required to report whether they have met Section 3 “benchmarks”, basically the number of labor hours worked or new hires (see page 9 below).

Instead, Small PHAs would only be required to report on Section 3 “qualitative” efforts (see page 11 below).

### **RECIPIENT** [§ 75.5 page 63 text, page 22 preamble]

This summary does not use the term “recipient”. Instead for the general reader it uses PHA.

Residents and advocates should be aware that HUD and PHAs will often use the term “recipient”.

As with the current rule, the proposed rule uses the term “recipient”.

A recipient is any entity that receives funds directly from HUD, such as a PHA that receives public housing capital and operating funds.

Other types of “recipients” include states, counties, and cities that directly receive CDBG, HOME, and other HUD funds.

## **SECTION 3 WORKER**, *next page*

## **SECTION 3 WORKER** [§ 75.5 page 64 text, pages 23 & 24 preamble]

The proposed rule would replace the interim rule's term "Section 3 resident" with a new term, "Section 3 worker", who is someone who meets one of the following:

1. The worker's income is less than the income limit set by HUD for the program(s) triggering Section 3 (for example 80% of AMI for CDBG and HOME); or,
    - ⇒ *The interim rule specifically lists a public housing resident as a "Section 3 resident". The proposed rule would no longer explicitly lists a public housing resident as a "Section 3 worker".*
    - ⇒ *Can we assume a public housing resident or a voucher resident or a project-based rental assistance resident meets this criterion? HUD needs to clarify.*
  2. The worker lives in a "qualified census tract"; or,
  3. The worker is employed by a Section 3 business (explained on page 7).
- A qualified census tract (QCT) is a term created for the Low Income Housing Tax Credit program.
    - A QCT is a census tract with a poverty rate of 25% or more, or with at least 50% of the households having income less than 60% of AMI.
    - HUD must officially designate QCTs each year.
- ⇒ *Someone who lives in a QCT will not necessarily be a low-income person. Depending on how the QCT is drawn, a large number of residents could be higher-income.*
- ⇒ *Someone hired by a Section 3 business (defined on page 7) will not necessarily be a low-income person or a public housing resident or resident with a voucher or with Section 8 project-based rental assistance.*

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

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

## **SECTION 3 BUSINESS CONCERN**, *next page*

## **SECTION 3 BUSINESS CONCERN** [§ 75.5 page 63 text, pages 22 & 23 preamble]

Although the proposed rule stresses employment [§ 75.1 page 59 text], Section 3 is not just about employment and training opportunities – there is also an obligation to make “best efforts” to give preference in awarding contracts to businesses owned or controlled by low-income people, or to businesses that hire a substantial number of low-income people.

The proposed rule significantly changes the definition of “Section 3 business concern”.

A section 3 business concern meets one of the following:

1. At least 51% of the business is owned by low-income people; or,
  2. Low-income people work more than 75% of the labor hours worked at the business; or,
  3. At least 25% of the business is owned by public housing residents or residents living in Section 8-assisted housing (either tenant-based or project-based).
- ⇒ ▪ *The first proposed category is the same as the current rule and reflects the statute’s definition.*
- *The second category is a modification of the current rule (which calls for 30% of full-time employees to be Section 3 residents.)*
- ⇒ *What do you think about 75% of the labor hours worked option?*
- *The third category is new and according to the preamble indicates HUD’s intent to encourage businesses owned by public housing and Section 8 residents.*

Also new, the proposed rule would state that the status of a Section 3 business shall not be negatively affected by a prior arrest or conviction of the owners or employees.

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

## **SECTION 3 EMPLOYMENT and CONTRACTING PRIORITIES**, *next page*

## SECTION 3 EMPLOYMENT PRIORITIES

The proposed rule would reflect the statute's requirements for giving priority to certain categories of Section 3 workers. [§ 75.9(a) page 66 text, page 26 preamble]

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

1. Residents of the public housing project(s) funded with public housing money;
2. Residents of a PHA's other public housing projects, or residents assisted with Section 8 vouchers or project-based rental assistance (*the addition of Section 8 residents would be an improvement over the existing rule*);
3. YouthBuild participants (see Attachment 1 on page 13); and,
4. People in the metro area (or non-metro county) with income less than 80% of the area median income (AMI).

## SECTION 3 CONTRACTING PRIORITIES [§ 75.9(b) pages 66 & 67 text, page 26 preamble]

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

1. Section 3 businesses that provide economic opportunity for residents of the public housing project(s) funded with public housing money;
2. Section 3 businesses that provide economic opportunity for residents of other public housing projects, or residents assisted with Section 8 vouchers or project-based rental assistance (*the addition of Section 8 residents would be an improvement over the existing rule*);
3. YouthBuild Programs (see Attachment 1 on page 13); and,
4. Section 3 businesses that provide economic opportunity to low-income people living in the metro area (or non-metro county).

When reading this part of the proposed rule it is important to remember the formal definition of a Section 3 business (as described on page 7 above).

This proposed version is much simpler than the current rule, but seems to address the statute's intent. (See box with the current rule's provisions at Attachment 2 on page 14.)

## SECTION 3 BENCHMARKS, *next page*



## **SECTION 3 BENCHMARK** [§ 75.13(b) PHAs pages 68 & 69 text, pages 20,11, & 29 preamble]

The proposed rule would establish Section 3 a “benchmark” to replace the current rule’s “goals” (see box with the current rule’s goals provisions at Attachment 3 on page 15).

The preamble indicates that the benchmark would be used to monitor a PHA’s accomplishments toward directing job opportunities to Section 3 workers and a new subcategory of Section 3 worker called “Targeted Section 3 workers” (described below on page 10).

The proposed benchmark is:

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

In other words, 30% of all labor hours worked are by Section 3 workers (25%) and Targeted Section 3 workers (5%)

[75.13(b)(3) proposed regulation text, page 29 preamble; proposed benchmark notice page 8]

- Professional services will not be included in the benchmark.
    - These are defined as non-construction services such as contracts for legal services, financial consulting, accounting, environmental assessments, and architectural and engineering services.
    - PHAs may include professional services to increase their total numbers to reach their benchmark.
- ⇒ *The current rule includes these professional jobs.*
- ⇒ *This exclusion might overlook entry-level and career-growth opportunities in those professional areas.*
- ⇒ *The proposed rule leaves it up to a PHA to decide whether to include.*
- Every three years, HUD will publish a Section 3 benchmark in a notice in the *Federal Register*. The first benchmark was published separately on the same day as the proposed rule.
    - The proposed benchmark is at: <https://bit.ly/2YP8td5>
    - An easier to read version of the proposed benchmark is at: <https://bit.ly/2VqufBK>

**TARGETED SECTION 3 WORKER**, *next page*

## **TARGETED SECTION 3 WORKER** [§ 75.11(a) page 67 text; pages 9, 27, & 28 preamble]

This is a new idea intended to give PHAs an incentive to focus on reaching workers given priority in the statute and providing contracts to Section 3 businesses.

[pages 27 & 28 preamble]

A Targeted Section 3 worker for PHAs would be:

1. A worker employed by a Section 3 business; or,
2. A worker who currently is or who was when hired:
  - a. A resident of any of the PHA's public housing or any resident assisted by Section 8, whether a voucher or project-based rental assistance; or,
  - b. A resident of other projects managed by the PHA that is using public housing assistance; or,
  - c. A current YouthBuild participant (see Attachment 1 on page 13).

HUD stresses in the preamble that by including current workers the proposed rule helps ensure they have continued long-term employment [page 28].

⇒ *It seems that 1. "A worker employed by a Section 3 business", could allow anyone at a Section 3 business to count as a Targeted Section 3 worker even if they didn't meet the definition of a Section 3 worker. (Review the definition of a Section 3 business on page 7 above.)*

*HUD explains its reason, indicating the intent is to make best efforts to award contracts to Section 3 businesses, which are significantly owned by low-income people or that substantially employ public housing or Section 8 residents [pages 27 and 28, preamble].*

*Is it safe to assume that a business with 51% low-income people ownership will hire public housing or Section 8 residents?*

*Regarding "2.b", no such projects currently exist. The rule just echoes the statute.*

## **SAFE HARBOR** [PHAs, § 75.13(a) page 68 text, page 28 preamble]

If a PHA certifies (pledges) that it has met the priorities for job and contract opportunities (as described on page 8 above) and has met the job benchmark (on page 9 above), then HUD assumes the PHA is complying with Section 3 – unless residents or advocates tell HUD about evidence that contradicts the PHA.

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

- If a PHA cannot certify that it has met the job and contract priorities and job benchmark, then it will have to send to HUD "qualitative" reports on their efforts (see "Reporting", page 11).
- ⇒ *Residents and advocates should monitor and report to HUD any evidence that contradicts a PHA.*

## **REPORTING** [§ 75.15 page 70-72 text; page 30 preamble]

The proposed rule would require PHAs to report to HUD their benchmark data:

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

This includes labor hours worked by contractors and subcontractors.

- If a contractor or subcontractor does not track labor hours, a PHA “may” accept the contractor’s or subcontractor’s “good faith assessment” of the labor hours of full-time or part-time employees.
- If the benchmark is not met, a PHA will be required to use a HUD form to report on the “qualitative” nature of its activities or the activities of contractors and subcontractors.

The preamble indicates that HUD is considering what it will require in a “qualitative” report from a PHA that did not meet its benchmark.

Qualitative efforts could include: outreach to generate job applicants, provision of on-the-job training, tuition for off-site training, and outreach to Section 3 businesses.

- PHAs will report to HUD each year with their PHA Plan.

**ALTERNATIVE 2 FOR PHAs**, *next page*

## **ALTERNATIVE 2 FOR PHAS** [pages 6 & 16 preamble]

In the preamble HUD states that some PHAs have said that they prefer continuing to use the “new hires” standard. Therefore, HUD proposes alternative language for PHAs.

Throughout the draft rule, there are provisions referring to “Alternative 2” for PHAs. HUD asks PHAs to comment on whether they would prefer to continue using “new hires”, or to start using “labor hours”. Depending on PHA responses, HUD states that it will decide whether PHAs can continue to use new hires or will be required to switch to labor hours worked.

### Definition of New Hires [§ 75.5 page 62 text, page 21 preamble]

A “New Hire” is a full- or part-time employee for permanent, temporary, or seasonal employment:

- Who was not on the payroll of a PHA or a PHA’s contractor or subcontractor at the beginning of a PHA’s award of public housing funds; or,
- Who was hired by contractors or subcontractors on a per-project basis as a result of receiving funds from public housing.

### Targeted Section 3 worker [§ 75.11 pages 67 & 68 text, page 27 preamble]

A Targeted Section 3 worker for public housing means:

1. A new hire employed by a Section 3 business; or,
2. A new hire employed by the worker’s current employer who is also:
  - a. A resident of a public housing project or a voucher household or a resident in a property subsidized with Section 8 project-based rental assistance; or,
  - b. A resident of other projects managed by the PHA that is “spending assistance”; or,
  - c. A YouthBuild participant (see Attachment 1 on page 13).

⇒ *It is not clear what sort of projects are being considered by “2.b”.*

*It seems that 1. “A worker employed by a Section 3 business”, would allow anyone at a Section 3 business to count as a Targeted Section 3 worker even if they didn’t meet the definition of a Section 3 worker. (Review the definition of a Section 3 business on page 7 above.)*

*HUD explains its reason, indicating the intent is to make best efforts to award contracts to Section 3 businesses, which are significantly owned by low-income people or that substantially employ public housing or Section 8 residents [pages 27 and 28, preamble].*

Benchmark, next page

**ALTERNATIVE 2 FOR PHAs**, *continued*

**Benchmark** [§ 75.13(b)(3) page 69 text and page 9 of benchmark text; page 30 preamble]

1. Section 3 workers make up 30% of the total number of new hires employed with public housing funds during a PHA's fiscal year.

**and**

2. Targeted Section 3 workers make up 5% of the total number of new hires employed with public housing funds during a PHA's fiscal year.

**Reporting** [§ 75.15(a) page 71 text, page 31 preamble]

- The proposed rule would require PHAs to report to HUD their benchmark data:
  - Total number of new hires;
  - Total number of new hires who are Section 3 workers; and,
  - Total number of new hires who are Targeted Section 3 workers.

This includes new hires by a PHA, contractors, and subcontractors during a PHA's fiscal year.

**ATTACHMENT 1, YouthBuild**

YouthBuild enables low-income young people to learn construction skills by building affordable housing for homeless and low-income people and other community assets such as schools, playgrounds, and community centers in their neighborhoods.

YouthBuild started as a HUD program but for many years has been primarily funded by the U.S. Department of Labor (DOL) through the authorized federal YouthBuild program administered by the Employment and Training Administration at DOL.

YouthBuild USA, Inc., is a nonprofit organization that provides low-income youth with the training, technical assistance, and leadership development.

More about YouthBuild is at: <https://www.youthbuild.org>

## ATTACHMENT 2, The current rule's contracting order of priority

The current interim rule's order of priority for PHAs' and their contractors' and subcontractors' obligation to make "best efforts" to award contracts and subcontracts to businesses that provide economic opportunities to Section 3 workers is in the following order of priority:

The interim rule's order of priority is:

First priority should go to businesses that:

- Are primarily owned (51%) by residents of the public housing receiving the HUD funds, *or*
- Have a full-time workforce made up of at least 30% residents of the public housing receiving the HUD funds.

Second priority should go to businesses that:

- Are primarily owned (51%) by residents of other public housing managed by the PHA receiving the HUD funds, *or*
- Have a full-time workforce made up of at least 30% residents of other public housing managed by the PHA receiving the HUD funds.

Third priority should go to YouthBuild programs in the metro area (or non-metro county).

Fourth priority should go to business that:

- Are primarily owned (51%) by low- and very low-income people in the metro area (or non-metro county); *or*,
- Have a full-time workforce made up of at least 30% low- and very low-income people in the metro area (or non-metro county); *or*
- Subcontract more than 25% of the dollar amount of all subcontracts to businesses that meet (a) or (b).  
[Sec. 135.36(a)(1)]

## ATTACHMENT 3, The current interim rule's "goals"

The current rule goals:

### Employment

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

The goal of 30% of new hires applies to public housing capital improvements or operating funds.

This includes management and administrative jobs, technical, professional, building trades, and non-construction jobs at all levels. (Section 3 Frequently Asked Questions, page 14.)

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

### Contracts

There are two numerical goals for contracts:

1. At least 10% of the total dollar amount of all Section 3 covered contracts should be awarded to "Section 3 businesses" for any building trades work<sup>▲</sup> for public housing maintenance, repair, modernization, or construction.
2. At least 3% of the total dollar amount of all other (non-building trades) Section 3 covered contracts should be awarded to "Section 3 businesses".

[Sec. 135.30(c)]

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