



Council of Large Public Housing Authorities

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Regulations Division
Office of General Counsel
US Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: [Docket No. FR-6085-P-01] Enhancing and Streamlining the Implementation of “Section 3” Requirements for Creating Economic Opportunities for Low-and Very Low-Income Persons and Eligible Businesses (the “Proposed Rule”)

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation's largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

Like the U.S. Department of Housing and Urban Development (“HUD”), PHAs are committed to expanding economic opportunities for low- and very-low income persons and businesses. These opportunities range from employment opportunities at construction sites to apprenticeship programs run by PHAs and their partners, to provision of business and legal clinics to help residents create their own businesses.

We applaud HUD’s efforts in advocating for such economic opportunities and appreciate the importance of better guidance to PHAs regarding their obligations to facilitate access to these economic opportunities. We also appreciate HUD’s efforts to clarify the criteria by which HUD judges PHAs’ fulfillment of their obligations to use their best efforts to direct employment and other economic opportunities toward low- and very low-income persons.

However, we remain concerned that many of the proposed changes do not reflect the current realities of the construction trade and, if finalized, would impose costly new obligations on PHAs without a funding source to pay for those requirements. Of the small proportion of public housing residents who are unemployed and work-ready, not all have a desire to be employed in construction work, a substantial amount of which is short-term and ill-suited for long-term career growth. The Proposed Rule also ignores a very real problem faced by PHAs and contractors across the country—in many

communities, contractors cannot locate enough skilled Section 3 businesses or individuals to fill their Section 3 hiring needs. Reflecting this reality, there is little evidence to date that Section 3 has successfully promoted long-term economic opportunities for low-income people and those receiving housing assistance.

In addition, serious attempts to increase economic opportunities for low- and very low-income individuals will require additional funding to help support PHAs in the many procedures and processes required for compliance with Section 3 of the Housing and Urban Development Act of 1968, as amended, (codified at 12 USC 1701u) (“Section 3”). Planning grants to form or strengthen partnerships with Workforce Investment Boards or inter-agency collaborations with workforce programs within the Department of Labor, 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.

Below, please find our responses to the specific questions posed by HUD for comment in the proposed rule.

(1) HUD seeks comments on the use of the statutory terms “best efforts” and “greatest extent feasible” in this proposed rule. Specifically, HUD seeks comments on whether this proposed rule should define these terms, whether the two terms should be considered interchangeable, whether only one term should be used, how the proposed rule should apply these terms relative to HUD’s efforts to increase employment and training opportunities for low- and very low-income persons, and how recipients can most effectively/efficiently demonstrate that they have satisfied these definitions in reporting to HUD.

Though HUD has previously considered the “best efforts” and “greatest extent feasible” standards to be interchangeable,¹ we strongly disagree and implore HUD to evaluate these as two separate concepts. While Section 3 generally requires recipients to direct employment and other economic opportunities generated by federal financial assistance to low- and very-low income persons “to the greatest extent feasible,”² Section 3 specifically explains how these requirements apply to PHAs, and provides that PHAs must simply “make their best efforts” to comply with their employment and contracting obligations under Section 3.³ As discussed in detail below, the “greatest extent feasible” is a much more rigid and prescriptive standard than the “best efforts” standard and so we applaud HUD’s effort to incorporate the term “best efforts” in the proposed rule, which more closely tracks the language of Section 3.

Accordingly, we believe that the “greatest extent feasible” and “best efforts” standards are in fact distinct and consistent with the statutory language in Section 3, but only the “best efforts” standard should be applied to PHAs. Congress clearly distinguished between these two standards and provided PHAs and their partners not with the absolute compliance obligation described by the more rigorous

¹ 80 FR 6519, at page 16520

² 12 USC 1701u(b)

³ 12 USC 1701u(c)(1)(A) and 12 USC 1701u(d)(1)(A)

“greatest extent feasible” standard, but allowed PHAs to meet the more subjective, flexible standard of “best efforts”. For example, courts interpreting the “greatest extent feasible” standard under the Section 3 Act have found that this standard requires a “maximum” effort with “every affirmative action” that can be properly taken.⁴ In contrast, the “best effort” standard has been found not to create an absolute, objective compliance standard. Instead, courts have found that the “best efforts” requirement “specifically avoids creating a mandatory obligation on the part of the agencies the statute affects”.⁵ This “best efforts” standard likewise “does not call for perfect compliance.”⁶ As a result, Congress and the federal courts clearly consider these to be separate distinct standards, and we implore HUD to do the same.

Therefore, we are encouraged to see HUD recognizing that flexibility in the Proposed Rule and further encourage HUD to allow PHAs to retain greater discretion over the development of their own Section 3 programs. PHAs and HUD share a mission of serving the nation’s most vulnerable, low-income families, and have accomplished their greatest achievements through strong partnerships with each other. Even in a climate of scarce financial resources, PHAs and HUD continue to work together to promote affordable housing and economic opportunities for public housing residents. PHAs across the country operate innovative Section 3 programs by identifying needs in their communities and by locating partners and resources to promote Section 3 opportunities for local residents and businesses. These opportunities range from employment opportunities at construction sites to apprenticeship programs run by PHAs and their partners, to provision of business and legal clinics to help residents create their own businesses. We ask that the Proposed Rule recognize the creativity and dedication that PHAs exercise in promoting Section 3 hiring by allowing PHAs the flexibility and discretion they need to develop and operate thoughtful, innovative Section 3 programs for their own communities.

(2) HUD specifically requests comments on the proposal to move to labor hours or retain new hires for public housing financial assistance reporting and tracking...HUD has heard from some PHAs that they may prefer to maintain the use of new hires. HUD requests those PHAs provide feedback on why maintaining the new hire framework is a benefit.

Moving to a labor hours metric will significantly increase the reporting burden for PHAs and is unlikely to capture the kind of data on sustained employment opportunities that HUD is seeking. In numerous Section 3 listening sessions conducted by HUD in 2018, multiple participants from PHAs expressed a preference for continued use of a new hires reporting metric. We appreciate that HUD is willing to allow PHAs to continue tracking new hires to fulfill their Section 3 obligations pursuant to the proposed language in Alternative 2 and request that HUD adopt the proposed Alternative 2 in the final rule. Collecting labor hours represents a significant and unfunded requirement for PHAs and tracking even a good faith estimate of labor hours in the absence of a detailed time and attendance system would present an excessive burden. Though HUD suggests that labor hour tracking will be a simple process for contractors already tracking labor hours, not all HUD construction projects are subject to Davis-Bacon compliance and for those that are not, even a good

⁴ See, e.g., Ramirez, Leal & Co. v City Demonstration Agency, 549 F.2d 97 (1976) at 105

⁵ Miller v Chicago Housing Authority, 2012 WL 2116190 (2012) at 4; Bardney v Chicago Housing Authority, 2013 WL 1278526 (2013) at 2

⁶ Conway v Chicago Housing Authority, 2013 WL 1200612 (2013) at 7

faith estimate of labor hours will require significant resources from PHA staff to monitor, review, and compile across multiple contracts.

CLPHA membership consists of large PHAs who manage and oversee a significant number of contracts across different funding sources at any given time. Our members tell us that extracting payroll information from contractors is notoriously difficult, particularly when contractors themselves do not have the adequate staffing capacity required to track the requested metric. In particular, CLPHA members report that needing to obtain individual labor hour information on an ongoing basis, rather than just once for new hires, will be a significant challenge.

While we appreciate HUD's interest in collecting information on various long-term, sustained employment opportunities provided to Section 3 residents, the realities of the construction jobs typically created through HUD funding are often short-term, seasonal jobs that are specific to individual worksites. Many of CLPHA's members note through reviews of their own Section 3 programs that the Section 3 employment is often consistent with short-term construction jobs available for low-skilled workers, as contractors simply do not keep pools of long-term general laborers on hand for consecutive projects as a means of employing Section 3 workers. If the goal is to track compliance with Section 3, new hires is a reasonable metric to do so, and PHAs should continue to be allowed to report new hires only.

While we prefer that HUD keep the new hires metric as its sole benchmark or at least as an optional one, we agree that tracking benchmarks for Section 3 workers and Targeted Section 3 workers separately is reasonable provided that the Targeted Section 3 worker definition is expanded (See Question #9 addressed below on the proposed Targeted Section 3 worker definition).

(3) HUD seeks comments on whether the threshold for Section 3 projects should be established by project, total funding received by the recipient, or whether the threshold should be based on total funds expended by a recipient.

There should be consistent thresholds across programs on a per project basis with a threshold large enough to reasonably generate Section 3 employment opportunities. While recognizing that the \$0 threshold for public housing is statutory, we would like to see a consistent threshold applied across programs. If the rationale is to include only projects large enough to generate at least one construction job, thresholds for Lead Hazard Control and Healthy Homes programs should also be increased to match the Community Development Block Grant Program threshold. The desire to avoid exempting Lead Hazard Control and Healthy Homes Programs from Section 3 is understandable, but it is meaningless to subject projects to Section 3 compliance when the amount expended is so minimal that it is not sufficient to generate new employment opportunities. Based on discussions with members and their experience with Section 3, we recommend a threshold of \$350,000 for each program on a per project basis.

Because Section 8 project-based rental assistance and project-based vouchers provide a housing subsidy and are not directly expended for any construction or rehabilitation that a project might require, CLPHA strongly agrees with HUD's decision to exclude Section 8 programs from the Section

3 requirements. In addition, due to the difficulties and challenges associated with Section 3 compliance for professional services and material and supply contracts, CLPHA is pleased to see HUD recognize that such contracts for such highly skilled or specialized tasks will not be subjected to Section 3 requirements.

(4) HUD seeks comment on HUD's proposal to include hours worked by Section 3 business employees in the Targeted Section 3 Worker definitions as a way to report all Section 3 activities in a single metric rather than reporting on Section 3 business concern participation separately through the existing aggregate dollars spent calculation. HUD also seeks comment on whether the changes to the Section 3 business concern definition are appropriate to the proposed new framework...

The Section 3 Business Concern definition proposed by HUD is too narrowly defined and restrictive. While businesses can still qualify as a Section 3 business concern if they are at least 51 percent owned by low- or very low-income persons, other businesses may no longer qualify, even if they provide evidence of a commitment to subcontract in excess of 25 percent of the dollar award to Section 3 Business Concerns or have at least 30 percent of their permanent, full-time employees who are currently Section 3 residents or were Section 3 residents within three years of the date of first employment. Instead, if a business is less than 51 percent owned by low- or very low-income persons, HUD proposes that such businesses would be required to have over 75 percent of their labor hours performed by low- or very-low income persons or must be at least 25 percent owned by public housing or Section 8 housing residents.

If these changes are implemented, the reality is that fewer Section 3 businesses will qualify. While HUD acknowledges and provides a mechanism for PHAs to continue documenting Section 3 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. This definition is inconsistent with the motivation expressed elsewhere in the proposed rule that recognizes the existing preference among many PHAs to continue focusing on new hires. Furthermore, how a business dedicates its labor hours on a particular project is something that can be measured only after the fact as part of the Section 3 reporting.

PHAs already face significant challenges in identifying enough Section 3 businesses to fill hiring needs. Accordingly, we suggest eliminating the 75 percent criterion from the definition of a Section 3 business so that it is defined as a business where at least 51 percent of the business is owned by low- or very low-income people or at least 25 percent of the business is owned by current public housing or Section 8 residents.

(5) HUD seeks comment on whether small PHAs should be required to report as other PHAs are if they put out a bid for a single procurement that exceeds the project threshold discussed in the above paragraph.

As an organization of large public housing authorities, CLPHA does not express a strong position either way on this question but is generally supportive of efforts to reduce and ease the reporting burden for large and small housing authorities alike wherever possible.

- (6) HUD seeks comments on whether Section 3 requirements, as it applies to Section 3 projects, should apply to all subcontractors, and whether at a certain level HUD should consider reducing the reporting or compliance burden for subcontractors.*

Whenever and wherever possible, HUD should consider ways to reduce unnecessary or overly complex reporting requirements for subcontractors. Our members do not typically work directly with subcontractors and do not want to interfere with general contractor-subcontractor relationship. CLPHA is concerned that by creating complex regulatory regimes without acknowledgement of the practical limitations faced by subcontractors, fewer private sector partners will be willing to work with PHAs, harming both PHAs and their low-income residents. For example, many of CLPHA's members report that contractors already find the existing Section 3 requirements too detailed and confusing; these partners may simply decide that working with PHAs is not worth the cost given the enhanced administrative requirements or risk of sanctions. PHAs rely on local businesses and contractors to provide services to their property and imposing significant regulatory burdens on third parties threatens to significantly diminish the number and quality of contractors willing to bid on PHA-sponsored projects. This diminished competition is not in the best interests of PHAs or the communities they serve.

- (7) HUD requests comment on whether its initial and future benchmarks should include benchmarks for both the number of labor hours worked by Section 3 workers divided by the total number of labor hours for all workers and the number of labor hours worked by Targeted Section 3 workers divided by the total number of labor hours for all workers. Alternatively, HUD seeks comment on limiting the benchmark to include Targeted Section 3 workers only.*

Benchmarking for both Section 3 workers and Targeted Section 3 workers is reasonable on the condition that PHAs be allowed to continue use of the new hire metric and that the Targeted Section 3 worker definition is expanded. As noted above, CLPHA members have a strong preference toward the ability to continue tracking new hires. If Alternative 2 is available to PHAs for benchmarking, these two benchmarks seem appropriate.

- (8) HUD specifically requests comment on whether the definition [of “neighborhood” or “service area”] works for recipients or if a different definition for “neighborhood” or “service area” is needed for purposes of Section 3.*

The proposed definition of a service area is too narrowly defined. While we recognize that defining a geographical service area appropriate for urban and rural areas is challenging, the proposed definition represents very small geographic areas in the urban context. In a large metropolitan area,

the proposed definition will amount to such a strict local preference that it will create additional challenges for contractors in identifying and prioritizing eligible workers. HUD uses the rationale that of current Office of Community Planning and Development (CPD) projects, 77 percent had a population of 5,000 within one mile of the project site. This is not a particularly compelling argument, as it is likely to vary considerably by urban and rural areas and only a small proportion of that population may be eligible for Section 3. For many CLPHA members, a one-mile radius will cover a trivial proportion of their jurisdiction and does not fully represent the “neighborhood” or “service area,” limiting and frustrating HUD’s goals of ensuring that job opportunities are provided to eligible Section 3 individuals.

Instead, we propose that the service area be defined by the PHA’s jurisdictional boundaries for purposes of Section 3 compliance. This would ensure the largest possible pool of Section 3 workers, while also ensuring that employment opportunities are targeted to those for whom Section 3 aims to benefit.

(9) HUD...asks whether [the definition of a “Targeted Section 3 Worker”] should be expanded to include previous YouthBuild workers that are under 24 years of age or those who are still eligible to participate in YouthBuild, but may have graduated out of the program.

The definition of a Targeted Section 3 worker should include previous YouthBuild participants under the age of 24, those who are still eligible to participate but may have graduated, and it should be further expanded to include participants from other job corps programs. While many of our members are involved with successful YouthBuild programs and would like to see those participants eligible as Targeted Section 3 workers, not all YouthBuild programs are focused on construction trades and there are a number of other programs that HUD should consider including. To create a definition for a Targeted Section 3 worker that will accurately reflect those who HUD is trying to prioritize through Section 3, we suggest that the definition of a Targeted Section 3 worker be expanded to include participants from other job corps programs, such as YouthCorps, Americorps, and local pre-apprenticeship or construction training programs that include jobs in the construction industry.

In addition to the above questions, CLPHA presents the following additional comments for consideration by HUD.

Transferring oversight and compliance from the Office of Fair Housing and Equal Opportunity (FHEO) to program offices is an appropriate change on the condition that oversight practices are standardized across program offices.

We applaud HUD’s proposal to integrate Section 3 into regular program operations and turning oversight over to offices most familiar with the programs that are impacted by Section 3; however, we remind HUD that, when doing so, there will be a large need to ensure the standardization of Section 3 implementation and monitoring. While we are encouraged by HUD’s chosen direction on this front, our members have expressed some questions as to whether oversight of Section 3 becomes the responsibility of program staff from the Office of Public and Indian Housing (PIH), the Office of Community Planning and Development (CPD), and/or the Office of Recapitalization. It is unclear

how oversight procedures would be adequately standardized across program offices and whether these offices have the necessary staff capacity to effectively monitor program compliance. 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.

The Section 3 worker definition is overly complex and should be simplified.

We appreciate HUD's attempt to expand the definition of a Section 3 worker to include those who are employed by a Section 3 business and others. However, the eligibility criteria are burdensome, and any benefits gained in increasing the eligible Section 3 worker population may be lost through the challenges of new paperwork requirements. Under the new definition of a general Section 3 Worker, contractors will need to conduct wage verification and determine whether the worker lives in a qualified census tract. Identifying census tracts is an onerous requirement and will remove the focus from employing eligible persons living within the neighborhood. Instead, we propose that HUD eliminate the second criteria related to qualified census tracts so that a Section 3 worker is defined as a low- or very low-income person or a worker employed by a Section 3 business.

In sum, we agree with HUD's efforts to track and target certain high priority Section 3 workers separately and efforts to fold Section 3 business engagement into other benchmarks. We also welcome HUD's willingness to provide a path for PHAs to continue to document Section 3 compliance on a new hire, rather than labor hour basis. However, as illustrated above, we do have some concerns with the proposed Section 3 rule that we would be happy to further discuss with HUD.

Thank you for the opportunity to submit these comments.

Sincerely,



Sunia Zatterman
Executive Director