

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

HUD’s Section 3 regulations direct employment opportunities generated by federal housing programs toward low- and very low-income people. On April 3, 2019, HUD proposed to revise its Section 3 regulations to better achieve the statute’s goals, to make reporting more meaningful and more aligned with statutory requirements, and to simplify compliance for recipients.

According to the proposed rule, the updates to the 1994 regulations would “create more effective incentives for employers to retain and invest in 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.”

To read the proposed rule online, please click [here](#).

A. Summary

The more significant provisions of this proposed rule include the following:

1. Promote Sustained Employment and Career Development

The new rule proposes the tracking and reporting of labor hours instead of new hires and solicits public comment on whether to retain tracking and reporting of new hires in some contexts. The proposed focus on labor hours would measure total actual employment and the proportion of the total employment performed by low- and very low-income workers. In addition, the proposed focus on labor hours emphasizes continued employment. To further encourage employers to invest in and retain newly-hired low and very low-income workers, the proposed rule would determine whether someone qualified as a Section 3 worker at the time of hire and the employer would continue to count that Section 3 hire even if in the future the Section 3 worker is no longer a low- and very low-income worker.

2. Align Section 3 Reporting with Standard Business Practices

As noted above, the new rule proposes the tracking and reporting of labor hours, rather than new hires. This is more consistent with business practices for most construction contractors working on HUD assisted or insured projects. The rule also provides for employers who do not track hours in detail through a time-and-attendance system, permitting a good faith assessment of labor hours (the proposed rule does not create an obligation to establish a detailed time-and attendance system).

3. Proposed Applicability and Reporting Thresholds

This proposed rule applies to (1) HUD’s Public Housing Program, and (2) Other programs that provide housing and community development assistance. For ease in administration, the rule would provide separate definitions for these types of funding and separate subparts relating to: (1) Public housing financial assistance and (2) Section 3 projects, which means 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. All recipients of public housing financial assistance and recipients that fund a Section 3 project would be required to report on whether they have met benchmarks (see below). PHAs with fewer than 250 units would only be required to report on Section 3 qualitative efforts and would not be required to report on whether they have met the reporting benchmarks.

4. Reporting and Targeted Section 3 Workers

This proposed rule creates the new concept of “Targeted Section 3 Workers” so that HUD can track, and recipients can target, hiring Section 3 workers in selected categories and those who work for Section 3 businesses. A “Targeted Section 3 Worker” is a subset of all Section 3 workers that HUD wishes to specifically track, reflecting both statutory and policy priorities. The Targeted Section 3 worker category also incorporates the statutory requirements pertaining to contracting opportunities for business concerns employing low- and very low-income persons. A long-standing criticism of local economic development policy is that spatially-targeted subsidies transfer jobs away from other areas without creating job opportunities for the neediest individuals in the targeted area. The proposed Section 3 regulation avoids this pitfall by encouraging the engagement of local firms and low-income workers through the definition of a targeted Section 3 worker.

5. Benchmarks

This proposed rule would establish new benchmark measurements, which will also serve as safe harbors. The primary impact of the Section 3 regulation is not to create new jobs but to redirect the job opportunities that are generated by HUD financial assistance to Section 3 workers and Targeted Section 3 workers, and the proposed benchmark would reflect and monitor grantees’ abilities to do so. The new benchmarks will be based on ratios of Section 3 workers and Targeted Section 3 workers in comparison to all workers. If a recipient certifies compliance with the statutory priorities and meets the outcome benchmarks, HUD would presume the recipient is in compliance with Section 3 requirements, absent evidence to the contrary. Otherwise, recipients will be required to submit qualitative reports on their efforts, as they are required to do under the current rule when they do not meet the safe harbor, and HUD may conduct monitoring to review the recipient’s compliance. HUD has published a proposed notification for comment that would set initial benchmarks at the final rule, available [here](#).

6. Multiple Funding Sources

HUD is seeking to streamline the administrative work for recipients that receive funds through more than one HUD program, and contractors that receive payment from funds under those programs. The rule provides for how to track funding and report benchmarks when there is a project that is funded by public housing financial assistance and also meets the criteria as a Section 3 project. Specifically, that the project must follow the public housing financial assistance requirements for the public housing financial assistance funds and may follow the requirements in subpart B or subpart C for the community development financial assistance funds. It would also provide for how to deal with reporting when a Section 3 project receives housing and community development assistance from two different HUD programs. Specifically, that HUD would designate reporting to one program office.

7. Integrate Section 3 into Program Enforcement

HUD program office staff are regularly in touch with HUD’s funding recipients. Under the proposed rule’s framework, HUD’s program offices would incorporate Section 3 compliance and oversight into regular program oversight and make Section 3 a more integral part of the program’s work. As a result, this proposed rule would eliminate the separate extensive complaint and compliance review procedures in the current rule. Relatedly, it would remove the delegation of authority in the current regulations, as Section 3 requirements, reporting, and compliance would be aligned with those of the applicable HUD program offices.

B. Specific Questions for Comment:

While HUD welcomes comments on all aspects of this proposed rule, HUD specifically requests comments on the following by June 3, 2019:

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 they have satisfied these definitions in reporting to HUD. In accordance with the Section 3 statute, both HUD’s existing Section 3 rule and this proposed rule do not provide an absolute mandate that employers hire Section 3 workers or that HUD funding recipients provide contracting opportunities to Section 3 businesses. Such a mandate would be infeasible, as there could be situations where no Section 3 workers or businesses are available or are qualified. However, HUD emphasizes its intention that the terms “best efforts” and “greatest extent feasible” should be read as very narrow qualifiers and seeks comment on how to best convey that.
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. As discussed above, 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. 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. By using a new hire measure, the Section 3 obligation is fulfilled by hiring Section 3 workers for jobs of any duration, rather than prioritizing opportunities for sustained employment. Additionally, using a new hire measure explicitly values entry rather than retention of workers, and thus provides an incentive for high turnover. While HUD believes that using labor hours for all financial assistance subject to Section 3 requirements will reduce burden, 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. HUD seeks comments from PHAs on alternative 2 regulatory language that would retain the new hire framework for tracking public housing financial assistance, but with the same benchmarking requirements that are in this proposed rule. HUD also seeks comments on how retaining new hires for public housing financial assistance while using labor hours for Section 3 projects will work for recipients, contractors, and subcontractors, especially for those who work with multiple funding sources.
3. This proposed rule would set the threshold for applicability of Section 3 requirements for Section 3 projects to when the amount of the assistance to the project exceeds \$200,000. HUD also provides that all projects that receive funding from HUD’s Lead Hazard Control and Healthy Homes programs are covered, and notes that Section 8 programs were not included in the Section 3 statute and are not covered in this rule. HUD seeks comment on whether an alternate threshold would be more appropriate or equally effective to the proposed \$200,000 per project threshold. HUD also seeks comment on the inclusion of all projects under the HUD’s Lead Hazard Control and Healthy Homes programs and exclusion of Section 8 programs. In addition to seeking comments on an appropriate per project threshold, 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. Establishing a project

threshold has advantages in that it ties Section 3 obligations to the specific projects that are generating economic opportunities. However, HUD understands that there may be disadvantages to using a threshold based on project size. The term “project” is defined differently by different HUD programs, which could make a uniform application of this rule difficult. Also, recipients might be able to change the scope of what would be considered a “project” to avoid compliance with Section 3. If HUD were to use a threshold based on total funding a recipient receives, rather than a per-project threshold, HUD seeks comment on whether the \$200,000 threshold included in this proposed rule should be maintained, or whether the rule should adopt a different threshold.

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, especially the change that to qualify as a Section 3 business over 75 percent of the labor hours performed for the business must be performed by low- or very low-income persons versus the current requirement that 30 percent of permanent, full-time employee, include persons who are currently Section 3 residents, or within 3 years of the date of first employment with the business concern were Section 3 residents.
5. This proposed rule would provide that small PHAs would not be required to report labor hour or new hire figures to HUD. 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.
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.
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.
8. For Section 3 projects, the statute requires that “where feasible, priority should be given to low- and very low-income persons residing within the service area of the project or the neighborhood in which the project is located.” The statute does not define “neighborhood” or “service area” for purposes of how recipients determine where they should focus their prioritization. The lack of definitions complicates compliance for contractors, subcontractors, and grantees receiving multiple types of HUD financial assistance. HUD proposes to provide a definition for recipients to use when prioritizing and reporting workers for Section 3 projects. The definition differs from existing regulatory definitions and local or state definitions, and HUD specifically requests comment on whether the definition works for recipients or if a different definition for “neighborhood” or “service area” is needed for purposes of Section 3. HUD also asks whether the 1 mile and 5,000 population radius is an appropriate geographic size of a ‘neighborhood’ or ‘service area.’
9. HUD provides that a Targeted Section 3 worker includes current YouthBuild participants and asks whether that definition 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.