



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 75

[Docket No. FR-6085-N-02]

Section 3 Benchmarks for Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses

AGENCY: Office of the Assistant Deputy Secretary for Field Policy and Management, HUD.

ACTION: Notification of proposed benchmarks.

SUMMARY: Section 3 of the Housing and Urban Development Act of 1968, as amended by the Housing and Community Development Act of 1992 (Section 3), contributes to the establishment of stronger, more sustainable communities by ensuring that employment and other economic opportunities generated by Federal financial assistance for housing and community development programs are, to the greatest extent feasible, directed toward low- and very low-income persons, particularly those who are recipients of government assistance for housing. HUD is statutorily charged with the authority and responsibility to implement and enforce Section 3. Elsewhere in this issue of the Federal Register, HUD published a proposed rule that would amend the Section 3 regulations to, among other things, increase the impact of the Section 3 requirements, and streamline and update HUD's reporting and tracking requirements. The proposed rule includes a requirement that HUD set Section 3 benchmarks by publishing a notification, subject to public comment, in the Federal Register. The proposed rule provides that HUD will set benchmarks based on the number of Section 3 workers and a subset of Section 3 workers, defined as Targeted Section 3 workers. If a recipient complies with the statutory priorities regarding effort and meets the outcome benchmarks, HUD would presume the recipient is following Section 3 requirements, absent evidence to the contrary. These proposed outcome benchmarks are being published concurrently with the proposed rule so the public can comment

on the proposed benchmarks and methodology for setting the benchmarks prior to adoption of the final rule and benchmarks.

DATES: Comment Due Date. [**Insert date that is 60 days after the date of publication in the Federal Register**].

ADDRESSES: Interested persons are invited to submit comments regarding this document to the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit comments, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying weekdays between 8 a.m. and 5 p.m. Eastern Time at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Alastair W. McFarlane, Director, Economic Development and Public Finance Division, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW, Room 8216, Washington DC 20410; telephone 202-402-5845 (voice/TDD) (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service, at toll-free, 800-877-8339. General email inquiries regarding Section 3 may be sent to: section3@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3 of the Housing and Urban Development Act of 1968 (Public Law 90-448, approved August 1, 1968) (Section 3) (12 U.S.C. 1701u) was enacted for the purpose of ensuring, to the greatest extent feasible, that economic opportunities generated by the expenditure of certain HUD financial assistance are directed to low- and very low-income persons, particularly those who receive Federal financial assistance for housing and those

residing in communities where the financial assistance is expended. HUD issued Section 3 regulations through an interim rule published on June 30, 1994, at 59 FR 33880, and the regulations are codified in 24 CFR part 135. The Section 3 regulations at 24 CFR 135.30 currently require that Section 3 covered public and Indian housing programs and other HUD programs that are covered by Section 3 meet a numerical goal of 30 percent of the aggregate number of new hires for a 1-year period in order to meet a compliance safe harbor. For contracts awarded in connection with Section 3 projects and activities, the current rule also applies the following goals for each recipient, contractor, and subcontractor to commit to award to Section 3 business concerns: (1) at least 10 percent of the total dollar amount of all Section 3 covered contracts for building trades work for maintenance, repair, modernization, or development of public or Indian housing, or for building trades work arising in connection with housing rehabilitation, housing construction, and other public construction; and (2) at least 3 percent of the total dollar amount of all other Section 3 covered contracts. Based on HUD's experience with implementing the program over the 24 years that have passed since HUD promulgated the currently codified Section 3 regulations, HUD is proposing to issue new regulations to strengthen and streamline the Section 3 requirements.

HUD issued a proposed rule, found elsewhere in this issue of the Federal Register, that would replace the current 24 CFR part 135 regulations with new Section 3 regulations in 24 CFR part 75. The new regulations aim to make Section 3 goals and reporting more meaningful and more aligned with statutory requirements, and to make compliance easier for recipients. This proposed rule also includes new metrics for compliance safe harbors and provides that these benchmarks will be set by notification in the Federal Register. The rule separates out the new requirements and benchmarks by the type of funding, as follows:

(1) Public housing program: Subpart B, Additional Provisions for Public Housing Financial Assistance, covers development assistance provided pursuant to section 5 of the U.S. Housing Act of 1937 (1937 Act) and Operating Fund and Capital Fund assistance provided pursuant to section 9 of the 1937 Act, collectively; these are defined as public housing financial assistance in the proposed rule.

(2) Other HUD programs: Subpart C, Additional Provisions for Section 3 Projects, covers housing rehabilitation, housing construction, and other public construction projects assisted under HUD programs that provide housing and community development financial assistance when the amount of assistance to the project exceeds a threshold of \$200,000, and is defined as a Section 3 project. This threshold will not apply to assistance from HUD's Lead Hazard Control and Healthy Homes programs.

As for new metrics, the rule provides that HUD will establish, through a Federal Register notification, Section 3 benchmarks by setting forth one or both of the following:

(1) The number of labor hours worked by Section 3 workers divided by the total number of labor hours worked by all workers in the recipient's fiscal year.

(2) The number of labor hours worked by Targeted Section 3 workers divided by the total number of labor hours worked by all workers in the recipient's fiscal year.

HUD also provides an alternative, titled Alternative 2, in the proposed rule that would provide for using new hires, as opposed to labor hours, to track Section 3 workers and Targeted Section 3 workers for public housing financial assistance (i.e., public housing authorities (PHAs) and other recipients of public housing financial assistance). In the final rule, HUD will adopt either the use of labor hours, Alternative 1, or new hires, Alternative 2, for public housing financial assistance.

The proposed rule explains how HUD plans to determine these benchmarks, noting that it

may establish a single nationwide benchmark for work performed by Section 3 workers and a single nationwide benchmark for work performed by Targeted Section 3 workers, or may establish multiple benchmarks based on geography, the type of public housing financial assistance, or other variables. The proposed rule also notes that in establishing the benchmarks, HUD may consider the industry averages worked by specific categories of workers or in different localities or regions; prior Section 3 reports by recipients; and any other factors HUD deems important. In establishing the Section 3 benchmarks, HUD would exclude professional services, which would be defined as non-construction services, including, but not limited to, contracts for legal services, financial consulting, accounting services, environmental assessment, architectural services, and civil engineering services. Lastly, HUD commits to updating the benchmarks no less frequently than once every three years through notice, subject to public comment, in the Federal Register.

HUD created the concept of a Section 3 worker and Targeted Section 3 worker so that HUD could track and set benchmarks to target selected categories of workers and to recognize the statutory requirements pertaining to contracting opportunities for business concerns employing low- and very-low income persons.

HUD would define a Section 3 worker for both public housing financial assistance and Section 3 projects as a worker that meets one of the following:

- The worker's income is below the income limit established by HUD;
- The worker lives in a qualified census tract; or
- The worker is employed by a Section 3 business concern.

HUD would define a Targeted Section 3 worker differently for public housing financial assistance and Section 3 projects. For public housing financial assistance, Targeted Section 3

workers would be:

- Workers employed by a Section 3 business concern;
- Current residents of public housing or Section 8 assisted housing;
- Residents of other projects managed by the PHA that is expending assistance; or
- Current YouthBuild participants.

For Section 3 projects, Targeted Section 3 workers would be:

- Workers employed by a Section 3 business concern;
- Section 3 workers living within the service area or neighborhood of the project; or
- Current YouthBuild participants.

HUD proposes to define a Section 3 business concern as a business concern that meets one of the following requirements:

- It is at least 51 percent owned by low- or very low-income persons;
- Over 75 percent of the labor hours performed for the business are performed by low- or very low-income persons; or
- It is a business at least 25 percent owned by current public housing residents or residents who currently live in Section 8-assisted housing.

For more information about the proposed rule, HUD refers readers to the proposed rule published elsewhere in this issue of the Federal Register.

II. This Document

This document proposes the benchmarks for both public housing financial assistance and Section 3 projects consistent with the proposed rule. HUD is seeking comment on both the benchmarks numbers themselves and the methodology for determining the benchmarks. HUD is proposing the same benchmarks for all public housing financial assistance and Section 3

projects. Once HUD has more data, it may determine whether different benchmarks are appropriate. The following benchmarks would apply:

Public Housing Financial Assistance

Alternative 1:

For meeting the safe harbor in proposed § 75.13, PHAs and other recipients that certify to following the prioritization of effort in proposed § 75.9 and meet or exceed the following Section 3 benchmarks will be considered to have complied with requirements in proposed 24 CFR part 75, subpart B, in the absence of evidence to the contrary:

(1) Twenty-five (25) percent or more of the total number of labor hours worked by all workers employed with public housing financial assistance in the PHA's or other recipient's fiscal year are Section 3 workers;

$$\frac{\text{Section 3 Labor Hours}}{\text{Total Labor Hours}} = 25\%$$

and

(2) Five (5) percent or more of the total number of labor hours worked by all workers employed with public housing financial assistance in the PHA's or other recipient's fiscal year are Targeted Section 3 workers, as defined at proposed § 75.11.

$$\frac{\text{Targeted Section 3 Labor Hours}}{\text{Total Labor Hours}} = 5\%$$

Alternative 2:

For meeting the safe harbor in proposed § 75.13, PHAs and other recipients that certify to following the prioritization in proposed § 75.9 and meet or exceed the following Section 3 benchmarks will be considered to have complied with requirements in proposed 24 CFR part 75, subpart B, in the absence of evidence to the contrary:

(1) Thirty (30) percent or more of the total number of new hires employed with public housing financial assistance in the PHA's or other recipient's fiscal year are Section 3 workers;

$$\frac{\text{Section 3 New Hires}}{\text{Total New Hires}} = 30\%$$

and

(2) Five (5) percent or more of the total number of new hires employed with public housing financial assistance in the PHA's or other recipient's fiscal year are Targeted Section 3 workers, as defined at proposed § 75.11.

$$\frac{\text{Targeted Section 3 New Hires}}{\text{Total New Hires}} = 5\%$$

Section 3 Project

For meeting the safe harbor in proposed § 75.23, recipients that certify to following the prioritization in proposed § 75.19 and meet or exceed the following Section 3 benchmarks will be considered to have complied with requirements in proposed 24 CFR part 75, subpart C, in the absence of evidence to the contrary:

(1) Twenty-five (25) percent or more of the total number of labor hours worked by all workers on a Section 3 project are Section 3 workers;

$$\frac{\text{Section 3 Labor Hours}}{\text{Total Labor Hours}} = 25\%$$

and

(2) Five (5) percent or more of the total number of labor hours worked by all workers on a Section 3 project are Targeted Section 3 workers, as defined at proposed § 75.21.

$$\frac{\text{Targeted Section 3 Labor Hours}}{\text{Total Labor Hours}} = 5\%$$

The Methodology

To determine the initial proposed benchmark figures, HUD looked at the total hours worked on a construction or development project, the total number of workers that would likely qualify as Section 3 workers, and the potential pool of Targeted Section 3 workers. For setting the total ratio for Section 3 workers / all total labor hours for those employed in on-site construction jobs, HUD considered workers in the construction trades employed by the construction industry (Industry-Occupation Matrix for Industry NAICS 230000 and Occupations in Construction and Extraction Summary level 47-0000). Although the construction industry employs a diversity of types of occupations (such as administration), only on-site jobs are covered by Section 3. Generally, construction trades are paid higher wages than the average occupation. For the purpose of analysis, HUD defines a low-income job as one earning no more than 80 percent of the median annual wage. This definition is consistent with HUD's definition of a low-income household, which is a household earning no more than 80 percent of the area median household income. The median annual wage for all occupations in the United States was \$37,690 in 2017 according to the Occupational Employment and Wage Estimates by the Bureau of Labor Statistics (BLS); 80 percent of that is \$30,152. The low-income estimate of \$30,152 approximates the upper end of the wage distribution for Section 3 workers. HUD considers all occupations with an annual wage less than \$30,152 as those that could be filled by someone who is low-income and meets the Section 3 requirements.

Data on occupations involved in on-site construction show that a very small fraction of occupations are characterized by a median less than the measure of low-income (\$30,152). That the wages of construction occupations are higher than average suggest that Section 3 workers

will not earn the industry’s median wage. Instead, a Section 3 worker is likely to be paid a wage that is lower than the median wage (50th percentile) for most industries. Earning less than the median is reasonable for recent hires who have less skills and experience than the average worker. Most occupations offer a wide distribution of wages based on worker productivity and other factors such as location. For example, a construction laborer earns a median salary of \$34,500, but can earn as much as \$63,400 (90th percentile annual wages), or as little as \$22,280 (10th percentile annual wages).

For the Section 3 employment goal to be attainable, the labor-hour threshold must be set at a level that is congruent with the labor market. Determining whether it is reasonable to expect there to be job openings for low-income workers (80 percent of median income across all occupations) requires examining the lower end of the wage distribution of the relevant industries. Whether Section 3 workers are to represent 25 percent of the labor hours completed will depend upon the 25th percentile level of wages.

Distribution of Annual Wages for Full-time Workers						
Industry	Occupation	10th Percentile	25th Percentile	Median	75th Percentile	90th Percentile
All	All	19,970	24,770	37,690	61,110	96,150
Residential Construction	All	24,590	32,200	43,730	61,580	88,950
Residential Construction	Construction and Extraction	25,130	32,000	41,430	56,610	74,300
Services to Buildings	All	18,830	21,610	26,790	35,690	49,060

Source: Bureau of Labor Statistics, May 2017 National Occupational Employment and Wage Estimates, United States

The 25th percentile wage for construction occupations in the residential construction industry is \$32,000, which is slightly above the low-income measure of \$30,152. The 25 percent employment goal is achievable because there are enough low-income construction jobs in

residential construction. To achieve this goal, however, will require a slight stretch. Either all of the low-income labor hours will have to be allocated towards Section 3 workers and/or a small portion of the jobs above the 25th percentile wage will have to be given to Section 3 workers. Examples of low-income construction occupations include helpers, cleaners, construction laborers, landscapers, carpet installers, roofers, and floor sanders.

Section 3 applies to other activities than on-site construction employment, all of which should be evaluated in the same manner to ascertain whether there is sufficient demand for low-income labor. The most prominent is the Operating Fund for PHAs, accounting for over 40 percent of all Section 3 new hires in 2017. Section 3 workers for PHAs are likely to be employed in occupations within the “Services to Buildings and Dwellings” industry. Most of the employment in the services to buildings industry is in occupations with a median wage below the low-income annual wage. The lowest-income occupations include janitors, housekeepers, refuse collectors, receptionists, data entry keyers, landscapers, office clerks, and file clerks. Compared to the low-income measure of \$30,152, the median (50th percentile) annual wage in building services is \$26,790, and the 25th percentile wage is \$21,610. The wage distribution for building services is more flexible than the one for on-site construction because the wage distribution for building services is centered around low-income jobs. The wage distribution of the building services industry allows PHAs to offer employment to workers with intermediate skills (as well as lower level) and to compensate them appropriately.

Based on the above wage distribution data for on-site construction and building services, HUD sets the threshold for Section 3 labor hours at 25 percent of all labor hours to encourage recipients, subrecipients, contractors, and subcontractors to hire more Section 3 workers for construction. In both industries, the 25th percentile annual wage for that industry is either close

to or below the upper boundary for low-income.

For the new hire alternative for public housing financial assistance, HUD proposes that the initial threshold for Section 3 hires as a percentage of all hires would be 30 percent, which is a figure comparable to that in HUD's currently codified Section 3 regulations.

To establish a Targeted Section 3 benchmark for public housing financial assistance projects, HUD estimated the number of residents of public housing or Section 8 assisted housing, of current YouthBuild participants, and of workers employed by Section 3 business concerns. Excluding children, the elderly, and persons with disabilities, there are around 2.4 million potential workers living in public housing or Section 8 assisted housing across the country's 2,934 PHAs. Because small PHAs, those with less than 250 units, make up the majority of PHAs and because of their size would have a small number of potential workers, HUD believes that the majority of the 2.4 million potential workers would be concentrated at the larger PHAs, where approximately 2,000 potential workers per large PHA could be hired by recipients, subrecipients, contractors, or subcontractors. Another pool of workers is current YouthBuild workers. Currently, approximately 8,000 youth between the ages of 18 and 24 are selected to enroll in the YouthBuild program each year.¹ While some of these workers may be working on specific projects for YouthBuild and, thus, are not available to be hired as a Targeted Section 3 worker, the rule provides for current or previous YouthBuild workers; therefore, this number would be expanded. Lastly, the Targeted Section 3 worker for a Section 3 benchmark includes workers that are employed by Section 3 business concerns, regardless of where the business is located. Based on the data in HUD's Section 3 business Registry, there is an ample number of

¹ See About YouthBuild, YouthBuild.com, <https://www.youthbuild.org/about-youthbuild-usa> (last visited June 19, 2018).

Section 3 business concerns. HUD, therefore, believes given the multitude of available workers that recipients, contractors, or subcontractors can find to meet the Targeted Section 3 benchmark, that 5 percent is a reasonable goal for the first Targeted Section 3 benchmark.

Targeted workers constitute one-fifth (5 percent/25 percent) of the proposed goals. To ensure that 5 percent of local workers is not a burdensome goal for employers, HUD refers to data on commuting times from the U.S. Census. For 5 percent to be easily attainable, the journey to work must be a short one for one-fifth of all workers. The travel time to work is less than 10 minutes for 12.7 percent of all workers; and less than 15 minutes for 26.3 percent of all workers. The distribution of travel times indicates that the Section 3 Targeted worker goal is attainable, but that the goal may require a slight stretch. However, a slight stretch is welcome given that the purpose of Targeted worker definition is to provide local employment to those workers who are low-income and typically have longer commutes.

Travel Time to Work, 2013-2017		
Minutes	Percentage of Workers	Cumulative Percentage*
Less than 10 minutes	12.7	12.7
10 to 14 minutes	13.6	26.3
15 to 19 minutes	15.3	41.6
20 to 24 minutes	14.6	56.2
25 to 29 minutes	6.4	62.6
30 to 34 minutes	13.7	76.3
35 to 44 minutes	6.8	83.1
45 to 59 minutes	8.1	91.2
60 or more minutes	8.9	100.1
Mean Travel time (minutes)	26.4	
*Total is greater than 100 percent due to rounding of percentages.		
<u>Source: U.S. Census, 2013-2017 American Community Survey 5-Year Estimates</u>		

As for Section 3 projects, HUD proposes the same fraction of 5 percent. HUD looked at nearly 3,000 past Community Development Block Grant program (CDBG) and HOME Investment Partnership Program (HOME) projects in diverse geographic regions with at least

\$200,000 in funding to estimate the number of potential Targeted Section 3 workers available for Section 3 projects. For those that fall into the first category, based on geographic proximity to the project site, HUD looked at the number of low-income persons and all persons living in qualified census tracts within the local area, and the percentage of population that is working age (to exclude the elderly and children). HUD data shows that a median of 4,627 potential Targeted Section 3 workers live in the local areas associated with the sample of housing and community development projects. HUD notes that the use of geographic proximity to define the local area means that there could be significant deviation among the number of Targeted Section 3 workers available for different projects. The number of potential Targeted Section 3 workers in the geographically diverse sample of CDBG and HOME projects ranged from a minimum under 500 to a maximum over 125,000. Targeted Section 3 workers for Section 3 projects also include current YouthBuild workers and workers employed by Section 3 business concerns to meet the Targeted Section 3 worker benchmark. While the estimated pool of potential Targeted Section 3 workers seems larger for Section 3 projects than for public housing financial assistance, HUD believes that given the large fluctuation of the number of available workers for Section 3 projects, the Section 3 project benchmark for Targeted Section 3 workers should initially also be 5 percent.

Dated: March 29, 2019.

Matthew F. Hunter,
Assistant Deputy Secretary for
Field Policy and Management.

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