May 12, 2015

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

Re: [Docket No. FR-4893-P-01], RIN 2529-AA91
Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses through Strengthened "Section 3" Requirements

Dear Madam/Sir:

The National Community Development Association (NCDA) and the National Association for County Community and Economic Development (NACCED) are pleased to provide comments on the above referenced proposed rule. NCDA represents over 300 city and county grantees that administer CDBG (including Section 108), HOME, and HUD's homeless assistance programs. Likewise, NACCED represents county governments that also administer CDBG (including Section 108), HOME, and HUD's homeless assistance programs. This rule will affect all of our members, so we urge HUD to incorporate the comments and suggestions outlined below into the final rule.

General Comments

We feel that in many respects, the regulations implementing Section 3 go beyond the statutory requirements and in some cases beyond the statutory intent. At a time when the resources covered by Section 3 are being cut, including the resources available for program administration, HUD should be seeking to streamline and reduce rather than expanding regulatory requirements. The regulations implementing Section 3 are unnecessarily complicated and administratively burdensome.

The purpose of Section 3 as stated in the statute is "to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, particularly those who are recipients of government assistance for housing." We agree with this statement of the purpose of Section 3; however, achieving the goals of Section 3 must not come at the expense of achieving the primary goals of the covered funding source. For example, HUD should not lose sight of the fact that the primary goal of the CDBG program is to create affordable housing or <u>permanent employment opportunities</u>, not temporary or construction jobs.

The Section 3 statute focuses on two primary goals, 1) ensuring that employment opportunities created by housing and community development funding directly benefit low and very low-income persons, and 2) ensuring that the contracting opportunities go to "business concerns" that in turn provide economic opportunities to low and very-low income persons. The statute defines "a business concern that provides economic opportunities" as a business concern that: (A) provide economic opportunities for a class of persons that has a majority controlling interest in the business: (B) employ a substantial <u>number</u> (emphasis added) of such persons; and (C) meet such other criteria as the Secretary may establish.

There are no minimum percentage (or any other numerical goals) specified in the statute. Part 3 of the definition of a Section 3 business requires that at least 30% of the permanent employees must be Section 3 residents. However, that would mean that a three person business with one Section 3 resident employee would qualify as a Section 3 business whereas a 35 person business with five Section 3 resident employees would not qualify. That would seem to be contrary to the intent of the statute and would potentially put larger firms with a larger number of Section 3 resident employees at a disadvantage.

We also recommend that HUD streamline reporting for Section 3 by building the reporting into existing reporting systems such as IDIS rather than establishing a separate free-standing reporting system just for Section 3.

We would like to encourage HUD to simplify the compliance requirements for determining Section 3 residents and Section 3 businesses by establishing a "presumed eligibility" criteria for businesses or residents located in HUD-approved Neighborhood Revitalization Strategy Areas, Choice Neighborhood target areas, Promise Zones, Empowerment Zones and Enterprise Communities and other areas defined at 24 CFR Part 570.208(a)(1)(vii).
Finally, several of HUD's cross-cutting requirements operate at cross-purposes and should be simplified and streamlined to make compliance and reporting more straightforward. Requirements regarding hiring and contracting under Section 3, Davis-Bacon and MBE/WBE goals should be better aligned. It would be extremely helpful if these requirements could have a common small project exemption and reporting was built into existing reporting systems such as IDIS rather than requiring separate reports with separate reporting thresholds and timelines.

Question 1. To address a loophole in the current regulation that does not limit jobs, training, and contracting opportunities to Section 3 residents residing and Section 3 businesses located within the proximity of the covered project or activity, this proposed rule introduces a new term "Section 3 local area" to clarify that in order for Section 3 residents and businesses to receive priority consideration they must be residing or located within the metropolitan area or nonmetropolitan county where the Section 3 covered financial assistance is expended. HUD seeks comment on whether this clarification may adversely impact Section 3 residents and businesses located in neighboring jurisdictions, particularly when no Section 3 businesses are located in the Section 3 local area, and in rural communities where Section 3 residents in adjacent counties may be the most qualified job applicant.

Response: The proposed language would allow Section 3 businesses or residents to receive priority consideration through a clarification that adversely impacts Section 3 businesses located in neighboring jurisdictions. In many areas of the United States, Section 3 contractors or businesses are difficult to find. Inclusion, not exclusion, should be the principle followed in creating allowable geographies and populations. The term “Section 3 local area” should be removed and no clarification given.

Question 2. The proposed rule revises the definition of a Section 3 business to remove the third category of the existing definition, which refers to businesses that can provide evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to other Section 3 businesses. This revision is made in response to complaints that the commitment presented an easy loophole for some businesses, and did not equate to a legal obligation. HUD solicits comment on the removal of this third category. See § 135.5.

Response: We support removal of this category. Removal will help simplify the definition of Section 3 businesses and eliminates a potential loophole. In any case, we are not aware of any grantees that are using this category to meet the Section 3 business contracting requirement.

Question 3: The proposed rule seeks to provide incentives to contractors that retain Section 3 residents who were hired to work on previous projects, and to provide apprenticeship opportunities to Section 3 residents by adding two new categories to the orders of priority consideration for projects that are financed with housing and community development assistance at 135.57. HUD solicits comment on the proposed orders of priority consideration.

Response: The proposed rule creates a priority classification system to businesses that have higher concentrations of Section 3 workers. Simplifying regulations is a preferred method in working with any regulation. Creating more orders of priority consideration will require additional reporting based on the revised regulations.

The effect of the proposed rule will add more complexity when the goal of the revisions should be to simplify the program.

Question 4: For the reasons presented in the preamble, HUD is maintaining the existing minimum numerical goals for employment and construction contracts. HUD seeks comments on whether other proposed minimum numerical goals for employment and contracting would be more appropriate.

Response: We agree with the decision to keep the current numerical goals even though it has been indicated that reported data shows that agencies are meeting the numerical goals by more than 20%. With all the changes being contemplated in the proposed rule, it makes sense to leave the numerical goals the same rather than concentrate on the methodology to ensure compliance.

Question 5. The proposed rule would replace the 3 percent minimum goal for the total dollar amount of all building trades and professional service contracts associated with construction (formerly referred to, respectively, as construction and non-construction contracts) with a goal of 10 percent. HUD seeks comment on whether the proposed goal that applies to building trades and professional services would result in any unintended consequences. See § 135.37 and § 135.57.

Response: The proposed change to implement a uniform 10% goal for both construction and non-construction covered contracts may result in difficulty for non-construction contractors to comply with this new standard. The current standard for non-construction contracts of 3% represents a fair and reasonably feasible goal to achieve. By increasing the goal to 10%, it may pose challenges due to the general nature of the contracted entities. Typically, these contracts would cover consulting, engineering and architectural contracts. These type of firms are generally staffed by professionally certified employees and increasing the goal from 3% to 10% would pose challenges to these types of companies to comply. The current goal of 3% is fair and sufficient to comply with the goals and objectives of the Section 3 requirements.

Question 6: For the reasons presented in this preamble, under the "Summary of the Major Provisions of this Regulatory Action," the proposed rule would change the threshold for recipients of housing and community development financial assistance to cover recipients that plan to obligate or commit $400,000 or more of annual expenditures of covered funds on construction or construction related projects. HUD believes that the expenditure of funds is a better indicator of the type and amount of economic opportunities that HUD funds create. The proposed threshold applies Section 3 to all construction and construction related projects (regardless of the dollar amount invested into individual projects) if a grantee plans to spend $400,000, or more, of covered HUD funding during the reporting period. HUD seeks comment on whether an alternate threshold would be more appropriate or equally effective to the proposed $400,000 threshold. HUD would consider a different threshold but no lower than $400,000. HUD would consider a high threshold but no higher than $1 million. Although the $1 million threshold would capture almost 85 percent of the funding, which HUD finds reasonable and acceptable, HUD believes the $400,000 threshold, which would cover more than 95 percent of the funding, 10 percentage points higher than a $1 million threshold, presents the better approach, but HUD welcomes comment on the thresholds. Further, HUD seeks comment on whether alternative thresholds (e.g., a threshold that applies Section 3 to all construction related projects if a grantee receives a certain amount of HUD funding, or a threshold that would only apply Section 3 to projects or activities that are receiving some minimum amount of housing and community development financial assistance) are more appropriate.

Response: Whereas we agree with the threshold of $400,000 which will ensure that a grantee is covered by Section 3 or not, we believe that there is the need to set a minimum threshold value for individual projects so as not to make Section 3 compliance too onerous for smaller contractors. HUD should consider a minimum of $100,000 as the threshold for individual projects to be covered by Section 3 regulations.

Question 7. In order for a Section 3 resident to be counted as a new hire, the proposed rule would require a resident to work, during employment as a new hire, a minimum of 50 percent of the average staff hours worked for the job category for which the resident was hired throughout the duration of time that the category of work is performed on the covered project. HUD seeks comment on whether this proposed change effectively addresses concerns that were raised about contractors that hired Section 3 residents for short timeframes for purposes of circumventing meaningful compliance with Section 3. See § 135.35 and § 135.55.

Response: While we understand the concern that contractors may circumvent meaningful compliance by hiring residents for a short period of time, the proposed requirement that a resident be hired for a minimum of 50 percent of the average staff hours normally worked for that job category will impose an enormous additional administrative burden on grantees. It is unclear where grantees would obtain reliable data on the number of hours worked for any of hundreds of possible trades. It seems odd that HUD would allow self-certification of Section 3 businesses yet require an onerous level of documentation of new hires. We are opposed to this requirement and ask that it be removed from the rule.

Question 8: N/A

Question 9: N/A

Question 10: HUD seeks comment on ways that recipients can demonstrate compliance with Section 3 in communities that are governed by agreements that prohibit work by non-labor union workers.

Response: It can be challenging to comply with Section 3 regulations in communities where agreements prohibit the use of non-labor recipients; however, the challenge is not insurmountable. The issue facing these communities is how to get Section 3 residents into a trade union. They key is the creation of pre-apprenticeship programs in these communities. The programs will enable candidates to overcome non-construction related obstacles that often limit opportunities, especially for youths. A strong program, preferably one with union support, will provide the skills necessary to pass the entrance exam. Once in the union, Section 3 covered projects provide an avenue for employment which will provide the Section 3 residents an opportunity to hone the construction skills needed to be a successful tradesperson.

Question 11. HUD seeks comment on requirements or goals that should apply to contractors whose expenditure of covered financial assistance will only enable them to sustain their current workforce and will not result in new employment, training, or subcontracting opportunities.

Response: We would caution HUD against enacting new requirements here. During the recent recession many experienced contractors laid off or reduced hours for existing employees and are only now able to put their employees back to work on a full-time basis. We do not believe it would be fair to penalize such firms by requiring or giving preference to firms that create new hire opportunities.

Question 12. HUD solicits comment on goals or strategies for training opportunities that the proposed rule should address.

Response: Too often Section 3 residents are hired for unskilled labor positions which really does not provide true economic opportunity. To achieve what the question asks the proposed rule needs to address providing skills to Section 3 residents that are marketable the Section 3 activity.

The rule addresses this issue in its redefinition of a Section 3 business but it limits the scope of eligible programs to DOL or State approved apprenticeship programs and YouthBuild participants. A key component would be to expand the scope to include pre-apprenticeship programs. By doing this, successful trainees can either be hired directly by a business and provided on the job training and/or enter a union sponsored apprenticeship program.

This approach will provide contractors, both Section 3 and non-Section 3 businesses, with a greater incentive to hire Section 3 residents as they will bring more value by having a skill that can be developed through on the job training and/or a union apprenticeship program. The resident benefits in they have a skill that is useable beyond the Section 3 activity.

Additionally, the rule should examine ways to provide incentives to non-construction businesses as well. Perhaps an approach would be to allow non-construction firms to qualify as a Section 3 business if they provide internships to Section 3 residents.

Question 13. HUD seeks comment on whether the proposal to require recipients to incorporate compliance with Section 3 into procurement procedures for responsive and responsible bidders creates an undue burden on recipients? See § 135.37(a)(3), § 135.57(a)(4), and § 135.11(b)(9).

Response: Incorporating Section 3 into compliance provisions raises legal and cost concerns which may cause undue burden on recipients.

Bid responsiveness can be a hot topic and decisions vary from state to state as to grounds for determining what is or is not a responsive bid. Adding a Section 3 review to determine the responsiveness of a bid may only complicate the applicability of the rule if legal cases arise and conflicting decisions occur.

Additionally, 135.11(b)(9) can also raise fairness issues especially in smaller jurisdictions. For example, in areas where the number of Section 3 businesses is limited there may be one contractor who prioritizes employing Section 3 residents whereas his/her competition does not. In theory, all of the competitors bids could be declared non-responsive due to a poor Section 3 review thus creating an unfair advantage for that one contractor.

Giving priority consideration to Section 3 may result in the bid of the successful bidder being significantly higher than the actual lowest bid. The increased cost would place an undue burden on the developer or recipient and possibly threaten the ability to complete the project.

Question 14: In 2012, HUD implemented a Section 3 Business Registry Pilot Program in five metropolitan areas as a potential resource to help recipients meet, or exceed, the minimum numerical goals for contracting and reduce administrative burden in identifying Section 3 businesses. Under the pilot program, businesses that met one of the definitions of a "Section 3 Business" self-certified their status with HUD, and others to notify these businesses about the availability of Section 3 contracting opportunities. See www.hud.gov/sec3biz. In 2014, HUD expanded the Section 3 Business Registry nationally. HUD seeks comments about this registry and way that HUD should incorporate its usage into the Section 3 requirements.

Response: Allowing businesses to self-certify results in an inaccurate list of qualified businesses as some non-qualified businesses inevitably add their name to the list. In order to make the registry an effective and accurate tool for recipients, HUD must certify all of the businesses on the list. HUD must also devote resources to the ongoing recruitment of qualified businesses to the list and to marketing the list to recipients, many of which are unaware of the registry.

Thank you for the opportunity to provide comments on this very important rule. We ask HUD to incorporate our comments into the final rule. Please feel free to reach out to Vicki Watson, Acting Executive Director, NCDA at vicki@ncdaonline.org and Jason Boehlert, Executive Director, NACCED at jboehlert@nacced.org with any questions.