

# Housing Law Bulletin

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**Cover:** Serenity Place, a 19-unit apartment community in Baltimore, Maryland with one- and two-bedroom apartments for formerly homeless women and their children. Developed by nonprofit Homes for America, the building is a former Catholic school. All residents receive assistance through Shelter Plus Care; the average annual household income is \$13,303.

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## New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program\*

This article discusses the applicability of Section 3 of the Housing and Urban Development Act of 1968 to programs of the Department of Housing and Urban Development (HUD) funded under the American Recovery and Reinvestment Act of 2009 (ARRA), including the Neighborhood Stabilization Program. With the unprecedented funding levels of ARRA comes significant opportunity to apply Section 3 with new vigor to create jobs for low- and very low-income individuals and businesses. For Section 3 to succeed, HUD must make Section 3 obligations and terms clear to fund recipients, and advocates will need to monitor compliance at the local level. This article therefore provides recommendations to HUD and advice to advocates to increase compliance and assist with implementation.

### ARRA Policies and Goals

ARRA included \$13.6 billion in funds to be administered through HUD. This funding, distributed across several existing and newly created HUD programs through formula and competitive allocations, will help advance a number of ARRA goals. These goals include promoting job creation and retention, modernizing the country's infrastructure, creating long-term impacts through increased energy efficiency, and providing opportunities for those most impacted by the economic crisis.<sup>1</sup> In its *Guidance on ARRA and Section 3*, HUD states that "[s]ince ARRA funding is specifically intended to create jobs and other economic opportunities for those most impacted by the recession, compliance with the requirements of Section 3 is critical."<sup>2</sup>

Section 3 targets training and jobs to public housing residents and other low-income residents living in areas where HUD funds are expended so as to multiply the benefit of the funds for low- and very-low income individuals. As discussed below, the underlying policy rationale of Section 3 is consistent with much of the driving

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<sup>1</sup>See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 116 (2009); Memorandum Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,531 (Mar. 20, 2009).

<sup>2</sup>HUD Economic Stimulus Funding and the Creation of Jobs, Training, and Contracting Opportunities, <http://www.hud.gov/recovery> [hereinafter *Guidance on ARRA and Section 3*].

force behind ARRA. By applying Section 3 requirements to its programs, HUD can ensure that ARRA funds create broad and lasting impact.

Subsequent guidance issued by the Office of Management and Budget (OMB) echoes the potential that HUD programs have to carry out ARRA's goals. In addition to ARRA's general objectives of job creation, infrastructure building and community impact, OMB cites more specific policy goals of "promoting local hiring," "providing maximum practicable opportunities for small businesses," "engaging in sound labor practices" and "providing equal opportunity for Disadvantaged Business Enterprises."<sup>3</sup> Recognizing that federal agencies have overlapping goals under ARRA, HUD Secretary Shaun Donovan issued a statement and Memorandum of Understanding, respectively, with his counterparts in the Department of Labor and the Department of Energy announcing HUD's intent to coordinate its efforts with these agencies.<sup>4</sup> Secretary Donovan may be the first HUD Secretary to take seriously the congressional directive that the Secretary *shall* consult with other federal agencies and their Secretaries to carry out Section 3.<sup>5</sup> Such coordination will increase job training and job opportunities, ease access to weatherization funds for low-income households, and promote long-term economic stability.

## Section 3 Overview

The policy goals articulated by ARRA and OMB reflect the same concerns that motivated Congress to enact Section 3 over four decades ago.<sup>6</sup> Section 3 aims to create a multiplier effect by targeting low- and very-low income individuals for the jobs created in the course of providing affordable housing or other public works. Where Section 3 applies, fund recipients must show that 30% of newly hired employees each year are Section 3 residents, which include public housing residents, residents (including the homeless) of the neighborhoods in which Section 3 projects are located, participants in the YouthBuild program, and other low- and very-low income individuals.<sup>7</sup> Recipients must also commit to allocate at least 10% of the total dollar amount of building trade contracts and 3% of all

other contracts to businesses controlled by public housing residents or other low- and very-low income individuals, or to businesses that largely employ such individuals.<sup>8</sup>

Recipients demonstrate their compliance with the provisions in several ways. Federal regulations require recipients "to comply with Section 3 in its own operations, and ensure compliance in the operations of its contractors and subcontractors."<sup>9</sup> Such compliance includes implementing procedures to notify Section 3 residents of related training and job opportunities, notifying potential contractors of Section 3 requirements and the need to incorporate Section 3 language into all solicitations and contracts,<sup>10</sup> and documenting actions taken to comply with Section 3, along with the results of those actions and any obstacles faced in the course of implementation.<sup>11</sup> In addition, applicants that receive funds subject to Section 3 are required to submit reports on Section 3 activities on an annual basis.<sup>12</sup> Failure to meet reporting requirements can result in sanctions that limit the ability to receive HUD funds in the future.<sup>13</sup>

As a general matter, Section 3 applies to all HUD funding received by public and Indian housing agencies, including capital fund and operating subsidy programs.<sup>14</sup> Beyond public and Indian housing, Section 3 also applies to rehabilitation, lead paint abatement, housing construction and other public construction projects funded by HUD programs providing housing and community development assistance.<sup>15</sup> While there are no minimum thresholds for Section 3 applicability on public and Indian housing programs and their contractors and subcontractors,<sup>16</sup> thresholds apply for other housing and community development work. Recipients of funds to perform such other housing and community development work must comply with Section 3 only if they receive more than \$200,000 for Section 3 covered projects.<sup>17</sup> Section 3 then applies to their individual contractors and subcontractors who receive more than \$100,000 for work on Section 3 covered projects.<sup>18</sup>

<sup>8</sup>§ 135.5.

<sup>9</sup>§ 135.32 (2009).

<sup>10</sup>The required Section 3 clause is somewhat extensive and can be found at § 135.38.

<sup>11</sup>§ 135.32; *see also* § 135.30(d)(2).

<sup>12</sup>§ 135.90 (2009); *see also* Form HUD-60002 Section 3 Summary Report, Economic Opportunities for Low- and Very Low-Income Persons (6/2001).

<sup>13</sup>Notice of HUD's Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2009 NOFAs for Discretionary Programs; Notice, 73 Fed. Reg. 79,548, 79,552 (Dec. 29, 2008) [hereinafter NOFA General Section].

<sup>14</sup>12 U.S.C.A. § 1701u(c)(1)(A) (Westlaw June 17, 2009).

<sup>15</sup>§ 1701u (c)(2)(A).

<sup>16</sup>24 C.F.R. § 135.3(a)(3)(i) (2009).

<sup>17</sup>§ 135.3(a)(3)(ii)(A). A Section 3 covered project is defined as "the construction or rehabilitation of housing (including reduction and abatement of lead-based paint hazards), other public construction which includes buildings or improvements (regardless of ownership) assisted with housing or community development assistance." § 135.7

<sup>18</sup>§ 135.7(a)(3)(ii)(B).

<sup>3</sup>Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, M-09-15 (Apr. 3, 2009). Though the Department of Transportation administers the Disadvantaged Business Enterprises program, the requirements it imposes on grantees are similar to those that HUD imposes under Section 3.

<sup>4</sup>*See* DOL-HUD Green Jobs Letter to PHAs and WIBs (May 27, 2009), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS\\_PARENCY\\_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LE\\_TTER%20FINAL.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS_PARENCY_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LE_TTER%20FINAL.PDF) [hereinafter DOL-HUD Letter]; Memorandum of Understanding Between Department of Energy and Department of Housing and Urban Development: Coordinating Recovery Act Funds for Home Energy Retrofits (May 6, 2009), <http://www.hud.gov/recovery/doemoucombined.pdf> [hereinafter DOE MOU].

<sup>5</sup>12 U.S.C.A. § 1701u(f) (Westlaw June 17, 2009).

<sup>6</sup>*See* § 1701u.

<sup>7</sup>24 C.F.R. § 135.5 (2009).

Recipients and contractors that meet the numerical goals are considered to have met the preference requirements, unless there is evidence to the contrary.<sup>19</sup> The safe harbor provisions are tempered by the fact that recipients and contractors are required to the “greatest extent feasible” to direct jobs and other economic opportunities to low- and very-low income persons, especially those who are recipients of federal housing assistance.<sup>20</sup> Thus, recipients of HUD funds subject to Section 3 must take “every affirmative action that . . . could [be] properly taken”<sup>21</sup> to achieve the goals of Section 3, as Section 3 “emphasizes results.”<sup>22</sup> Accordingly, meeting the letter of the regulations may not be sufficient if the spirit of the law is ignored.<sup>23</sup>

## ARRA Funds and Section 3 Compliance

ARRA allocated \$13.6 billion to HUD for distribution, of which \$7.8 billion carries a Section 3 obligation in either of two ways. In the interest of expediting fund distribution, HUD allocated roughly 75% of its ARRA funds through a traditional formula process.<sup>24</sup> For formula allocation recipients, the rules regarding Section 3 compliance have not changed. The remaining ARRA funds are being distributed through a competitive process. For these programs, advocates should look to the General Section to HUD’s FY2009 NOFAs,<sup>25</sup> the individual NOFAs for the particular program, and HUD’s *Guidance on ARRA and Section 3*<sup>26</sup> for information on how Section 3 applies.

### Formula Allocations

HUD programs receiving funding by formula include the Public Housing Capital Fund Program (\$3 billion), Community Development Block Grant Programs (\$1 billion), and Native American Housing Block Grants (\$255 million).<sup>27</sup> For these programs, Section 3 strictly applies as laid out in the Section 3 regulations<sup>28</sup> and in the rules applicable to the individual programs.

The Public Housing Capital Fund program, as part of its routine fund administration, requires recipients to certify that they will comply with Section 3<sup>29</sup> and also requires that every PHA include a statement on Section 3 activities in its annual plan.<sup>30</sup>

The Community Development Block Grant (CDBG) program specifically requires Section 3 compliance.<sup>31</sup> However, in its CDBG Notices, HUD has been less vigilant in communicating Section 3’s applicability. For example, the HUD website does not contain a Section 3 link through its CDBG program webpage. More significantly, the Notice of Program Requirements, calling on grantees to amend their consolidated plans post-ARRA, also makes no mention of Section 3.<sup>32</sup> If not for the annual reports<sup>33</sup> and certifications<sup>34</sup> required of CDBG grants, grantees might mistakenly believe that the Secretary will not vigorously enforce Section 3 compliance for CDBG ARRA funds.

It is similarly unclear how Section 3 applies to the Native American Housing Block Grant (NAHBG) program. Though HUD’s Formula Program Plan for the NAHBG funds does not mention Section 3,<sup>35</sup> subsequent HUD guidance makes clear that Section 3 applies to these funds.<sup>36</sup> Despite the lack of clear language, Section 3 requirements apply to NAHBG projects as outlined in HUD’s regulations, which state that Section 3 applies to Indian housing authorities and other construction and development programs “to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act.”<sup>37</sup>

### Competitive Allocations

HUD funds allocated through competitive processes are governed by the General Section to HUD’s FY2009 NOFAs published in the Federal Register.<sup>38</sup> The General Section applies to all NOFAs released for the competitive distribution of FY2009 funds, unless otherwise stated.<sup>39</sup> It

<sup>19</sup>§ 135.30(d).

<sup>20</sup>12 U.S.C.A. § 1701u(b) (Westlaw June 17, 2009).

<sup>21</sup>Ramirez, Leal & Co., v. City Demonstration Agency, 549 F.2d 97, 105 (9th Cir. 1976).

<sup>22</sup>Letter from Carolyn Peoples, Assistant Secretary for Fair Housing and Equal Opportunity to Heather A. Mahood (Apr. 26, 2004) (Section 3 Complaint: Determination of Non-Compliance Carmelitos Tenants Ass’n v. City of Long Beach, Case No. 09-98-07-002-720) (emphasis in original).

<sup>23</sup>*Id.* at 12-13 (“Although it may appear that Recipient may have come close to meeting the numerical percentage goals set forth in the Section 3 regulations by relying on the hiring of individuals for only a limited number of work hours/days after the complaint filing, the City failed to meet its “greatest extent feasible” standard when analyzing the payroll data in “full time” hours worked.)

<sup>24</sup>HUD Allocates More than \$10 Billion of Recovery Act Funding One Week After Bill Signing, HUD No. 09-014 (Feb. 25, 2009).

<sup>25</sup>See NOFA General Section, *supra* note 15.

<sup>26</sup>See Guidance on ARRA and Section 3, *supra* note 4.

<sup>27</sup>HUD Allocates More than \$10 Billion of Recovery Act Funding One Week After Bill Signing, HUD No. 09-014 (Feb. 25, 2009).

<sup>28</sup>24 C.F.R. § 135.5.

<sup>29</sup>PHA Certification of Compliance with PHA Plans and Related Regulations, <http://www.hud.gov/offices/adm/hudclips/forms/files/50077.pdf>.

<sup>30</sup>§ 903.7(l)(1)(ii).

<sup>31</sup>§ 570.607.

<sup>32</sup>Notice of Program Requirements for Community Development Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://www.hud.gov/offices/cpd/pdf/5309\\_N\\_01.pdf](http://www.hud.gov/offices/cpd/pdf/5309_N_01.pdf).

<sup>33</sup>§ 135.90.

<sup>34</sup>§ 570.303; § 91.225 (Local Governments Certifications); § 91.325 (State Governments Certifications); § 91.425 (2009) (Consortia Certifications).

<sup>35</sup>American Recovery and Reinvestment Act of 2009, Department of Housing and Urban Development, Program-Level Plan, Native American Housing Block Grants (Formula), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NATIVE%20AMERICAN%20HOUSING%20BLOCK%20GRANTS%20\(FORMULA\).PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NATIVE%20AMERICAN%20HOUSING%20BLOCK%20GRANTS%20(FORMULA).PDF).

<sup>36</sup>Guidance on ARRA and Section 3, *supra* note 4.

<sup>37</sup>§ 135.3(c). For information on job training, employment, and contracting preferences required by the Indian Self-Determination and Education Assistance Act, see 25 U.S.C.A. § 405e(b) (Westlaw June 22, 2009).

<sup>38</sup>NOFA General Section, *supra* note 15, at 79,552.

<sup>39</sup>*Id.* at 79,549.

discusses Section 3 extensively, providing a brief overview of its requirements and purpose, a statement on annual reporting requirements, instructions on report submissions, and a description of sanctions for failure to comply with reporting requirements.<sup>40</sup> These requirements apply to the following competitively funded HUD programs:

- Neighborhood Stabilization Program (\$2 billion);
- Public Housing Capital Funds (\$1 billion);
- Green Retrofit Program for Multifamily Housing (\$250 million);
- Native American Housing Block Grants (\$242 million); and
- Indian Community Development Block Grants (\$10 million).

As discussed below, applicants for the \$100 million in ARRA funds under the Lead Hazard Control programs applied for those funds in the FY2008 cycle.<sup>41</sup> The General Section for FY2008 NOFAs mirrors that of 2009, with the exception that HUD was then taking under consideration, but had not yet included, reference to the sanctions that are now reiterated in FY2009 NOFA.<sup>42</sup>

Beyond the General Section requirements, however, the funding notices for individual programs vary widely in their discussions of Section 3. Further, HUD has not been consistent in its own compliance with the requirements placed on it by federal regulations. With every applicable NOFA, HUD must include a provision that Section 3 applies to the project, a certification for applicants regarding intent to comply with Section 3, a statement of purpose on Section 3, and evaluation criteria that consider the extent to which an applicant has demonstrated that it will comply with Section 3.<sup>43</sup> The General Section meets two of these requirements, but does not address the certification or the evaluation criteria.

#### *Public Housing Capital Funds*

The NOFA for the Public Housing Capital Funds contains the most extensive language regarding Section 3, repeating much of the Section 3 language found in the

General Section. The notice also indicates that in judging applications for one of the four funding categories, HUD will award five of 105 points to those that address job creation.<sup>44</sup> HUD will award one point for certification that the applicant complied with Section 3 during the most recent fiscal or calendar year, with an additional two points for certifying that the applicant has completed and kept on file a “feasible” Section 3 plan. The NOFA lists seven criteria that it expects such Section 3 plans to address. Applicants also receive one point each for certifying that they will partner with the area Workforce Investment Board and with other organizations to connect public housing residents to job and training opportunities.<sup>45</sup> Applicants for these funds should have no difficulty understanding the importance of Section 3 and the need to comply with its requirements.

#### *Lead Hazard Control (LHC) Grants*

The LHC grants,<sup>46</sup> though allocated immediately after ARRA’s enactment in February 2009, were not distributed by formula. These funds were distributed to those groups who had applied for funding through the competitive FY2008 cycle, but who did not receive awards at that time due to limited funding availability.<sup>47</sup> As such, no specific ARRA NOFA exists, but the applicable FY2008 LHC NOFA made Section 3 requirements clear. That NOFA contained a brief Section 3 description, awarded two out of 102 application points to Section 3 feasibility, and addressed Section 3 reporting.<sup>48</sup> The FY2009 NOFA, though not directed at distributing ARRA funds, contains the same language.<sup>49</sup> The HUD website also lists Section 3 reporting in its chart of required reports for LHC grantees.<sup>50</sup>

<sup>44</sup>HUD’s Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA) for the Capital Fund Recovery Competition Grants, <http://www.hud.gov/recovery/recovery-comp-grants.pdf>.

<sup>45</sup>See also DOL-HUD Green Jobs Letter to PHAs and WIBs (May 27, 2009), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS\\_PARENCEY\\_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LETTER%20FINAL.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS_PARENCEY_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LETTER%20FINAL.PDF).

<sup>46</sup>LHC, for purposes of this article, includes both the Lead Based Paint Hazard Control (LBPHC) grants and the Lead Hazard Reduction Demonstration (LHRD) grants. Under the FY2009 LHC NOFA, recipients of LBPHC funds under the FY2008 cycle may not apply for LBPHC funds in FY2009, nor may LHRD FY2008 fund recipients apply for funds in FY2009, because ARRA funds were distributed based on the FY2008 NOFA cycle.

<sup>47</sup>Vice President Biden Announces Nearly \$100 Million in Recovery Act Funds to Clean Up Dangerous Lead in Housing, HUD No. 09-062 (May 15, 2009) (“The recipients of these Recovery Act grants were qualified applicants in the FY08 funding cycle but were not initially awarded grants because of the limited number of funds available at that time.”).

<sup>48</sup>Fiscal Year 2008 SuperNOFA for HUD’s Discretionary Programs at 27, 47-48, 60, <http://www.hud.gov/library/bookshelf12/supernofa/nofa08/leadsec.pdf>.

<sup>49</sup>LHC 2009 NOFA, *supra* note 43.

<sup>50</sup>OHHLHC Grantee Reporting Requirements at 2, <http://www.hud.gov/offices/lead/library/grants/GranteeReportingRequirements.5.5.09.pdf>.

<sup>40</sup>*Id.* at 79,552.

<sup>41</sup>Notice of Funding Availability for HUD’s Fiscal Year 2009 Lead-Based Paint Hazard Control Grant Program and Lead Hazard Reduction Demonstration Grant Program at 7, [http://www.hud.gov/offices/lead/09NOFA/FY2009\\_Lead\\_Combino\\_NOFA.pdf](http://www.hud.gov/offices/lead/09NOFA/FY2009_Lead_Combino_NOFA.pdf) [hereinafter LHC 2009 NOFA].

<sup>42</sup>Compare NOFA General Section, *supra* note 15, at 79,552, with Notice of HUD’s Fiscal Year (FY) 2008 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD’s FY2008 NOFAs for Discretionary Programs; Notice, 73 Fed. Reg. 14,882, 14,886 (Mar. 19, 2008). For more information regarding sanctions for failure to comply with Section 3, see 24 C.F.R. §§ 135.38F, 135.74(d) and 135.76(g) (2009).

<sup>43</sup>§ 135.9 (2009).

### *Green Retrofit Program for Multifamily Housing*

In implementing its newly created Green Retrofit Program (GRP), HUD's guidance on Section 3 has been inconsistent. HUD's *Guidance on ARRA and Section 3* explicitly lists GRP as one of the six programs "subject to the statutory and regulatory requirements of Section 3 of the Housing and Urban Development Act of 1968."<sup>51</sup> The notice implementing the program, however, gives the impression that Section 3 compliance is not mandatory but "optional."<sup>52</sup> The funding notice references Section 3 only in the context of an "optional targeted incentive" for property owners, whereby HUD will award up to \$25,000 to owners who contract with Section 3 residents or Section 3 business concerns.<sup>53</sup> Further, the GRP application form makes no mention of Section 3 and does not require owners to certify Section 3 compliance.<sup>54</sup> Significantly, ARRA authorized the HUD Secretary to provide incentives in distributing GRP funds to encourage job creation for low-income and very low-income individuals.<sup>55</sup> However, if this is the manner in which HUD has chosen to incentivize job creation, it may prove ineffective. Optional Section 3 compliance may fail to create jobs for low-income persons, which is inconsistent with ARRA's overriding goals and its particular objectives regarding GRP.

HUD Notice H 09-02 is the NOFA for the Green Retrofits Program.<sup>56</sup> It is subject to the same General Section (and thereby Section 3) requirements governing the release of ARRA funds for programs administered competitively.<sup>57</sup> As per federal regulations, all Section 3 NOFAs must contain a Section 3 statement of purpose, a statement that Section 3 applies to the program in question, a certification requirement and Section 3 evaluation criteria.<sup>58</sup> The GRP notice does not include any of these.<sup>59</sup>

Nevertheless, given ARRA's job creation goals, along with its job creation language specific to GRP,<sup>60</sup> HUD should use GRP toward these ends and make clear that all applicants must comply with Section 3.<sup>61</sup>

### *HUD Native American Programs*

Section 3 explicitly applies to funds distributed competitively through the Native American Housing Block Grant (NAHBG) Program and the Indian Community Development Block Grant (ICDBG) Program, to the extent that compliance does not derogate the Indian Self-Determination and Education Assistance Act.<sup>62</sup> The NOFAs for these programs, however, contain little information regarding Section 3.<sup>63</sup> Neither NOFA requires applicants to provide Section 3 certifications, and only the ICDBG NOFA awards points (2 out of 100 total) for intent to comply with Section 3.

### *Neighborhood Stabilization Program (NSP)*

NSP was originally funded through the Housing and Economic Recovery Act of 2008, and these funds are known as NSP1. ARRA authorized a second round of funding, known as NSP2. None of the NSP funding notices emphasizes Section 3. The only mention of Section 3 in the NSP1 funding notice is a requirement that applicants certify that they will comply with Section 3.<sup>64</sup> For NSP1 only, HUD waived the annual reporting requirements of the consolidated plan,<sup>65</sup> which contains Section 3 certifications and summaries.<sup>66</sup> The justification for the waiver is to allow HUD to collect quarterly reports "on various aspects of the uses of funds and of the activities funded with these grants."<sup>67</sup> The quarterly reports will require information regarding the numbers of low- and moderate-income persons or households benefited, but it is not clear whether that reporting will include Section 3 compliance. Because NSP1 is a Section 3-applicable program, NSP1 recipients are required to submit an annual

<sup>51</sup>Guidance on ARRA and Section 3, *supra* note 4.

<sup>52</sup>Green Retrofit Program for Multifamily Housing (GRP), H 09-02 (May 13, 2009).

<sup>53</sup>*Id.*

<sup>54</sup>GRP Application Form, [http://portal.hud.gov/portal/page?\\_pageid=153,7973195&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973195&_dad=portal&_schema=PORTAL).

<sup>55</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 223 (2009).

<sup>56</sup>Green Retrofit Program for Multifamily Housing: Process for Making Awards, [http://portal.hud.gov/portal/page?\\_pageid=153,7973195&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973195&_dad=portal&_schema=PORTAL). For more information about the Green Retrofit Program, see NHLP, *Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing*, 39 HOUS. L. BULL. 146 (2009).

<sup>57</sup>The FY2009 NOFA General Section states that "HUD's general policy requirements set forth in this notice apply to all HUD federal financial assistance made available through HUD's FY2009 NOFAs." NOFA General Section, *supra* note 15, at 79,549.

<sup>58</sup>24 C.F.R. § 135.9.

<sup>59</sup>H 09-02, *supra* note 54. It should be noted that the funding notice does not contain specific point criteria for application evaluation, but it does enumerate general requirements that applicants must meet and also outlines the "feasibility assessments" to be conducted during the application process. It does not, however, mention Section evaluation criteria or certification requirements as mandated by § 135.9.

<sup>60</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 223 (2009).

<sup>61</sup>24 C.F.R. part 135.

<sup>62</sup>*See supra* note 39.

<sup>63</sup>*See* Notice of Funding Availability (NOFA) for HUD's Indian Community Development Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/INDIAN\\_COMMUNITY\\_DEVELOPMENT\\_RESOURCES/ICDBG%20FUNDING%20NOTICE.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/INDIAN_COMMUNITY_DEVELOPMENT_RESOURCES/ICDBG%20FUNDING%20NOTICE.PDF); Notice of Funding Availability (NOFA) for Native American Housing Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/NATIVE\\_PROGRAM\\_RESOURCES/NAHBC%20FUNDING%20NOTICE.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/NATIVE_PROGRAM_RESOURCES/NAHBC%20FUNDING%20NOTICE.PDF).

<sup>64</sup>Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008; Notice, 73 Fed. Reg. 58,330, 58,343 (Oct. 6, 2008).

<sup>65</sup>73 Fed. Reg. at 58,341.

<sup>66</sup>24 C.F.R. §§ 91.215(j), 91.225(a)(7), 91.325(a)(7), 91.425(a)(1)(ii).

<sup>67</sup>73 Fed. Reg. at 58,341.

Section 3 report,<sup>68</sup> and HUD retains the authority to impose sanctions for failure to report.<sup>69</sup> It would enhance compliance with Section 3 if NSP1 recipients were required to submit the Section 3 report<sup>70</sup> on a quarterly basis.

Significantly, HUD recently acted to address the sparse treatment that it gave Section 3 in the NSP1 program funding notice by posting guidance on its Section 3 webpage.<sup>71</sup> The guidance clarifies the applicability of Section 3 to NSP funding, summarizes NSP1 grantees' obligations regarding compliance and reporting, and explains how to seek technical assistance.

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As with NSP1, the NOFA for NSP2 makes little mention of Section 3 beyond the requirement that applicants certify that they will comply with Section 3.<sup>72</sup> The mandatory statement of purpose and statement of applicability, while not located in the NSP2 NOFA itself, are covered by the General Section to FY2009 NOFAs.<sup>73</sup> In derogation of federal regulations,<sup>74</sup> the NSP2 NOFA does not contain evaluation criteria related to Section 3, despite the fact that it does describe in detail a 150-point scale that HUD will use in reviewing applications.<sup>75</sup> It is unclear what reporting requirements will govern NSP2 participants. Materials available on HUD's Recovery website do not mention Section 3 in its description on NSP2 "Data Collection and Reporting."<sup>76</sup> Despite this, NSP2 recipients are still subject to the annual Section 3 reporting requirements dictated by federal regulation.<sup>77</sup>

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<sup>68</sup>§ 135.90.

<sup>69</sup>§ 135.74(d) (2009).

<sup>70</sup>Form HUD-60002 Section 3 Summary Report, Economic Opportunities for Low- and Very Low-Income Persons (6/2001).

<sup>71</sup>See Applicability of Section 3 of the Housing and Urban Development Act of 1968 to Neighborhood Stabilization Program Funding, available at <http://www.hud.gov/offices/ftheo/section3/section3.cfm>. HUD initially made this document available at NHLP's webinar on Section 3 and the NSP, which was held June 25, 2009.

<sup>72</sup>Notice of Fund Availability (NOFA) for the Neighborhood Stabilization Program 2 under the American Recovery and Reinvestment Act, 2009, [http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp2\\_nofa.pdf](http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp2_nofa.pdf) [hereinafter NSP2 NOFA].

<sup>73</sup>NOFA General Section, *supra* note 15, at 79,552.

<sup>74</sup>§ 135.9(c).

<sup>75</sup>NSP2 NOFA, *supra* note 74.

<sup>76</sup>American Recovery and Reinvestment Act of 2009, Department of Housing and Urban Development Program-Level Plan, Neighborhood Stabilization Program (NSP) at 7, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NEIGHBORHOOD%20STABILIZATION%20PROGRAM%20\(NSP\).PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NEIGHBORHOOD%20STABILIZATION%20PROGRAM%20(NSP).PDF).

<sup>77</sup>§ 135.90.

## Recommendations for Section 3 Compliance

The ability of Section 3 to create economic opportunities for low-income persons hinges on HUD funding levels.<sup>78</sup> With ARRA comes a significant opportunity to apply Section 3 in a manner that addresses the current economic crisis and that meets the goals that Congress envisioned when enacting Section 3 some forty years ago. In the past, when funding for public housing construction and rehabilitation was nearly \$3 billion, it was estimated that 16,000 jobs would be created annually for public housing residents. Today, HUD has several times that amount at its immediate disposal—\$13.6 billion in ARRA funds alone—which should be used to create jobs for Section 3 residents and businesses. However, several challenges threaten to undermine Section 3's potential impact.

First, HUD must be consistent in the message that it sends to all recipients of HUD funds, including recipients of ARRA funds. By regulation, HUD is required to include several items in every NOFA for Section 3 programs: a statement of purpose, notice of applicability, certification statement, and application evaluation criteria.<sup>79</sup> But while the FY2009 General Section, which applies to all FY2009 NOFAs, addresses the first two items, several NOFAs for ARRA funding lack either the Section 3 certification statements, Section 3 evaluation criteria, or both.<sup>80</sup> At the very least, this creates grantee confusion as to how Section 3 applies and signals HUD's lack of interest in enforcing Section 3. Even worse, these inconsistencies and failures to address Section 3 may give grantees the impression that the statute does not apply at all. The GRP NOFA sends the harmful message that Section 3 compliance is "optional" when in fact, given HUD's guidance and General Section requirements, it should be mandatory. HUD should correct these inconsistencies by ensuring that NOFAs for all applicable programs contain, at a minimum, the components required by regulation. In addition, Section 3 links should be available on HUD's general website, its Recovery website, all applicable webpages, such as the NSP webpage, and anywhere reporting requirements are mentioned for the programs subject to Section 3.

HUD also has the opportunity to encourage Section 3 compliance in light of ARRA's emphasis on committing and expending funds in a timely fashion. For example,

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<sup>78</sup>However, once Section 3 applies to a project, its requirements apply to the entirety of that project, regardless of whether HUD funds only a portion of the overall work. See § 135.3(b). Thus, Section 3 may have an impact substantially beyond the level of HUD funding.

<sup>79</sup>§ 135.9.

<sup>80</sup>The NOFAs lacking certification statements regarding intent to comply with Section 3 include GRP and NAHBG. The Public Housing Capital Fund NOFA does not contain a specific certification section, nor does the LHC FY2008 NOFA through which ARRA funds were administered to LHC grantees. NOFAs containing point-based application evaluation criteria, but failing to allocate points for Section 3 compliance, include NAHBG and NSP2. The Public Housing Capital Fund NOFA awards Section 3 points for one out of four funding categories only. See *supra* note 59 for more detail on the GRP application criteria.

recipients of NSP2 funding must expend at least 50% of their awards within two years and 100% within three years of the award date.<sup>81</sup> Failure to meet those deadlines will result in the federal government recapturing funds. HUD should consider reallocating the recaptured funds with a preference to those recipients that satisfactorily met Section 3 requirements. While HUD has moved in a positive direction by emphasizing in NOFAs the sanctions for failure to submit Section 3 reports, HUD can further incentivize grantees by reallocating funds to those who maximized their Section 3 compliance. This could also help resolve some of the problems with Section 3 enforcement: while applicants are required to certify that a project “will comply with Section 3,” there are few consequences for those that fail to do so. Until HUD is ready to address failings on the results end, financial incentives to successful Section 3 projects can help attend to this gap.

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*HUD should consider how to further  
Section 3 through alliances with  
other federal agencies.*

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Within its own programs, HUD has not taken full advantage of the Section 3 opportunities provided. The Secretary applied the Section 3 waiver provision far more broadly than necessary. For instance, waiving Section 3 requirements for the Tax Credit Assistance Program (TCAP) means that recipients of the program’s \$2.25 billion in ARRA monies do not have to provide a preference for low-income individuals and contractors in construction and rehabilitation of tax credit properties. Because Section 3 applies to an entire project regardless of the percentage of HUD funding,<sup>82</sup> the potential for job creation would have been significant. This lost opportunity for Section 3 residents has no countervailing benefit, especially since a major purpose of TCAP funds is “to immediately create new jobs or save jobs at risk of being lost due to the current economic crisis.”<sup>83</sup>

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<sup>81</sup>Neighborhood Stabilization Stimulus Program (Competitive), [http://portal.hud.gov/portal/page?\\_pageid=153,7973319&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973319&_dad=portal&_schema=PORTAL). In addition, the NSP1 funds must be obligated within eighteen months, or they will be recaptured and reallocated. Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008; Notice, 73 Fed. Reg. 58,330, 58,340 (Oct. 6, 2008).

<sup>82</sup>§ 135.3(b).

<sup>83</sup>Implementation of Tax Credit Assistance Program, CDP-09-03 (May 4, 2009).

Finally, HUD should consider how to further Section 3 through alliances with other federal agencies. While Secretary Donovan is to be commended for his recent letter to the Public Housing Agencies and Workforce Investment Boards, signed in conjunction with Secretary Solis of the Department of Labor (DOL),<sup>84</sup> the call of the letter should be expanded. It recognizes Section 3 as an important component of the employment and training opportunities now available to public housing residents, but fails to mention other intended Section 3 beneficiaries, such as voucher holders, YouthBuild participants, and recipients of other housing and community development funds. Nor does the letter emphasize the important role that Workforce Investment Boards and local community development agencies can play in identifying and working with Section 3 residents and publicizing Section 3 employment and contracting opportunities.

In addition to its collaboration with DOL, HUD should also coordinate with the Department of Energy (DOE) regarding Section 3 issues. HUD signed a Memorandum of Understanding (MOU) with DOE to streamline the use of Weatherization Assistance Program funds in federally subsidized housing.<sup>85</sup> Under the MOU, DOE will modify its eligibility guidelines to make weatherization funds more readily available for residents in public housing, federally assisted private units, and Low-Income Housing Tax Credit units. The estimated number of units impacted totals roughly 3 million. The labor that will be expended, such as weatherstripping homes and laying insulation, is ideally suited for Section 3 application. But because these funds are administered through DOE, Section 3 does not apply by law, and nowhere in the MOU is Section 3 or a Section 3-like job creation effort mentioned. Both this MOU and the DOL letter represent important opportunities to ensure that ARRA funds will create jobs for the very low-income residents who reside in the buildings and neighborhoods where these funds will be expended.

OMB has warned that the premium ARRA places on swift expenditures does not exempt agencies from following the same laws and principles that they must follow in administering non-ARRA funds. The desire for an expedited distribution process should not justify the derogation of Section 3, particularly in light of ARRA’s goals of job creation and long-term impact on communities most affected by the recession. Section 3 furthers each of the seven policy goals laid out by OMB in its guidance on ARRA implementation, which include compliance with equal opportunity principles, the provision of practicable opportunities for small businesses, and the promotion of local hiring. With nearly \$8 billion at issue, monitoring Section 3 compliance and sending a consistent

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<sup>84</sup>DOL-HUD Letter, *supra* note 6.

<sup>85</sup>DOE MOU, *supra* note 6. For more information regarding the weatherization funds, see NHLP, *Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing*, 39 HOUS. L. BULL. 146 (2009).

message to grantees regarding Section 3's application will be crucial in ensuring that ARRA funds are used to assist low- and very-low income residents to obtain economic opportunities.

For further information on Section 3 as it applies to these programs, advocates should consult the relevant statutes and federal regulations governing Section 3, the National Housing Law Project's *An Advocate's Guide to the HUD Section 3 Program*<sup>86</sup> and the Center on Budget and Policy Priorities' 2009 report.<sup>87</sup> ■

## Oakland Alleges that Post-Foreclosure Evictions Violated Just Cause Ordinance\*

In an effort to prevent displacement of tenants living in foreclosed properties, the Oakland, California, city attorney's office has filed five lawsuits against banks, realtors and brokers that allegedly violated a city ordinance that requires just cause for eviction.<sup>1</sup> According to the complaints, the banks sent the eviction notices to tenants after foreclosing on the rental properties' underlying mortgages, apparently believing vacant properties are easier to sell.<sup>2</sup> However, foreclosure is not good cause for eviction under the ordinance.<sup>3</sup> The lawsuits seek to prohibit future violations of the ordinance, to restore displaced tenants to their homes, and to reimburse tenants for their moving costs and any other expenses incurred as a result of the evictions.

### Background

According to the city attorney's office, the defendant banks, realtors and brokers sent tenants in foreclosed properties illegal eviction notices that provided as little as twenty-four hours' notice and sometimes threatened to bar access to the property and dispose of tenants' possessions.<sup>4</sup> For example, the city attorney's office alleges that one of the notices to vacate advised tenants that property ownership had been transferred, that they were required to vacate the premises, and that failure to contact the broker within forty-eight hours would result in legal action.<sup>5</sup> The eviction notices were often accompanied by so-called "cash-for-keys" offers that provided cash incentives for

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\*The author of this article is Adam Cowing, a J.D. candidate at the University of Michigan Law School and a summer intern at the National Housing Law Project.

<sup>1</sup>Press Release, City of Oakland, Office of the City Attorney, Oakland City Attorney Sues Major Banks, Local Agents to Stop Illegal Evictions and Abuse of Tenants' Rights (Mar. 11, 2009), [http://www.oaklandcityattorney.org/PDFS/News%20Release/Illegal%20Evictions%20media%20advisory%20\(F\)%203%2011%2009.pdf](http://www.oaklandcityattorney.org/PDFS/News%20Release/Illegal%20Evictions%20media%20advisory%20(F)%203%2011%2009.pdf). The lawsuits were filed prior to the enactment of the federal Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009), and therefore do not allege violations of this statute. The Act does not preempt state or local laws that offer tenants additional protections, such as Oakland's ordinance.

<sup>2</sup>*Id.* The complaints are available on the city attorney's website. See Oakland City Attorney, Wrongful Evictions Lawsuits, <http://www.oaklandcityattorney.org/Notable/Evictions.html>.

<sup>3</sup>See OAKLAND, CAL., MUN. CODE § 8.22.360 (2002).

<sup>4</sup>See Press Release, Office of the City Attorney, *supra* note 1. For examples of eviction notices served by the defendant brokers, see <http://www.oaklandcityattorney.org/PDFS/Eviction%20Notices%20for%20web%20site.pdf>.

<sup>5</sup>Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief at ¶ 11, *State v. Fidelity Nat'l Fin.*, No. 09-436907 (Cal. Super. Ct. filed Feb. 19, 2009).

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<sup>86</sup>The Guide will be available at [www.nhlp.org](http://www.nhlp.org) or by contacting NHLP's publications clerk at (510) 251-9400.

<sup>87</sup>BARBARA SARD & MICAH KUBIC, CTR. ON BUDGET & POLICY PRIORITIES, REFORMING HUD'S "SECTION 3" REQUIREMENTS CAN LEVERAGE FEDERAL INVESTMENTS IN HOUSING TO EXPAND ECONOMIC OPPORTUNITY (2009), <http://www.cbpp.org/research/index.cfm?fa=topic&id=33>.