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RENO & CAVANAUGH PLLC

May 26, 2015
Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: [Docket No. FR-4893-P-01] Creating Economic Opportunities for Low- and Very Low-Income persons and Eligible Businesses Through Strengthened "Section 3" Requirements (the "Proposed Rule")

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments on the Proposed Rule.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on affordable housing issues since its inception. Reno & Cavanaugh was founded in 1977 and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry.

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. We applaud HUD's efforts in advocating for such economic opportunities and appreciate the importance of better guidance to recipients 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.

Generally, our comments follow three overarching concerns, which are evident in many sections throughout the Proposed Rule. More specifically, we are concerned that the Proposed Rule imposes an unnecessarily restrictive compliance standard on PHAs, imposes costly new obligations without a funding source to pay for these requirements, and ignores the practical

realities confronting PHAs that wish to hire Section 3 residents and businesses. Our comments first highlight these general concerns and then identify specific provisions of the Proposed Rule that we encourage HUD to revisit.

1. **General Comments on Proposed Rule**

    a. **The Proposed Rule exceeds the scope of the governing statute by imposing an unnecessarily restrictive compliance standard. PHAs and HUD share a mission of serving the nation's most vulnerable, low-income families, and have accomplished some of their greatest achievements through strong partnerships with each other. We ask that the Proposed Rule recognize the numerous efforts that PHAs already make to promote Section 3 hiring by treating PHAs as valued partners who are afforded the flexibility and discretion they need to develop and operate thoughtful, innovative Section 3 programs for their own communities.**

PHAs and HUD share a mission of serving the nation's most vulnerable, low-income families, and have accomplished some of 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 many innovative Section 3 programs, often 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. We are concerned, however, that the Proposed Rule instead attempts to tightly regulate every aspect of PHAs' programs, threatening the ability of PHAs to respond to the needs of their own communities.

These restrictions are perhaps most evident in HUD's new requirement that PHAs comply with Section 3 to "greatest extent feasible", rather than allowing PHAs to use their own judgment and "best efforts". For example, Section 3 of the Housing and Urban Development Act of 1968, as amended, (codified at 12 USC 1701u)(the "Section 3 Act") applies to recipients of HUD funds, including PHAs, states, counties and municipalities. The Section 3 Act 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."[1] However, the Section 3 Act 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 the Section 3 Act.[2] In the introduction to the Proposed Rule, HUD explained that HUD views these standards as essentially the same, and so deleted the "best efforts"

[1] 12 USC 1701u(b)
[2] 12 USC1701u(c)(1)(A) and 12 USC1701u(d)(1)(A)

standard and replaced it with the requirement that PHAs and their contractors and subcontractors meet their obligations "to the greatest extent feasible".[3] As discussed in greater detail below, however, the "greatest extent feasible" standard is much more rigid and prescriptive than the "best efforts" standard and so we ask that HUD restore the statutory "best efforts" standard to allow PHAs to retain the flexibility that Congress provided to PHAs in the Section 3 Act.

Despite HUD's assertion, we believe that the "greatest extent feasible" and "best efforts" standards are in fact distinct. Accordingly, HUD should not require PHAs and their partners to meet the more rigorous "greatest extent feasible" standard when Congress clearly provided more flexibility to these entities through a "best efforts" requirement. For example, courts interpreting the "greatest extent feasible" standard under the Section 3 Act have found that this standard requires a "maximum" effort and that it requires "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, while HUD may consider these two standards to be equivalent, Congress and the federal courts have not reached the same conclusion.

Congress clearly distinguished between these two standards, and provided PHAs and their partners not with the absolute compliance obligation described by the "greatest extent feasible" standard but allowed PHAs to meet the more subjective, flexible standard of "best efforts". We therefore encourage HUD to recognize that flexibility in the Proposed Rule, not only by using the "best efforts" standard, but also allowing PHAs to retain greater discretion over the development of their own Section 3 program. In many instances throughout the Proposed Rule, for example, HUD attempts to strictly quantify PHAs' obligation, seemingly without recognition that "best efforts" can take many forms depending on the experiences of particular PHAs and their communities. The risk of overly detailed rulemaking is again apparent in HUD's conclusion that PHAs and their partners "may" give priority to Section 3 residents or businesses "when they are minimally qualified"[7]. Given HUD's requirement that PHAs provide Section 3 employment opportunities under the "greatest extent feasible" standard, providing express permission to PHAs to hire minimally qualified Section 3 residents or contractors could therefore be construed to require PHAs to give preference to Section 3 residents or businesses that are minimally qualified rather than to a non-Section 3 contractor that is the most responsive and responsible. We ask that HUD reconsider this approach throughout the Proposed Rule to accommodate a wider range of PHA experiences and individual circumstances by allowing PHAs and their partners to use their "best efforts" to meet these requirements rather than requiring compliance "to the greatest extent feasible". In many instances, this means providing general requirements without the detailed, prescriptive benchmarks provided in the Proposed Rule. Providing PHAs with the flexibility and discretion to best operate their Section 3 programs

[3] Proposed Rule page 16520
[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
[7] Proposed Rule page 16527

will allow them to continue operating innovate, thoughtful programs that best respond to the needs of their own communities and residents.

b. The Proposed Rule imposes an unfunded mandate on PHAs, with its extensive new monitoring, reporting and enforcement requirements without providing funding for these new responsibilities.

The Proposed Rule imposes a number of new monitoring, reporting and enforcement requirements but does not provide any mechanism for PHAs to cover these new costs. We encourage HUD to revisit these costly new requirements and impose a more realistic monitoring and reporting regime that can be accommodated with existing resources rather than effectively requiring PHAs to find a new source of funds to pay for these costs. For example, the Proposed Rule requires that PHAs monitor the payroll data of developers, contractors and subcontractors throughout the project or activity for projects that are subject to Davis Bacon wage requirements.[8] However, HUD's Davis Bacon requirements do not themselves require this level of monitoring. In the Davis Bacon context, PHAs are simply required to perform "spot checks" of contractor compliance, and monitoring is primarily focused on willful violations, such as falsification of payroll data.[9] In contrast, the Proposed Rule's monitoring and verification procedures are much more extensive, often requiring PHAs to engage in complex reviews of individual hiring decisions by contractors and subcontractors.

The Proposed Rule likewise requires PHAs to develop and implement sanctions for non-compliant contractors but does not provide PHAs with realistic benchmarks for sanctions or alternatives to sanctions. Developing these processes and defending proposed sanctions are likely to create further administrative and fiscal burdens for PHAs that are already operating in an environment of scarce financial resources. By imposing significant new monitoring, reporting and sanctions requirements without providing the funding for PHAs to implement these requirements, HUD is requiring PHAs to divert their scarce resources to new costly administrative obligations, detracting from their broader missions of serving low income families.

c. By creating a complex new regulatory regime without acknowledgment of the practical limitations faced by PHAs that wish to hire Section 3 residents and businesses, HUD risks undermining PHAs' abilities to focus on their core missions of providing affordable housing to low income families.

In addition to the costs discussed in the prior sections, the Proposed Rule may significantly reduce the number of private sector partners willing to work with PHAs, harming both PHAs and their low income residents. For example, many of CLHPA's members report that contractors already find the existing Section 3 requirements too detailed and confusing; when combined with the threat of sanctions for non-compliance, these partners may simply decide that working with PHAs is not worth the cost given the enhanced administrative requirements or risk of sanctions. We are concerned that this loss of potential bidders and partners for PHAs may be exacerbated by the fact that the Proposed Rule removes many of the safe harbor standards and alternative

[8] Proposed Rule page 16536
[9] See, e.g., HUD Handbook 1344.1, Rev. 2, Section 5-2(A)(6) and Section 5-8

compliance measures in the current Section 3 regulations while making compliance with the core Section 3 requirements more difficult. PHAs rely on local businesses and contractors to provide services to their property, and by imposing significant regulatory burdens on third parties while removing safe harbor standards that mitigate the risk of inadvertent noncompliance, the Proposed Rule 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. Among other things, we encourage HUD to retain the safe harbor provisions in the current rule and allow contractors to receive notice and an opportunity to cure before mandatory sanctions for non-compliance are imposed.

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. HUD's emphasis on sanctions for failure to meet hiring targets, rather than on clear safe harbor standards, suggests a significant misunderstanding of the realities of hiring Section 3 residents and businesses. It also disregards the fact that the Section 3 Act does not require absolute compliance, but rather "best efforts". Furthermore, the current rule and the Proposed Rule do allow contractors to also satisfy their requirements by providing on-the-job training or registered apprenticeship programs, but this alternative is often costly and requires a significant investment of time and resources from the contractor's staff. Because Congress and HUD are not providing additional funds for contractors to provide these trainings or apprenticeship programs, contractors and PHAs become responsible for finding funding sources to cover these training programs. As a practical matter, many PHAs have found that contractors simply inflate their prices to cover these Section 3 costs rather than reducing their own profits, effectively requiring PHAs to finance the cost of Section 3 trainings and apprenticeships. Like HUD's proposed monitoring and reporting requirements that create new costs for PHAs without new funding to implement these requirements, HUD's enhanced requirements for contractors appears to be a cost-shifting exercise where PHAs, rather than HUD, bear the expense of these new requirements.

We are concerned that contractors will choose not to assume these new costs and will simply decline to provide their services to PHAs, resulting in a smaller pool of qualified contractors for PHA projects. Similarly, by drastically raising the Section 3 threshold from 3 percent to 10 percent of all non-construction contracts, the Proposed Rule may discourage contractors that provide professional services (i.e., architects, engineers, lawyers, accountants, etc.) from providing services to PHAs. As the current regulations appropriately recognize, it is difficult to hire Section 3 individuals and businesses to provide these types of professional services, which require highly skilled employees who are typically not Section 3 eligible. As a result, professional service providers may be particularly disinclined to provide their services to PHAs knowing that they cannot meet the 10 percent hiring requirement and knowing that the risk of non-compliance is significantly higher given the increased sanctions and the removal of critical safe harbor standards under the Proposed Rule.

Instead of improving PHAs' abilities to develop high quality housing in an affordable manner, the changes to the Section 3 rule are likely to have a detrimental impact on the ability of PHAs to serve low income families by providing high quality, affordable housing. Those partners who remain committed to working with PHAs may simply pass the new compliance costs on to PHAs

in the form of higher project costs, thus reducing the funds available for PHAs to serve low-income families. We strongly encourage HUD to reconsider its approach with respect to Section 3 by making the program more flexible and administratively simpler to improve the ability of PHAs to solicit and retain the most responsible and responsive contractors to further PHAs' missions of provide high quality, affordable housing to low income families. The remainder of this letter discusses our specific concerns in greater detail.

2. Detailed Comments on Proposed Rule

a. General Provisions—Subpart A

24 CFR 135.5, "Public housing financial assistance"

Subsection (1): This subsection provides that Section 3 requirements apply to projects funded under Section 5 of the U.S. Housing Act of 1937 (the "1937 Act"). However, no funds are appropriated under Section 5 and so this reference is unnecessary. Public housing funds are already covered by the remaining definitions in this section and so we ask that HUD delete the reference to Section 5, which is overly inclusive.

Subsection (5): This subsection provides that Section 3 applies to "emergency funds" authorized for emergency capital repairs of public housing. However, PHAs may receive emergency funding from a number of sources that may not be public housing sources and which may not be subject to the Section 3 Act. We ask that this Subsection be deleted to allow the type of funding to continue to determine whether Section 3 applies.

Subsection (6): This subsection provides that Section 3 applies to financial assistance "made available under an appropriations act…" While this Subsection provides Choice Neighborhood funding as an example, the general reference to appropriations is excessively broad and seeming covers all funds appropriated by Congress. We ask that this Subsection be deleted, particularly since Subsection (7) already provides HUD with a mechanism for determining that Section 3 applies to particular funding sources.

24 CFR 135.5, "Section 3 business"

Please retain the current definition of "Section 3 business" that includes a business that provides evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to an eligible Section 3 business. Many PHAs successfully use this definition on large construction contracts, particularly for complex projects where a Section 3 business could not successfully perform the entire prime contract, but is well-equipped to serve as a subcontractor on a portion of the project. Eliminating this category of business will have a detrimental impact on the inclusion of Section 3 businesses in large, complex construction projects. If HUD feels the need to clarify this definition, we suggest adding a requirement that the prime contractor must make this hiring commitment for each project in which it wishes to receive a Section 3 preference.

135.7, Compliance to the greatest extent feasible

Subsection (a): As discussed above, we encourage HUD to recognize that PHAs and their contractors and subcontractors may use their "best efforts" to award contracts to eligible individuals and businesses. Likewise, we encourage HUD to re-incorporate the statutory language of the Section 3 Act that requires such effort "consistent with existing Federal, State, and local laws and regulations" to make it clear that PHAs and others are not required to violate other laws or regulations in order to meet the Section 3 compliance requirements in the Proposed Rule.[10] For example, in addition to Section 3 requirements, PHAs are subject to many other federal laws and regulations regarding civil rights and non-discrimination and must continue to award Section 3 contracts in compliance with these federal civil rights and non-discrimination requirements. Similarly, many PHAs are subject to state and local procurement laws that require the award of construction contracts to the lowest bidder through a sealed bid process. The Proposed Rule should acknowledge that the Proposed Rule is not intended to preempt other existing federal, state and local laws and regulations, except as specified below with respect to local hiring preferences.

Subsection (b): We agree that it is important to require recipients of HUD funds to establish policies and procedures. We also understand that HUD requires written justifications when a recipient or contractor does not meet HUD's Section 3 numerical goals. However, we encourage HUD to retain the "safe harbor" standards in the current Section 3 rule. More specifically, under the current 24 CFR 135.31(d)(1) and (2), recipients who cannot meet the numerical targets for employment and hiring may also demonstrate that they have met the applicable Section 3 requirements by providing other economic opportunities, such as those listed in the current 24 CFR 135.40 and by showing that they took some or all of the actions listed in the Appendix to the current regulations. These supplemental compliance opportunities are critical for PHAs and their partners, who may not otherwise be able to document that they used their best efforts to comply with the Section 3 hiring requirements if they could not locate or retain sufficient numbers of qualified Section 3 individuals and businesses.

Subsection (c): While we appreciate the importance of Section 3 enforcement, we encourage HUD to combine enforcement measures with the alternate compliance measures contained in the current Section 3 regulations. Sanctions are a very serious penalty, and without clear safe harbor standards, PHAs and their partners lack a meaningful way to mitigate their risk of sanctions if they are not able to meet the Section 3 hiring requirements. While we appreciate that HUD will take various "justifications" by PHAs and their partners into consideration when reviewing a failure to meet hiring targets, we ask that HUD provide examples of acceptable justifications so that PHAs and their partners may appropriately evaluate those alternatives if they are confronted by an insufficient number of Section 3 hiring opportunities. Additionally, we also encourage HUD to allow recipients to receive notice and an opportunity to cure before mandatory sanctions for non-compliance are imposed.

[10] 12 USC 1701u(c)(1)(A) and 12 USC 1701u(d)(1)(A)

135.9, Official Section 3 policies and procedures

Subsection (a), subsection (2): This section provides very detailed descriptions of what Section 3 recipients must include in their official Section 3 policies and procedures. After this description, the second sentence of Subsection (2) says that this list "is not inclusive of all elements that recipients should include". However, if there are key elements that HUD has not included on this detailed list, we encourage HUD to add those elements before publication of a final rule so that PHAs and their partners may review these elements. If this list is not missing key elements, then we ask HUD to delete this reference to unlisted requirements. As discussed above in the context of safe harbor standards for justifications for non-compliance, we are concerned that the Proposed Rule implies a number of unstated requirements. Given HUD's emphasis on sanctions for non-compliance in the Proposed Rule, we ask that HUD clearly state what will be required of PHAs and their partners so that they do not face sanctions without clear knowledge of how to avoid these sanctions.

Subsection (a), subsection (3): The first sentence of this section requires that "official" Section 3 policies and procedures be incorporated into "any strategic and annual plans required by recipients" of HUD assistance. However, this change is overly prescriptive and seemingly requires PHAs to incorporate their full Section 3 policies and procedures into all of their strategic plans and annual plans. However, PHAs typically have extensive stand-alone Section 3 policies that cannot be easily incorporated into the various plans submitted to HUD. In addition to official Section 3 policies, many PHAs have developed secondary materials, including procedures and internal procurement guidance related to Section 3, and it is not clear how the full text of these procedures could be readily incorporated into all strategic plans and annual plans submitted to HUD. Attempting to do so may cause PHAs to overly simplify their policies and procedures in a way that is not beneficial to compliance with the applicable Section 3 requirements. We believe that HUD did not intend this outcome, and so request that HUD either delete this requirement or clarify that recipients must simply agree to comply with applicable Section 3 requirements in their strategic and annual plans.

Subsection (a), subsection (3)(i): This subsection is both overly broad and vague and so we ask that it be deleted. This subsection requires that recipients include a general description of their Section 3 policies and procedures "in required recipient plans, such as public housing plans required by HUD regulation in 24 CFR Part 903, strategic and annual action plans required by HUD regulations in 24 CFR parts 91 and 570, or other similar plans that may be required under other covered HUD programs." As discussed above, as a general matter, we ask that recipients simply be required to agree to comply with Section 3 in their strategic and annual plans rather than being required to incorporate their policies and procedures. Additionally, this subsection is ambiguous—it is not clear what HUD means by "required recipient plans", since this is not a defined term. The reference to "other similar plans" is also overly broad since it is not clear which plans HUD might be referring to. The Proposed Rule allows HUD to impose sanctions for failing to satisfy these requirements (see, e.g., 24 CFR 135.7(c)(2)) and so it is critical that the obligations of PHAs be clearly defined so that PHAs are not confronted with sanctions for non-compliance with unstated requirements.

135.11, Recipient responsibilities

Generally: We encourage HUD to review the level of detail provided in Section 135.11 and remove unnecessarily prescriptive requirements to allow PHAs greater flexibility in discharging their Section 3 obligations. We encourage HUD to look to its Davis Bacon guidance as a model for ensuring compliance while allowing PHAs to retain the flexibility necessary to administer their own programs. In the Davis Bacon context, for example, HUD has noted that contract administrators are responsible for ensuring that the bid solicitation and applicable contract contain the necessary wage decision and appropriate labor standards. HUD explained that "HUD does not prescribe specific actions for [contract administrators] to achieve these results, only that the [contract administrator] successfully carry out its responsibilities."[11] Davis Bacon compliance is often seen as similar to Section 3 compliance, yet HUD and the Department of Labor allow PHAs significantly more flexibility in discharging their responsibilities with respect to Davis Bacon wages. We encourage HUD to follow that approach here as well.

Subsection (b)(5): We are concerned by the administrative burden and costs associated with this requirement and ask that HUD delete this subsection. This subsection provides that recipients must "monitor the payroll data of developers, contractors, and subcontractors throughout the project or activity, to ensure that new employment opportunities are made available consistent with the requirements of this parts. This requirement only applies to projects or activities that are subject to wage rates determined under the Davis Bacon Act".

This requirement is problematic for two reasons. First, HUD is not providing any additional funding for the heightened Section 3 requirements in the Proposed Rule, but this change is likely to require significant amounts of PHA staff time to review payroll data. The Proposed Rule only imposes this requirement on projects subject to Davis Bacon wages, but HUD does not require PHAs to conduct this level of review even for projects paying Davis Bacon wages. For example, in the Davis Bacon context, PHAs are simply required to perform "spot checks" of contractor payroll data, and monitoring is primarily focused on willful violations, such as falsification of payroll data.[12] Once the initial spot check has been performed for a Davis Bacon project, HUD permits PHAs to conduct less frequent and invasive monitoring. This Davis Bacon monitoring is usually limited to a desk review of Davis Bacon wage reports.[13] Furthermore, most PHAs do not have the staff capacity or technology to conduct Section 3 payroll monitoring for large construction projects, since PHAs would have to review not only wage reports by prime contractors, but also by their subcontractors. While we are aware of one technology company that sells software to facilitate this type of review for large construction projects, the cost of the software is prohibitive for most PHAs, who would instead have to manually review hundreds or thousands of pages of Davis Bacon payroll data. The Proposed Rule's requirement that PHAs monitor payroll data throughout the project therefore imposes a costly administrative burden on PHAs that are already struggling with fewer resources, and we ask that this requirement be removed.

[11] HUD Handbook 1344.1, Rev. 2, Section 5-3(B)
[12] See, e.g., HUD Handbook 1344.1, Rev. 2, Section 5-2(A)(6) and Section 5-8
[13] HUD Handbook 1344.1, Rev. 2, Section 5-8(A)

Equally important, this additional payroll monitoring will not accomplish HUD's objectives of improving Section 3 compliance. In the Davis Bacon context, PHAs can quickly review contractors' payrolls to determine what wages the contractors are paying, and can therefore determine whether the contractors are in fact paying Davis Bacon wages. In the Section 3 context, however, the relationship between payroll wages and Section 3 compliance is not clear, since Section 3 eligibility is not apparent from payroll data. Furthermore, only a small portion of a contractor's employees are typically Section 3 employees, and it is not efficient to require PHAs to review large volumes of payroll data where most of the data relates to non-Section 3 hires. In contrast, in the Davis Bacon context, all of the Davis Bacon wage reports are relevant to whether a contractor is complying with Davis Bacon requirements, since typically the entire project is subject to Davis Bacon wage requirements. As a result, having incurred the cost of monitoring Davis Bacon payments to comply with the Section 3 Proposed Rule, PHAs would still need to conduct site visits or other established forms of Section 3 monitoring to actually determine Section 3 compliance. Monitoring Davis Bacon wages is not an effective means of monitoring for Section 3 compliance, and we therefore ask that HUD remove this costly new administrative requirement that does not align with the desired outcome.

Subsection (b)(8): This subsection requires PHAs to ensure that notices are posted that advertise Section 3 opportunities, and provides extensive details about what the notices should include. We ask that HUD delete this list and allow PHAs to exercise their discretion in order to disseminate information to Section 3 applicants in a cost-effective and easily understood manner.

Among other things, the Proposed Rule requires that notices include anticipated dates that work will begin and end; anticipated number and type of job vacancies available; anticipated number and type of registered apprenticeship or training opportunities offered; anticipated dollar amount and type of subcontracting opportunities; application and bidding procedures; required employment and subcontracting qualifications; and the name and contact information for the person(s) accepting application.

This level of detail is not appropriate for a public sign, particularly when the objective is communication with Section 3 residents who may be interested in employment. PHAs have developed communication tools that are most effective for outreach to low-income families in their communities, and we are concerned that the level of detail in the Proposed Rule will impede effective communication with Section 3 individuals and businesses by providing an overwhelming and confusing amount of detail for people who are not accustomed to reviewing and interpreting government notices.

Subsection (b)(9): Please clarify that in connection with Section 3 procurements, PHAs may provide local preferences for Section 3 hiring, which will ease the selection of Section 3 residents and businesses. HUD's current procurement regulations at 2 CFR 200.319 prohibit the use of statutorily or administratively imposed state or local preferences in the evaluation of bids or proposals. We believe that the Section 3 Act and the regulations at 2 CFR Part 200 provides HUD with the authority to allow local preferences for Section 3 hiring. Accordingly, we ask HUD to clarify that the Section 3 requirements preempt the prohibition on local hiring in 2 CFR 200.319. Finally, we would also ask that HUD update the references in the Proposed Rule to reflect that 2 CFR Part 200 has replaced 24 CFR Part 85.

Subsection (b)(10): Please delete the second sentence in this subsection. This subsection requires that collective bargaining agreements, project labor agreements or other agreements between labor unions or recipients must ensure that covered Section 3 projects comply with the applicable Section 3 requirements. However, we believe that project-specific contracts (i.e., for construction services, etc.) are the more appropriate place for recitals about Section 3 requirements since not all labor agreements relate solely to Section 3 covered work.

Subsection (c), Responsibilities specific to PHAs: Generally, we ask that HUD revise this section and Subsection (d) below so that PHAs and other recipients are subject to the same responsibilities. The distinctions between public housing agencies and other recipients are also redundant and confusing here given the additional provisions for public housing discussed in Subpart B of the Proposed Rule. In addition, Subpart (c) does not meaningfully clarify the obligations of PHAs under the Proposed Rule. Subpart (c)(1)) already provides an extensive discussion of recipient responsibilities and it is not clear what additional monitoring HUD is requiring at Subpart (c)(1) nor is it clear how this is different from the obligations of PHAs discussed in Subpart (c)(1). We also ask that HUD delete the requirements in Subparts (c)(2) and (c)(3) that obligate PHAs to develop procedures to comply with "earned income disregard requirements" and set-aside requirements for resident owned business. Inclusion of these requirement is both unnecessary and confusing given that the earned income disregard and resident owned business provisions are not addressed by the Section 3 Act and are already the subject of separate regulations issued by HUD at 24 CFR Part 963 and 24 CFR Part 5, respectively. We find the mention of set-asides particularly confusing since that the definition of "numerical goals" in Section 135.5 explicitly says that these goals "are not construed as quotas, set-asides, or a cap…". Given these concerns, we encourage HUD to delete this Subpart (c).

135.13, General minimum numerical goals

We encourage HUD to delete this subpart, which simply reiterates that recipients of public housing and community development financial assistance must meet the minimum numerical goals provided in other subparts. This subpart does not provide any new information but simply recites requirements that are already fully provided in other subparts, including Section 135.35 and 135.55 and 135.7, and so may cause confusion. We discuss the requirements of those other sections in more detail below.

135.15, Verification of Section 3 resident and Section 3 business status.
Subpart (a): Please clarify that recipients may rely on certifications or other documentation by contractors and subcontractors regarding the Section 3 eligibility of the individuals or businesses hired by the contractor or subcontractor. Please also clarify that compliance with the verification procedures in subsections (b) and (c) satisfy the verification obligations of recipients with respect to individuals or businesses hired by the recipient. As explained in our general comments to the Proposed Rule, these kinds of safe harbor standards are important to allow PHAs to appropriately develop their compliance measures given the enhanced opportunities for sanctions under the Proposed Rule.

Subpart (b)(2) and (b)(3): It appears that a phrase is missing after the word "HUD". As drafted, it is not clear what kind of designation the neighborhood, zip code or other area needs to receive from HUD.

Subpart (b)(4): Please make the imposition of sanctions discretionary rather than mandatory by revising this subpart to say that recipients "may" impose sanctions and "may" refer such individuals to the OIG. This will allow PHAs to exercise their discretion when individuals make claims that are erroneous or inaccurate but not intentionally deceptive.

Subpart (c)(2): It appears that a phrase is missing after the word "HUD". As drafted, it is not clear what kind of designation the neighborhood, zip code or other area needs to receive from HUD. Likewise, please delete or revise the phrase that says that recipients may presume that a business meets the eligibility criteria if the business provides evidence that it "substantially" employs residents from a designated area. This phrase is confusing given the definition of Section 3 business in 24 CFR 135.5 that requires specific percentages of employees to be Section 3 residents. While we understand that the Section 3 Act also uses the term "substantially", HUD has exercised its rulemaking authority to define Section 3 business elsewhere, and that definition should be sufficient. The presumption in the first part of Subpart (c)(2) does not cause the same confusion because that presumption does not relate to documentation of a specific percentage of employees.

Subpart (c)(3): We ask that HUD delete the provision allowing recipients to require federal tax returns for workers and to require evidence that employees received housing or other federal subsidies. This authorization raises significant privacy concerns on behalf of possible Section 3 residents, who should not be subjected to automatic, additional scrutiny by their employers simply because those employees may be low-income. This concern also supports the need for the less-intrusive safe harbor provision described in Subpart (c)(2), which allows recipients to presume that a business meets the Section 3 eligibility criteria as long as it is located in a low-income area. Any other required documentation should be provided directly by the employer and should disclose private information about the employer rather than its employees.

Subpart (c)(4): Please make the imposition of sanctions discretionary rather than mandatory by revising this subpart to say that recipients "may" impose sanctions and "may" refer such businesses to the OIG. This will allow PHAs to exercise their discretion when businesses make claims that are erroneous or inaccurate but not intentionally deceptive.

135.17, Written Agreements

Subpart (e), generally: As we have noted in a number of other sections, this proposed change is overly prescriptive. We encourage HUD to make the simplifying changes described below to allow PHAs and their partners to adopt a more streamlined approach to Section 3 compliance

Subpart (e)(1): Please clarify that the PHA's or subrecipient's plan may instead be incorporated by reference into the written agreement. Otherwise, this provision of the Proposed Rule seemingly requires subrecipients to incorporate their full Section 3 plans into their written agreements with recipients, but many subrecipients have extensive stand-alone Section 3 policies

that cannot be easily incorporated into the written agreement with the recipients. In addition to official Section 3 plans, many subrecipients have developed secondary materials, including procedures and internal procurement guidance related to Section 3, and it is not clear how the full text of these procedures could be readily incorporated into the written agreement. Attempting to do so may cause subrecipients to overly simplify their policies and procedures in a way that is not beneficial to compliance with the applicable Section 3 requirements. We believe that HUD did not intend this outcome, and so request that HUD either delete this requirement or clarify that subrecipients may alternatively incorporate their Section 3 plans and procedures by reference.

Subpart (e)(4): Please delete the reference to "contractor" compliance since contractors are not parties to the written agreements between recipients and subrecipients described in 135.17.

135.19, Contracts and Section 3 clause

Subparts (c) and (d): Please clarify that the form of this Section 3 Clause may be modified to fit the type of contract that it is attached to. For example, when the Section 3 Clause is attached to an agreement between a contractor and subcontractor, the references to "contractor" will need to be updated to refer to the "subcontractor."

Subpart (e), generally: We ask that HUD revise this form to reflect our other comments to the Proposed Rule.

Subpart (e), Item F of Section 3 Clause: Please delete the phrase "to the recipient" since in many instances this Section 3 Clause will be attached to an agreement between a contractor and a subcontractor. In that situation, the subcontractor would initially provide its justifications to the contractor, not to the recipient. This change is particularly important because there would not be privity of contract between the subcontractor and the recipient.

Subpart (e), Item M of Section 3 Clause: Please delete this section. We encourage HUD to consider which entities will have enforcement power under the Proposed Rule and to clarify this throughout the Proposed Rule. In this subpart, for example, HUD is obligating the contractor to impose sanctions on its subcontractors. Section 135.11(b)(12), however, suggests that recipients have this obligation instead. To avoid confusion and situations where multiple entities attempt to sanction a contractor for the same violation, we encourage HUD to consider which entities should have the obligation to impose sanctions and to enforce Section 3 more generally.

Subpart (e), Item O of Section 3 Clause: Please delete this section. Contractors often have agreements with labor organizations but rarely have the power to negotiate these agreements. In addition, these agreements often address significant amount of work that is not covered by Section 3. Furthermore, these labor agreements may cover multiple regions or multiple employers within a region, many of whom may have their own Section 3 requirements for the particular contract. As a result, it is more appropriate for these requirements to be incorporated into project-specific contracts, which are then subject to the Section 3 Clause described in 24 CFR 135.19(e).

Subpart (e), Item O of Section 3 Clause: Please delete this section. Contractors should receive notice and an opportunity to cure before sanctions are imposed, particularly before a contract is terminated.

135.23, Reporting requirements

Generally: We encourage HUD to remove many of the details from this section. This level of detail is not necessary or appropriate for a regulation, particularly given that HUD's online Section 3 reporting system is still in the test phase and is not yet operational. For example, we suggest removing most of the details of this section and simply requiring recipients to report those items described in Subpart (a) in the format approved by HUD. This will allow HUD the discretion to require use of a paper HUD form or an online form depending on HUD's needs at a particular time.

b. Additional Provisions for Public Housing Financial Assistance—Subpart B

135.35, Minimum numerical goals

Subpart (a), generally: We strongly encourage HUD to retain the requirement in the current rule that requires that 3 percent of the total dollar amount of non-construction contracts be awarded to Section 3 businesses. HUD's introductory comments note that "there was no statutory reason to make a distinction between construction and nonconstruction contracts."[14] However, the Section 3 Act also provides HUD with broad rulemaking authority, which HUD has exercised in order to require contractors to use best efforts to award at least 10 percent of the total dollar amount of covered contracts to Section 3 businesses.[15] As a result, we ask that HUD exercise the same rulemaking authority to retain the 3 percent threshold for non-construction contracts and to eliminate these requirements entirely for certain types of professional services contracts and materials-only contracts. As we discussed in our introductory comments, it is already difficult to award at least 10 percent of the dollar amount of construction contracts to Section 3 businesses; it is even more difficult to award at least 10 percent of the dollar amount of non-construction contracts to Section 3 businesses. Rather than creating a requirement that PHAs and their partners cannot realistically meet, we suggest that HUD set a target that better aligns with what PHAs and their partners can reasonably achieve using their best efforts. As discussed in our general comments, professional service providers may be disinclined to provide their services to PHAs knowing that they cannot meet the 10 percent contracting requirement and those who continue in this role are likely to charge higher fees to account for the heightened risk of sanctions under the Proposed Rule. This outcome is likely to increase the costs of obtaining professional services without any clear benefit to PHAs or their residents in return.

We also encourage HUD to clarify that certain categories of professional services and products are exempt from Section 3 hiring requirements given that Section 3 hiring is not typically

[14] Proposed Rule at page 16525

[15] In Price v Housing Authority of New Orleans, 2010 WL 1930076 (2010) (page 4), for example, the court noted that "the Secretary of HUD has institutional competence to determine the feasibility of providing economic opportunities in connection with the revitalization projects that it funds".

feasible for those providers. For example, engagement of firms to provide legal, accounting, and financial services rarely directly generates any new hiring needs. When such hiring needs exist, they typically require selection of highly skilled, highly educated employees who rarely qualify as Section 3 residents. Furthermore, even if such qualified residents exist, professional service companies are often national or regional firms and are rarely located in the same geographic area as the PHA purchasing the services. As a result, any Section 3 hires by the professional services company would not typically be within the Section 3 service area of a given PHA and so still would not qualify as a Section 3 hire under the Proposed Rule. For example, a national financial consulting firm may represent many PHAs across the country but may only have a few offices. Thus, as a practical matter, these firms cannot operate physical offices in all of the markets that they serve, and so cannot hire Section 3 employees in places where they do not have physical locations even if they could find qualified employees. As a result, we encourage HUD to create an exception for professional services since they rarely generate any Section 3 hiring in the Section 3 service area of the PHAs they serve.

CLPHA also endorses the comments of the HAI Group, which has requested that HUD revise the Proposed Rule to acknowledge that (1) it is not feasible to require Section 3 hiring with respect to certain categories of services such as the provision of insurance services and to create a hiring exemption for such services, and (2) Section 3 compliance is only required to the extent consistent with existing federal, state and local laws and requirements as provided in the Section 3 Act and therefore is not required for insurance providers. As discussed above, we believe that the Section 3 Act provides HUD with the discretion and rulemaking authority to make these changes.

Finally, we ask that HUD create an exemption for providers of materials-only contracts for similar reasons. These contracts typically do not directly generate employment opportunities of any type, and when such opportunities are created, they are rarely in the Section 3 service area of the PHA. The administrative burden of requiring these suppliers to justify their failure to meet the Section 3 hiring requirements far outweighs the occasional Section 3 resident or business that these suppliers might hire.

Subpart (a)(1): At the end of the first sentence, please add “to the extent that the employment opportunity arises from the expenditure of public housing financial assistance.” This addition is important because many PHAs also have non-public housing revenue and may use this revenue to hire employees and conduct activities not related to the expenditure of public housing funds. For example, many PHAs develop Low Income Housing Tax Credit projects that are not additionally public housing, and internal hiring related to those developments is not subject to Section 3 requirements. Please also clarify that these numerical goals only apply to projects that generate “new hires”. It is otherwise not clear how projects without hiring needs could meet these requirements. If the expenditure of public housing assistance does not result in the need for new hiring, third-party contractors should not be required to expend significant time and money to document why they did not hire Section 3 residents or businesses.

Subpart (a)(3): Please delete this requirement, which provides that a Section 3 resident must work a minimum of 50 percent of the average staff hours worked for the category of work for which they were hired. This conflicts with the definition of “new hire” provided in Section

135.5. That section provides that a "new hire" means full time employees or part time employees for permanent, temporary, or seasonal employment. The conflict in these definitions occurs if an employer has long-term employees who are not Section 3 eligible and also has a smaller number of temporary needs for the same employment class. If the employer hires Section 3 eligible residents to fill its temporary needs, then the temporary nature of this work may mean that the Section 3 residents do not work at least 50 percent of the average staff hours of the permanent workers. If HUD believes that the definition of "new hire" in Section 135.5 is not sufficient, we encourage HUD to revise that definition rather than attempting to provide an additional, conflicting definition in 135.35(a)(3).

The requirement that Section 3 residents work at least 50 percent of the average hours also puts Section 3 residents at a significant disadvantage, and is likely to result in fewer Section 3 job applicants. First, many Section 3 residents cannot commit to full-time employment, often because they have school-aged children or because they take care of elderly or disabled relatives who need part-time assistance. As a result, many Section 3 residents strongly prefer reduced work schedules or work that only occurs during school hours to accommodate their childcare or other family obligations. Requiring them to work at least 50 percent of the hours of other employees may discourage these residents from even applying to these jobs. Similarly, many PHAs and residents support these reduced-work arrangements because they provide greater job training opportunities for a greater number of residents. For example, if a contractor can hire two part-time Section 3 residents for a given position rather than hiring one full-time resident, then the contractor has doubled the number of Section 3 residents who can acquire the job skills related to that job. As a result, we strongly encourage HUD to remove the requirement that Section 3 residents work at least 50 percent of the hours of an "average" employee.

Subpart (b): As discussed above, we strongly encourage HUD to retain the 3 percent threshold for non-construction contracts and to create an exception to these requirements for certain professional services contracts.

Section 135.37, Orders of priority consideration for employment and contracting opportunities

Subpart (a), generally, and subparts (1) through (5): This section creates heightened hiring requirements while making the compliance obligations of PHAs less clear. We ask that HUD delete this subpart (a) and instead retain the provisions of the current Section 3 rule. We believe that PHAs should not be required to hire Section 3 residents and businesses that are only "minimally" qualified as described in HUD's introductory comments to the Proposed Rule, nor should PHAs should be required to hire Section 3 residents who have the "same" qualification as the general pool of other "applicants".[16] PHAs are committed to providing high quality affordable housing to low-income families despite chronic under-funding, and must be allowed the flexibility to meet this mission by selecting employees or contractors who are capable of carrying out the scope of work effectively as determined by the PHA during the PHA's procurement process. Accordingly, we strongly encourage HUD to delete the new Section 135.37 and retain the current Section 135.34 and 135.36 and Appendix to Part 135. These current sections provide PHAs with the necessary flexibility to hire the most responsible and

[16] Proposed Rule, page 16527

responsive bidder while also providing important safeguards for the interests of Section 3 residents and businesses. As discussed in our general introductory comments, HUD has concluded that a PHA must provide Section 3 employment opportunities under the "greatest extent feasible" standard. This suggests that the PHA may therefore be required to give preference to Section 3 residents or businesses that are minimally qualified or only have average qualifications rather than to a non-Section 3 contractor that is the most responsive and responsible. If PHAs do not provide these preferences to minimally qualified Section 3 employees, we are concerned that HUD or the OIG might construe selection of any other contractor as non-compliant with the "greatest extent feasible" standards. PHAs are not sufficiently protected by the requirement that a Section 3 resident possess the same qualifications as other "applicants" as provided in subpart (a)(2), since nothing requires the PHA or contractor to hire those applicants. Subpart (a)(3) is likewise not helpful in resolving this ambiguity, since the procurement requirements of 24 CFR Part 85 require that contracts be awarded to the lowest bidder or most responsive and responsible bidder.[17] It is therefore not clear how this subpart (a)(3) will help PHAs in determining that they are not required to hire unqualified Section 3 businesses as a result of their procurements.

HUD's current Appendix to Part 135 provides a number of helpful examples of when PHAs must select Section 3 businesses that are not the lowest bidder or the most responsive bidder.[18] We therefore strongly encourage HUD to delete the new Section 135.37 and retain the procurement requirements in the current Section 3 rule, including those examples in the current Appendix to Part 135. Otherwise, HUD is imposing ambiguous new requirements without providing clear safe harbor standards for Section 3 procurement and hiring.

c. Additional Provisions for Housing and Community Development Financial Assistance—Subpart C

Because many of the provisions in Subpart C are identical to those in Subpart B, we ask that HUD consider our comments to Subpart B to also apply to the analogous provisions in Subpart C.

d. Additional Provisions for Recipients of HUD Competitive Grant Financial Assistance—Subpart D

135.73, Application selection criteria

Please delete the new language saying that consideration will be given "to the extent to which an applicant has described in their application their plans to train and employ Section 3 residents…"

[17] On December 26, 2014, the Office of Management and Budget published final guidance that removed 24 CFR Part 85 and replaced it with the requirements of 2 CFR Part 200. However, HUD's Section 3 Proposed Rule continues to refer to Part 85 rather than to 2 CFR Part 200. We encourage HUD to update this reference in the Proposed Rule before a final Section 3 rule is issued.

[18] Appendix A to Part 135, Section III: Examples of Procurement Procedures that Provide Preference for Section 3 Business Concerns.

Instead, please continue to use the current Section 3 language at 135.9(c), which focuses on the extent to which an applicant "has demonstrated that it will train and employ Section 3 residents…" We believe that HUD's emphasis should be on what applicants will do, rather than the amount of detail that they provide in their applications. The current rule better accomplishes this focus on results.

135.77, Resolution of outstanding Section 3 matters

We understand that HUD believes it is important to exclude non-compliant applicants from future competitive HUD funding rounds but are concerned that the language in this section is overly broad. For example, this section says that various categories of applicants will be prohibited from applying for future competitive HUD funding rounds. Excluded groups include (i) prospective applicants that have received a letter of finding from HUD identifying noncompliance with Section 3 and (ii) applicants with sanctions that have not been resolved to HUD's satisfaction. However, the prohibition in item (i) above would also exclude applicants who receive a letter from HUD shortly before competitive funding applications are due, and who have not yet been required to respond to HUD, or who are in the process of challenging the findings or are resolving the findings but have not yet finished. Likewise, item (ii) above would exclude some applicants that have long-term voluntary compliance agreements with HUD and who may be fully compliant with their voluntary compliance agreements but are still subject to the terms of the voluntary compliance agreement. If the voluntary compliance agreement was in effect, however, those applicants would be ineligible to apply for the funding. Rather than excluding applicants with open findings, we encourage HUD to simply note that HUD retains the discretion to determine that applicants with open Section 3 findings that are not being resolved may be ineligible for funding. HUD has adopted this approach with respect to other civil rights matters such as Fair Housing, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. We believe that HUD's approach taken with respect to such civil rights matters in many of HUD's General Sections for NOFAs would also work well with respect to Section 3.

e. Enforcement—Subpart E

135.93, Conduct of Investigations

Subpart (g): Please delete the new language saying that HUD may provide assistance in drafting a complaint, which appears to create a significant conflict of interest. Subparts (j) through (n) provide that HUD will also investigate the complaint and may accept or reject the complaint and take various enforcement actions based on the complaint. As a result, it appears inappropriate for HUD to also provide assistance in drafting the complaint, since doing so is likely to prejudice HUD in favor of the complaint when it is then submitted to HUD.

Subpart (h): While we appreciate that complaints may sometimes need to be revised, we ask that HUD limit any substantial, non-technical amendments to a period that does not exceed 90 days after the complaint is filed. Otherwise, PHAs and their partners may be required to dedicate significant resources to defending themselves against shifting allegations without knowing the final form that these allegations may take. By imposing a deadline for amending complaints, the

Proposed Rule will encourage the parties to investigate and resolve the complaint in a more focused manner.

Subpart (l), first paragraph: Rather than requiring HUD to issue a letter of finding for "a" failure to comply with Section 3, we ask that the Proposed Rule be modified to say that a letter of finding will be issued for "significant" or "material" failure to comply with Section 3 in a manner that caused actual harm to the complainant. These revisions will prevent situations where an investigation reveals either minor non-compliance (such as typographical errors in Section 3 reports) or non-compliance that did not affect the complainant.

Subpart (l)(4): To allow recipients sufficient time to correct non-compliance without also requesting a regulatory waiver, we ask that a sentence be added to this subpart allowing the Secretary to exercise the Secretary's discretion to extend the time for recipients to resolve or remedy findings of noncompliance.

Subpart (n): Under the Proposed Rule, this subpart requires that sanctions be imposed if a matter cannot be resolved in 30 days. We ask that HUD delete the new 30-day timeline and instead provide that HUD may impose sanctions if a recipient fails to make acceptable progress under the terms of the voluntary compliance agreement. Many voluntary compliance agreements cover a number of activities, include measures to ensure hiring beyond the numerical targets in the Proposed Rule and are often most beneficial to Section 3 residents and businesses when they address long-term plans. For example, a typical voluntary compliance agreement might address not only immediate hiring needs but also cover multiphase projects that a PHA is developing over several years. By requiring HUD to impose sanctions if a matter cannot be resolved in 30 days, the Proposed Rule denies Section 3 residents, businesses and PHAs the option of using voluntary compliance agreements where it makes sense to do so. As a result, we ask that HUD instead impose sanctions only if the recipient is not complying with the terms of its voluntary compliance agreement.

In light of our substantial comments and other unsettled issues, we ask that HUD consider our comments and those from other interested parties, release a revised version of the proposed Section 3 rule and allow for a second round of comments before finalizing the rule.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman
Executive Director
CLPHA

Stephen I. Holmquist
Member
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