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HUD Publishes Final Section 3 Rule to Direct Employment and Other Opportunities for Low- and Very Low-Income Persons



On September 29, 2020, HUD published a final rule (the “Final Rule”) re-codifying and revising rules implementing the policies of Section 3 of the Housing and Urban Development Act of 1968, as amended (“Section 3”). The goal behind Section 3 is to ensure that employment and other economic opportunities generated by federal financial assistance for housing and community development programs is, to the greatest extent feasible, directed toward low- and very low-income persons, particularly recipients of government assistance. The Final Rule largely codifies the April 4, 2019, proposed rule, which we summarized [here](#), with a few notable updates outlined below.

The Final Rule represents an overhaul of HUD oversight and administration of Section 3 by integrating requirements into regular program oversight and enforcement mechanisms and removing a separate compliance review process. Under the Final Rule, HUD establishes updated recordkeeping, reporting, and compliance benchmarks that apply to recipients and subrecipients receiving, as well as contractors and subcontractors carrying out the work in connection with, (i) HUD public housing assistance, and (ii) HUD housing and community development assistance for projects meeting the Section 3 project threshold (described below). The Final Rule adopts the proposed exclusion of Section 8 assistance from Section 3 requirements, meaning that a project whose only source of HUD financial assistance involves a project-based or tenant-based Section 8 contract has no hiring or reporting requirements under the Final Rule.

Final Rule Highlights:

- **Tracking Labor Hours Instead of New Hires.** The proposed rule generally shifted Section 3 compliance benchmarks and reporting to account for the proportion of total hours worked rather than counting the number of new hires. However, the proposed rule also included an “Alternative 2” that would have allowed public housing agencies (“PHAs”) to continue reporting based upon the number of new hires. The Final Rule does not include Alternative 2, meaning that PHAs, along with recipients of other housing and community development assistance for Section 3 projects, will be required to shift to labor hours reporting.
- **Section 3 Project Threshold.** The proposed rule indicated that the \$200,000 threshold for projects assisted with housing and community development assistance would be based on the amount of HUD assistance provided to the project (rather than the amount of assistance received by the recipient). The Final Rule maintains this threshold, but also (1) sets a separate threshold of \$100,000 per project receiving Lead Hazard Control and Healthy Homes grant



assistance, and (2) provides that, in addition to adjusting the threshold at least every 5 years based on construction cost inflation, as published in a Federal Register notice, HUD will also update Section 3 benchmarks at least once every three years.

■ **“Section 3 Worker” Definition.**

- HUD’s proposal to qualify residents living in qualified census tracts as Section 3 workers, regardless of income, was removed in the Final Rule.
- The proposed rule allowed workers to count as targeted Section 3 workers if they qualified at the time of hire. Allowing employers to look back to the time of hire was meant to encourage sustained employment and wage growth. At the Final Rule stage, HUD determined there should be some time limit and added a 5-year limit to that look back. Therefore, under the Final Rule, workers who qualified at the time of hire may continue to be classified as a Section 3 worker despite increasing their income above the low-income threshold, but only for a period of 5 years from the date of hire.
- To qualify as a Section 3 worker under the Final Rule, the worker must be, or have been at the time of hiring within the last 5 years: (i) low- or very-low income; (2) employed by a Section 3 business concern; or (iii) a YouthBuild participant.

■ **“Section 3 Business Concern” Definition.** In the Final Rule, HUD raised the percentage ownership requirement for a business to qualify based on public housing or Section 8 residents from the proposed 25% to 51%. A business may also qualify as a Section 3 business concern if it is at least 51% owned by low- or very-low income persons or if 75% of the labor hours are performed by Section 3 workers.

■ **Editorial Note:** Maintaining Section 3 business concern status under the 75% threshold may require some complicated analysis for employers desiring to keep their status. To maintain balance, for every worker that was originally counted as a Section 3 worker based on hiring that has since increased wages and remains an employee beyond the 5 year-year lookback (described above), four new Section 3 workers would need to be hired.

■ **“Professional Services” Definition.** The proposed rule exempted professional services employees from consideration in determining if Section 3 benchmarks are met. The Final Rule maintains this exemption but clarifies that only non-construction services requiring an advanced degree or professional licensing, such as architectural, engineering and legal services are exempted.

The final Section 3 rule, to be codified at a new Part 75 of Title 24 of the Code of Federal Regulations, has an effective date of November 30, 2020, and is available [here](#). HUD will phase in compliance for PHAs beginning the first full fiscal year after July 1, 2021, and for Section 3 projects for which assistance or funds are committed on or after July 1, 2021.

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