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May 17, 2022
ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV

The Honorable Martin Joseph Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

RE: ***Comments on Proposed Rule:*** **Docket No. WHD-2022-0001 –** ***Updating the Davis-Bacon and Related Acts Regulations (RIN 1235-AA40)***

Dear Secretary Walsh:

On behalf of the National Association of Home Builders of the United States (NAHB), we are pleased to submit these comments in response to the Department of Labor's (DOL) Wage and Hour Division (WHD) proposed rule on Updating the Davis-Bacon and Related Acts (DBRA) Regulations that was published in the Federal Register on March 18, 2022 (87 Fed. Reg. 15,698). As interested stakeholders in this regulatory activity, NAHB urges the Department to consider the following recommendations as it proceeds with this rulemaking. In addition, NAHB believes it would be extremely helpful to stakeholders and the agency to hold a series of hearings to gather additional input on practical implications of this proposal prior to issuing a final rulemaking.

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in all facets of the residential construction industry. Members' businesses include single-family home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction.

In addition, NAHB members include the home building industry's suppliers and service providers that support the industry in many different capacities and are a vital component of the residential construction industry. The overwhelming majority of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA), and NAHB members collectively employ over 3.4 million people nationwide. Four out of every five new homes in the U.S. are built by NAHB members.

Many of NAHB's multifamily members use a mix of federal, state, and local government programs to build, renovate and preserve affordable multifamily rental housing. A number of these federal programs, most notably the Federal Housing Administration (FHA) Multifamily Mortgage Insurance programs for new construction and substantial rehabilitation, are subject to the DBRA.

In the roughly 90 years since its implementation, the wage determination process under the Davis-Bacon Act (DBA) has evolved into a scientifically unsound and fundamentally flawed methodology, resulting in prevailing wage rates that are misrepresentative of the real wages being paid in any given area. Additionally, the administrative burden of the DBRA has grown, in some cases, to financially infeasible levels – to the point where builders and skilled tradesmen are deterred from participating in DBRA-covered housing projects. Despite this proposal stemming from the Department's first comprehensive review of these regulations in 40 years, NAHB is concerned the revisions in the NPRM do not address

either of these critical issues. Instead, it exacerbates the compliance obstacles faced by builders who produce the country's desperately needed affordable housing supply.

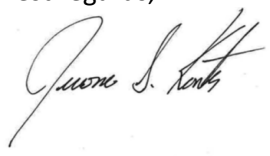
Moreover, NAHB remains concerned about its ability to thoroughly respond to DOL's proposed rule within the relatively short comment period of 60 days due to the size and scope of the rulemaking. Although NAHB submitted a letter requesting a 60-day extension of the current comment period, DOL has not responded to this request, nor has the Department responded to similar requests from roughly one dozen other construction and multifamily housing associations.

NAHB urges WHD to withdraw the current NPRM, fix the problems stakeholders have identified within the proposal and the current regulations that inhibit the construction and rehabilitation of affordable housing and issue a revised proposal. Absent the withdrawal of the proposal, NAHB recommends DOL take the following actions, which are discussed in greater detail throughout the attached letter prior to issuing a final rule:

- Develop and implement a new scientifically sound methodology to determine prevailing wages that are more representative of wages determined by the market for any given area;
- Keep in place the bar on cross-consideration of metropolitan and rural wage rates when determining prevailing wages;
- Remove provisions expanding the definition of "site of the work" from the rulemaking;
- Provide additional clarification and guidance on "employed," "prime contractor," "public building," and other definitions;
- Assign the residential construction category to all apartment properties covered under DBRA and assign only a single residential wage determination for apartment projects;
- Lock in prevailing wages for covered apartments that are effective on the date of the borrower's application; and
- Reduce administrative requirements that burden employers as well as deter small and minority firms from participating in DBRA covered projects.

NAHB appreciates DOL's consideration of our comments and welcomes the opportunity to work with the agency to ensure the concerns and burdens of the residential construction industry are not further exacerbated by revisions to the DBRA requirements. Please contact NAHB's Program Manager for Labor and Immigration, Brad Mannion, at (202) 266-8265 or via email at bmannion@nahb.org if you have any questions or require any additional information.

Best regards,



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National Association of Home
Builders of the United States

CC: Julie A. Su, U.S. Department of Labor
Jessica Looman, Wage and Hour Division
Amy DeBisschop, Wage and Hour Division

NATIONAL ASSOCIATION OF HOME BUILDERS

Docket No. WHD-2022-0001 Updating the Davis-Bacon and Related Acts Regulations;

Notice of Proposed Rulemaking

I. Introduction

The National Association of Home Builders (NAHB) appreciates the opportunity to provide feedback to the Department of Labor (DOL) on its proposed revisions to the regulations administering and enforcing the Davis-Bacon and Related Acts (DBRA). These regulations require much-needed review and comprehensive changes to modernize and streamline the process for determining prevailing wages on covered projects and addressing the needs of today's construction industry, among other things.

However, NAHB is concerned that if the proposed rule moves forward in its current form, DOL will have failed in producing substantive, positive change to the DBRA. Instead, these provisions will drive up project costs and, as it relates to residential construction, reduce the production of much-needed affordable housing covered under the DBRA during the current housing affordability crisis. The importance of these projects and the impact Davis-Bacon requirements have on them were either ignored completely or severely misunderstood by WHD, a concern amplified by the lack of communication between the agency and the residential construction industry during the pre-rule stage of the Notice of Proposed Rulemaking.

NAHB believes this proposal also fails to fully consider the state of the residential construction industry, which is experiencing severe worker and supply shortages, while at the same time being pressured by an administration actively advocating for the increased production of affordable housing. The root of the current affordable housing crisis is a lack of supply. There are simply not enough units available to meet the demand. This problem is particularly acute for low-income families. This lack of supply is compounded by long-standing labor shortages in the construction industry. To ensure these realities are fully considered and incorporated, NAHB strongly urges WHD to withdraw the proposed rule to allow additional time to consult with the residential construction industry and develop a rulemaking that neither inhibits production of quality multifamily housing, nor runs contrary to the Biden Administration's stated goal of increasing the supply of affordable housing. Should DOL decide not to withdraw the rulemaking, NAHB strongly urges the agency to fully consider the following comments and recommendations and make associated revisions prior to publishing its final rule.

II. Background

Enacted in 1931, the Davis-Bacon Act (DBA or the Act) requires the payment of locally prevailing wages (*i.e.*, hourly wage, fringe benefits and overtime, paid to the majority of workers within a particular area) to workers involved in contracts entered into by federal agencies and the District of Columbia that are in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. Since its passage, the Act has subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as "Related Acts") under which Federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods. Today, the Davis-Bacon Act and 71 active

Related Acts apply to roughly $217 billion in federal and federally assisted construction spending annually and provide minimum wage rates for an estimated 1.2 million U.S. construction workers.[1]

As it relates to residential construction, Davis-Bacon prevailing wage requirements apply to a number of Department of Housing and Urban Development (HUD) programs, including various Federal Housing Administration (FHA) Multifamily Mortgage Insurance programs (most notably under National Housing Act section 221(d)(4)) that NAHB multifamily members use to construct and substantially rehabilitate apartment properties affordable to low- and moderate- income families.[2] Other HUD programs of interest to NAHB's membership that are covered under DBRA include the Home Investment Partnerships Program (HOME) block grant, the Community Development Block Grant (CDBG), and Project-Based Housing Choice Vouchers. Each of these programs has a different threshold for DBRA applicability. For example, DBRA applies to HOME projects when 12 or more HOME-assisted units are under contract,[3] to CDBG construction work when there are eight or more units,[4] and to project-based voucher program deals when there are nine or more assisted units in the property.[5] As noted, these and other federal housing programs almost exclusively deal with multifamily projects, and as a result, the rate at which single-family builders participate on covered projects is significantly lower than multifamily builders.

On March 18, 2022, WHD issued this NPRM to amend the regulations implementing the DBRA.[6] As the agency notes in the NPRM, this proposal marks the first comprehensive regulatory review in nearly 40 years, dating back to a final rule issued under the Reagan administration in 1983.[7] The 2022 proposal revises various definitions from the 1983 rulemaking, as well as proposes new definitions, for terms such as "prevailing wage," "employed," "prime contractor," "subcontractor" and "site of the work" in order to "update and modernize" these regulations. In particular, the agency proposes to return to the original (first implemented in 1935) methodology used to determine DBA wage rates, also known as the "three-step process," in its definition of "prevailing wage." Additionally, WHD is seeking feedback on several revisions to the DBRA regulations, including:

- allowing the cross-consideration of Davis-Bacon prevailing wage rates from metropolitan and rural counties to determine wage rates of a given area;
- implementing periodic updates to nonunion prevailing wage rates; and
- adopting state and local prevailing wage rates for federal and federally assisted projects under certain circumstances.

Shortly after issuance of the NPRM, and recognizing the size and scope of the rulemaking, NAHB submitted a letter requesting a 60-day extension of the current comment period[8] to allow for thoughtful consideration and analysis of the revisions to the DBRA.[9] NAHB also requested that WHD withdraw the

[1] 87 Fed. Reg. at 15,699.
[2] 12. U.S.C. §1715l(d)(4); *see also* National Housing Act §212, 12. U.S.C. §1715c, requiring the application of DBA to the 221(d)(4) program.
[3] Cranston Gonzalez National Affordable Housing Act, 12 U.S.C. §286.
[4] Housing and Community Development Act of 1974, §110, 42 U.S.C. §5310.
[5] U.S. Housing Act of 1937 §12(a), 42 U.S.C. §1437j(a).
[6] 87 Fed. Reg. at 15,698.
[7] 48 Fed. Reg. at 19,532.
[8] https://www.regulations.gov/comment/WHD-2022-0001-0037.
[9] 87 Fed. Reg. at 15,698.

NPRM or, at the very least, extend the comment deadline to allow for discussion between the agency and interested stakeholders as a result of failing to engage with the residential construction sector during the pre-rulemaking phase. In accordance with Executive Order 12866 on Regulatory Planning and Review, federal agencies, where appropriate, must seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation. Given the economic impact of the Davis-Bacon Act and the Related Acts on its multifamily builder and lender members, NAHB expressed its disappointment that representatives from the residential construction industry were not involved in discussions with the administration before the proposal was issued. NAHB is disappointed DOL, having also received similar requests from roughly one dozen other construction and multifamily housing associations, including the Associated Builders and Contractors,[10] Associated General Contractors of America (AGC)[11] and Mortgage Bankers Association,[12] did not grant an extension to the comment period.

III. About the Residential Construction Industry

The residential construction (*i.e*., home building) industry in the United States is predominantly comprised of small businesses whose employees generally choose not to join or be represented by a union.[13] In fact, residential construction remains an industry of independent entrepreneurs, with close to 80% of homebuilders and specialty trade contractor firms being self-employed independent contractors. Among firms with paid employees, 63% of homebuilders and two-thirds of specialty trade contractors generate less than $1 million in total business receipts.[14] According to a 2020 NAHB member census, at least 91% of builders reported a dollar volume of less than $15 million (which is still well below the $39.5 million threshold for the SBA's size standard classification for all residential construction[15]), with the median annual revenue at $2.6 million. In 2020, NAHB's builder members had an average of 15.6 employees on payroll, with a median of five paid employees.[16]

a. About Multifamily Builders

The 2017 Economic Census by the U.S. Census Bureau found multifamily builders are a small fraction of overall residential construction establishments (roughly 0.5%), yet these firms are integral to the economy of the home building sector. According to the census, the 3,200 firms classified as multifamily builders

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[10] https://www.regulations.gov/comment/WHD-2022-0001-0038.
[11] https://www.regulations.gov/comment/WHD-2022-0001-0034.
[12] https://www.regulations.gov/comment/WHD-2022-0001-0042.
[13] *Union Members – 2021*, U.S. Department of Labor, Bureau of Labor Statistics, Jan. 20, 2022, https://www.bls.gov/news.release/pdf/union2.pdf (Accessed May 10, 2022). Because most residential construction does not use union labor, this number is likely much smaller for the residential construction industry.
[14] Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf (Accessed April 22, 2022).
[15] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Aug. 19, 2019, https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf (Accessed April 20, 2022).
[16] Paul Emrath, Ph.D., *Who Are NAHB's Builder Members?*, National Association of Home Builders, April 5, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf (Accessed April 22, 2022).

with payroll employees reported an average of $14.6 million in annual revenue, and these builders employ an average of 14 payroll workers.[17]

Consistent with the breakdown of all residential construction firms, an overwhelming majority of NAHB's multifamily member builders can be easily classified as small businesses. As of the 2020 NAHB member census, roughly 83% of multifamily builders have less than 50 employees, with a median of 10 employees on payroll. Additionally, 63% of these multifamily firms generated less than $15 million in business activity, while the median annual revenue reached slightly more than $7 million.[18] Despite a comparatively higher median annual revenue and employee count than other builder categories, multifamily builders face unique cost challenges compared to other residential builders. For example, NAHB found multifamily builders have some of the lowest residual revenue compared to residuals reported by specialty trade contractors and remodelers.[19] They can also face significantly more challenges when attempting to provide affordable housing due to the steep competition for and administrative burdens associated with the various federal support programs.

b. Multifamily Builders Rely Heavily on Subcontractors and Specialty Firms

One of the unique challenges multifamily builders face is a strong reliance on subcontractors to conduct a significant portion of the work performed on their projects. Subcontracting is ubiquitous in residential construction. Multifamily builders are not alone in their reliance, as most residential builders typically subcontract a large portion of their construction work out to specialized trade contractors who can more efficiently deliver individual pieces of the construction process. Work typically performed by subcontractors includes excavation, framing, roofing, plumbing, electrical, tile, finish carpentry, masonry, painting, dry wall, and paving. But, for multifamily builders, the 2017 Economic Census found 51.2% of work is subcontracted out on multifamily work, nearly double the next highest category, which is single-family builders at 27.4%.[20]

IV. Proposed Changes Will Needlessly Increase Housing Production Costs and Decrease Availability of Affordable Housing

Safe, decent, affordable housing provides fundamental benefits that are essential to the well-being of families, communities, and the nation. Yet owning or renting a suitable home is increasingly out of

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[17] Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf (Accessed April 22, 2022).
[18] Paul Emrath, Ph.D., *Who Are NAHB's Builder Members?*, National Association of Home Builders, April 5, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf (Accessed April 22, 2022).
[19] Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, Page 9, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf (Accessed April 22, 2022).
[20] Natalia Siniavskaia, Ph.D., *Home Building Census,* National Association of Home Builders, July 1, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf (Accessed April 22, 2022).

financial reach for many households. In fact, almost a third of the nation's households are cost burdened and pay more than 30 percent of their income for housing.

The cost of housing is determined by a complex equation involving labor and materials prices; interest rates and financing costs; federal, state, and local regulations; and supply and demand. In today's market, a limited supply of land, a shortage of skilled labor, rising materials prices and high regulatory costs are all contributing to higher prices. NAHB analyses show that, in 2021, prices of materials used in residential construction were rising even faster than overall inflation,[21] and that record percentages of builders were reporting shortages of skilled labor.[22] Joint research conducted by NAHB and the National Multifamily Housing Council shows that regulation imposed by all levels of government (local, state or federal) accounts for 32.1 percent of the cost of an average multifamily development.[23] Moreover, interest rates are higher than they have been in several years,[24] and the Federal Reserve has recently announced its intention to increase them further. These factors make it difficult to increase the supply of affordable housing and ensure that it meets the needs of increasingly diverse households.

While major tenets of the Build Back Better Agenda[25] and Justice40 initiative[26] have been to increase the supply of affordable housing units, the WHD's proposed changes are in direct conflict with this Administration's affordable housing goals. A report from the National Low Income Housing Coalition found that prior to the COVID-19 pandemic only 37 affordable and available rental homes were available for every 100 renter households with extremely low incomes, and every state and nearly every county in the U.S. lacked an adequate supply.[27] Considering the severity of the affordable housing crisis and the current supply side cost escalations and severe supply chain interruptions, NAHB questions the extent to which WHD considered the impact of this rulemaking on building these critically needed affordable housing units and is extremely disappointed the WHD did not consult with residential construction during the pre-rule phase. Any final rule must not further erode the industry's ability to fulfil this need.

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[21] David Logan, *Prices of Goods and Services Used in Residential Construction*, National Association of Home Builders, Nov. 1, 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-prices-of-goods-services-used-in-residential-construction-november-2021.pdf.

[22] Paul Emrath, Ph.D., *Record Share of NAHB Members Report Labor Shortages*, National Association of Home Builders, Nov. 15, 2021, https://eyeonhousing.org/2021/11/record-share-of-nahb-members-report-labor-shortages/ .

[23] Paul Emrath, Ph.D, National Association of Home Builders and Caitlin Walter, Ph.D., National Multifamily Housing Council, *Multifamily Cost of Regulation, Special Studies,* June 12, 2018, https://www.nahb.org/-/media/33AB4591BA3B4F5EBA4DCCEA34038623.ashx (Accessed May 4, 2022).

[24] Litic Murali, *Mortgage Rates Reach 3-Year High*, National Association of Home Builders, April 6, 2022, https://eyeonhousing.org/2022/04/mortgage-rates-reach-3-year-high/.

[25] *Fact Sheet: Biden-Harris Administration Announces Immediate Steps to Increase Affordable Housing Supply*, Sept. 1, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/01/fact-sheet-biden-harris-administration-announces-immediate-steps-to-increase-affordable-housing-supply/ (Accessed April 29, 2022).

[26] *The Path to Achieving Justice40*, July 20, 2021, https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/ (Accessed May 5, 2022).

[27] *Out of Reach: The High Cost of Housing*, National Low Income Housing Coalition, 2021, https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf (Accessed April 29, 2022).

a. The Methodology to Determine Prevailing Wages Will Significantly Increase Labor Costs

The current methodology used to determine prevailing wages creates wage rates that are contrary to the purpose of the regulations – to provide wages that are representative of the area in which these projects are being performed. In some cases, these wages are raised to unrealistic, impracticable levels, resulting in the current methodology making DBRA programs practically unusable in certain parts of the country. Despite the low union representation within construction, collectively bargained rates, which are typically higher than merit shop wages, determine a significant amount of the prevailing wages for covered projects.[28] In addition, many of the Davis-Bacon calculations are too small to provide a meaningful, representative estimate of the wage rates of an area. These factors working in tandem result in wage rates that stray far from those set by the market which are more characteristic of actual worker pay. WHD's proposed return to the three-step method to determine the prevailing wages will further exacerbate this long-standing pattern of setting unrepresentative, unrealistic wages and will reduce much-needed construction work.

Importantly, this issue is not a recent development or a direct result of the COVID-19 pandemic, as Davis-Bacon wage requirements have historically driven up federal construction costs. Not only has the Beacon Hill Institute found that Davis-Bacon wage determinations unnecessarily increase the cost of federal construction by nearly 10%,[29] but the Congressional Budget Office (CBO) estimates a $12 billion reduction in discretionary outlays from 2019 through 2028 if Davis-Bacon wage requirements were not applied to covered projects.[30]

At the same time, the method for determining prevailing wage rates have the effect of both lowering worker pay below market wages in one area of the country and raising those wage rates to infeasible levels for employers in another. For example, in 2011, Davis-Bacon wages in Nassau-Suffolk, N.Y., were 30% above market wages for carpenters, 45.5% above market wages for electricians, and 58.7% above market wages for plumbers/pipefitters; however, those same worker classifications in Spartanburg County, S.C., saw wage rates that were 52.9%, 55.1% and 64.1% below market wages, respectively. While market wages for carpenters, electricians and plumbers/pipefitters are 70% higher in Nassau-Suffolk, N.Y., than in Spartanburg County, S.C., the Davis-Bacon wages impose a 487% wage premium for Nassau-Suffolk workers ($43.98/hour) compared to Spartanburg workers ($7.49/hour).[31] In failing to use a method that benefits workers and employers with increased wages to a reasonable, practical degree,

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[28] *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, U.S. Government Accountability Office, March 2011, https://www.gao.gov/assets/gao-11-152.pdf (Accessed April 21, 2022).
[29] Paul Bachman, MSIE, Michael Head, MSEP, Sarah Glassman, MSEP, and David G. Tuerck, Ph.D., *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, The Beacon Hill Institute, February 2008, http://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf (Accessed May 5, 2022).
[30] *Repeal the Davis-Bacon Act*, Congressional Budget Office, Dec. 13, 2018, https://www.cbo.gov/budget-options/54786 (Accessed May 5, 2022).
[31] Rachel Greszler, *Why Congress Must "Cancel" the Davis-Bacon Act,* The Heritage Foundation, April 7, 2021, https://www.heritage.org/jobs-and-labor/commentary/why-congress-must-cancel-the-davis-bacon-act (Accessed May 6, 2022).

these revisions not only fail to meet their goal, they further the divide between realistic, market-driven wages and DOL's nonscientific, unrepresentative rates.

Another CBO report[32] noted the inverse relationship between increased costs and employment and product availability on various federally assisted housing projects. It states, "*Certain federal housing assistance programs, for example, provide a fixed level of dollars to aid in the construction of residential units. As a result, the number of units and quality of units, or both—and, hence, the number of construction workers—would decline with rising construction costs. In addition, if government demand for construction projects—and the attendant amount of employment—are sensitive to cost, then the amount of federally financed construction would decline as the cost per project rose.*" In the 40 years since this report was published, and because the regulations have not changed, the relationship of increased costs and decreased housing production for Davis-Bacon covered projects remains consistent. The proposal, unfortunately, does nothing to change this equation.

b. The Costs and Administrative Burdens Associated with the Proposed Rule Will Needlessly Increase Housing Production Costs

The ability to compete efficiently in the home building industry and optimally price a home depends on the degree to which overall costs are certain and predictable. This impact is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low- to moderate-income homebuyers and renters who are more susceptible to being priced out of the market. As part of the aforementioned regulatory costs imposed at all levels of government for multifamily developments, these costs, for example, commonly come in the form of delays caused by lengthy approval processes as state and federal governments are becoming increasingly involved in the building process.[33]

NAHB is concerned that the NPRM will add to the regulatory compliance burdens builders and skilled tradesman must satisfy when using DBRA-covered programs to build affordable apartments. The current DBRA requirements already deter small, "mom and pop" and minority-owned firms from participating in DBRA-covered projects. The proposed rule does not make the DBRA framework more user friendly to these small businesses and may even discourage the builders and skilled craftsmen who currently build DBRA-covered apartments from working on future DBRA projects.

V. The NPRM Should be Withdrawn to Address the Concerns of Residential Construction

The residential construction industry is vitally important in maintaining a healthy economy. A strong housing sector provides a critical component of local economic development. Housing creates jobs, increases the demand for goods and services within a particular community, generates revenues for local governments and provides affordable housing. Residential construction provides significant income and jobs for local workers and generates important benefits for local residents, businesses, and governments.

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[32] Congressional Budget Office, *Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget*, July 1983, https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire_0.pdf (Accessed April 27, 2022).

[33] Paul Emrath, Ph.D., National Association of Home Builders and Caitlin Walter, Ph.D., National Multifamily Housing Council, *Multifamily Cost of Regulation, Special Studies,* June 12, 2018, https://www.nahb.org/-/media/33AB4591BA3B4F5EBA4DCCEA34038623.ashx (Accessed May 4, 2022).

In the roughly 90 years since enactment of the Davis-Bacon Act, along with the subsequent adoption of Davis-Bacon requirements in the various Related Acts, the state of the residential construction industry has evolved. The current residential construction labor market demands that businesses pay higher, competitive rates in order to recruit and retain workers, and the average hourly earnings for residential building workers is noticeably higher than worker wages in other sectors.[34] Yet, the industry has been suffering from a skilled labor shortage for many years. Today, skilled craftsmen are better positioned to pick and choose which jobs they will take. Numerous NAHB members report that the skilled labor shortage is further exacerbated because the skilled tradesmen will not even consider taking DBRA-covered work. The tradesmen simply do not want to assume the extra compliance costs, administrative burdens and legal responsibilities associated with DBRA-covered work.

WHD must understand DBRA requirements should not be "one-size-fits-all" across all construction industries. There are strong policy arguments for tailoring a regulatory framework that promotes, rather than inhibits affordable housing production. The DBRA-covered housing programs serve low-to-moderate- income families who desperately need affordable housing. As discussed earlier in these comments, the Administration has called for policies to increase the supply of affordable rental housing. However, the current DBRA mandates are actually hindering affordable housing production by driving up builders' costs, reducing the number of units that can be constructed, and discouraging participation of qualified general contractors and subcontractors. WHD's proposed changes will only compound that problem. In order to better understand the concerns of housing providers who participate in DBRA-covered programs and to create a rule that facilitates, rather than hinders, new affordable rental housing production, NAHB strongly urges DOL-WHD to:

- Withdraw this proposed rule in its entirety;
- Hold a series of DBRA hearings with multifamily builders and owners;
- Revise the regulatory burden estimate and assess the impact of DBRA regulatory changes on production of new multifamily units *before* proposing a new DBRA regulation; and
- Create a new DBRA regulatory framework tailored to facilitate construction of new rental housing.

Absent full withdrawal of the NPRM, and in an effort to truly modernize the wage methodology, NAHB recommends that DOL collaborate with the industry and find solutions to the concerns surrounding DBRA's regulatory requirements before a final rule is issued. For example, NAHB supports provisions of S.3941, the Housing Supply Expansion Act (introduced by U.S. Sen. John Thune (R-SD)), including the establishment of a Davis-Bacon Modernization Working Group.[35] NAHB recommends, at the very least, the Department take the steps necessary to establish a working group of federal officials, as well as employer, employee and public representatives, to analyze alternatives to the current wage methodology and create solutions to the undue administrative burden placed on builders, among other tasks included in the legislation.

Unless changes are made to the NPRM, the proposed provisions will result in projects becoming financially and administratively infeasible for many residential contractors. Accordingly, NAHB urges the agency to

[34] Jing Fu, *Residential Building Worker Wages Continue to Rise*, National Association of Home Builders, April 4, 2022, https://eyeonhousing.org/2022/04/residential-building-worker-wages-continue-to-rise/ (Accessed April 22, 2022).
[35] https://www.congress.gov/bill/117th-congress/senate-bill/3941?s=1&r=9.

fully consider these recommendations so that these firms are not only not deterred from participating on covered projects, but compelled to participate. By doing so, it would introduce more competition, reduce costs and deliver the best value to U.S. taxpayers. However, should DOL decide not to take the above-described route, NAHB then urges the agency to consider the following concerns as it develops a final regulation.

VI. The Definition of "Prevailing Wage" and Reverting to the Three-Step Process

In accordance with this proposal, DOL seeks to define a prevailing wage as: (1) any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30% of workers, and, if there was none, then (3) the weighted average rate. In reverting to the definition of "prevailing wage" used from 1935 to 1983, WHD intends to reintegrate the "30-percent rule" as the second step for a prevailing wage determination. However, in proposing this definition, the agency fails to enact substantive change that provides a method for determining wage rates that are more representative of wages in a given area, encourages builder participation – both in bidding on DBRA-covered contracts and in the prevailing wage surveys – and addresses the realities of today's economy (i.e. an increasingly transient and aging workforce,[36] increased building costs resulting from supply shortages, and the economic impact of COVID-19, among other things). For these reasons, NAHB strongly opposes WHD's proposed definition of "prevailing wage" as well as the three-step process.

VII. The Proposal Fails to Address Systemic Flaws in the Prevailing Wage Methodology

As part of its proposal, WHD aims to reduce the supposed overuse of weighted averages, as DOL has interpreted the term "prevailing wage" as an actual wage rate that mirrors, to the greatest extent possible, rates that are actually paid to workers.[37] Specifically, the agency calculated that the re-introduction of the 30-percent rule will reduce the use of average rates roughly by half—from 63% to 31%. WHD reasons the three-step method will result in the majority rule and 30-percent rule determining 36% and 33% of wage rates, respectively.[38]

The overarching focus should not be to address the rate at which weighted averages are used. Rather, WHD should assess the methodology in its entirety and in doing so, will understand that its failings, for a long time, have not justified its use, particularly in the residential construction industry. The agency has entered into a repeated cycle of gathering wage data in a manner practically designed to deter small businesses from participating; setting a low threshold to receive wage data from a handful of union-dominated organizations with the staffing infrastructure to incur these administrative costs; and setting a wage rate that does not factor in the true majority of employees and is misrepresentative of the actual wage rates paid.

WHD's Davis-Bacon wage methodology has historically experienced issues with the collection of accurate data to determine the prevailing wage rates for a certain area. In addition to repeated criticisms of the

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[36] Na Zhao, *More Young Workers Join the Construction Labor Force,* National Association of Home Builders, Aug. 3, 2021, https://eyeonhousing.org/2021/08/more-young-workers-join-the-construction-labor-force (Accessed May 6, 2022).
[37] 87 Fed. Reg. at 15,700.
[38] 87 Fed. Reg. at 15,704.

Davis-Bacon wage methodology from the U.S. Government Accountability Office (GAO),[39] U.S. Congress,[40] and other non-government stakeholders,[41] a March 2019 audit report from DOL's Office of Inspector General (OIG) found roughly 4,400 of WHD's unique published rates had not been updated in 21 to 40 years. While WHD addresses the issue of outdated prevailing wage rates – albeit only outdated *nonunion* wage rates – in its proposed rulemaking, the OIG report also found nearly half of the 124 wage rates analyzed were not determined from data about a single construction worker within the 31 counties that the published rates represented. While this issue will be discussed in greater detail in these comments, in short, the lack of participation should not be linked to a lack of interest in participating, but rather the complexity and burden of these surveys.

The OIG report also notes WHD's rationale for not updating certain prevailing wage rates – namely, the inefficient use of agency resources to make these changes, given the time and cost the agency would incur to do so. Evidently, businesses and the agency are experiencing similar administrative burdens. Thus, NAHB agrees with OIG's position that using an alternative method to update wage rates could increase the likelihood of WHD being able to bring current those rates that agencies need for their bid and solicitation processes and builders need to develop bids and determine labor costs.

It is beyond dispute that the current methodology favors collectively bargained rates. According to a GAO report, roughly 63% of Davis-Bacon wage rates were set through collective bargaining agreements; in contrast, an estimated 14% of construction workers nationwide were represented by unions in 2010.[42] Today, the percentage of union membership remains stagnant with 13.6% construction workers being represented by unions.[43] The rate at which union wages are used should better reflect the representation breakdown (union or nonunion) of the workforce whose wages WHD determines, yet the 30-percent rule facilitates the favoring of this substantial minority of workers to dominate the prevailing wage determinations. As a methodology that supposedly results in a representative wage rate for a given area, these findings from OIG demonstrate the real-world application going against the intent and purpose of the DBRA and one of the overriding goals of this rulemaking.

Therefore, NAHB recommends DOL conduct a comprehensive study and assessment of alternatives to the current prevailing wage determination methodology. The agency should consider, for example, using Bureau of Labor Statistics (BLS) data to develop DBA prevailing wage determinations, similar to its use of BLS data to determine prevailing wage rates for the Service Contract Act and Foreign Labor Certification program. By working with BLS to develop a model that fits the criteria for calculating Davis-Bacon prevailing wage rates, WHD could use data from two BLS surveys, the Occupational Employment Statistics

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[39] *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, U.S. Government Accountability Office, March 2011, https://www.gao.gov/assets/gao-11-152.pdf (Accessed April 21, 2022).
[40] *Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates*, U.S. Department of Labor Office of Inspector General, March 29, 2019, https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf (Accessed April 21, 2022).
[41] James Sherk, *Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately*, The Heritage Foundation, Jan. 21, 2017, https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more (Accessed April 21, 2022).
[42] *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, U.S. Government Accountability Office, March 2011, https://www.gao.gov/assets/gao-11-152.pdf (Accessed April 21, 2022).
[43] *Union Members – 2021*, U.S. Department of Labor, Bureau of Labor Statistics, Jan. 20, 2022, https://www.bls.gov/news.release/pdf/union2.pdf (Accessed May 10, 2022).

and National Compensation surveys, to serve as an alternative method for DBA wage determinations.[44] Among other options, the agency should also assess outsourcing the wage data collection processes to a verifiable third-party organization better equipped to collect greater quantities of data to achieve the most representative rates at the lowest level of civil subdivisions as possible. At the same time, any alternatives to be considered by DOL should also improve the percentage of businesses choosing to participate in prevailing wage determination surveys or, if using a statistically random sample, apply a sufficient, representative sample of wages in the area in which these rates will be determined.

VIII. Removing the Bar on Cross-Consideration of Metropolitan and Rural Wage Data

Since the 1983 rulemaking, DOL has implemented a bar on the cross-consideration of wage rates for counties designated as "rural" and "metropolitan," meaning metropolitan counties would not factor into the wage determinations for nearby rural counties and vice versa. To account for the supposed "realities" of today's labor market, DOL proposes to remove the barrier to using rural and metropolitan county wage data together to determine a prevailing wage. DOL argues that construction workers travel long distances for work and nearby counties with different designations may be competing for the same supply of workers.[45]

However, this statement by DOL contradicts the system of metropolitan areas delineated by the Office of Management and Budget (OMB) and the U.S. Census Bureau through a careful process of analyzing commuting data, precisely to capture local labor markets. These metropolitan areas are treated as authoritative and used by a variety of government agencies for important programs, including the Bureau of Labor Statistics, which reports local employment and unemployment rates for metropolitan areas.

The work done by OMB and the Census Bureau to define local labor markets should not be ignored or contradicted without substantial evidence. The comment by DOL that suggests labor markets should be enlarged for the construction industry because that is an industry in which workers tend to commute longer distances is not in any way persuasive. The fact that it takes workers in construction and mining occupations 1.6 minutes longer, on average, to commute to work than workers in computer science and math occupations can be easily explained by the need of construction workers to travel to various work sites rather than to a single central office. That construction workers naturally tend to spend more time travelling within metropolitan areas for this reason does not mean they routinely travel to locations outside the metropolitan area.

Nor are the two papers on commute time and construction workers by the same lead author cited by DOL in support of removing the cross-consideration bar persuasive. First, those papers are based on one data set consisting of a limited number of public projects in one city in California which is unlikely to be representative of the nation as a whole. Second, neither paper presents evidence that travel outside of a metropolitan area is broadly representative of what is actually occurring nationwide. One paper primarily shows that builders travel farther to a project than workers. A central thesis of the second paper is that

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[44] James Sherk, *Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately,* The Heritage Foundation, Jan. 21, 2017, https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more (Accessed April 21, 2022).
[45] 87 Fed. Reg. at 15,719.

construction workers only travel long distances to a project in search of higher wages. If true, this means that workers who live inside a metropolitan area are particularly unlikely to travel a great distance to work outside of a metropolitan area where wages tend to be lower. Therefore, it would be particularly inappropriate to base non-metropolitan wage determinations in part on data from within a metropolitan area. Because both papers cited analyze only projects within a single metropolitan area, neither is capable of demonstrating a tendency of construction workers to travel outside metropolitan areas nationwide.

The decision to remove this longstanding bar is another policy revision that will directly result in unrepresentative inflated wages and the decrease in production of much-needed affordable housing. According to testimony during an SBA roundtable on April 25, 2022, an NAHB member indicated a 30% difference in the cost of two projects. While both were subject to federal Davis-Bacon prevailing wage requirements, the project within the wage rate of the Philadelphia metropolitan area amassed a cost of roughly $120,000 per unit. The other project, which was described as a more complex project that occurred outside of the Philadelphia area and was subject to significantly lower wage rates, saw a per unit cost of roughly $95,000.

More substantively, several business groups, some of which represent the construction industry, sued DOL for not adhering to the requirements of its wage determination and rural/metro proviso language and instead using wage data from the Las Vegas area to set rates for counties in Northern Nevada.[46] The set rate of $56.17 was an 80% increase from the $31.22 rate that AGC argued was appropriate.[47] In the case of multifamily contractors, DOL's proposal will misrepresent wage rates, likely reduce the number of affordable units built, and could make some projects infeasible.

NAHB opposes WHD's proposal to remove the bar on cross-consideration of metropolitan and rural wage data in its calculations to determine Davis-Bacon prevailing wages. Rather, this nearly 40-year policy should be kept in place so that metropolitan rates are not overcounted in these calculations and rural projects, which already face rising costs as a result of supply chain disruptions, worker shortages and other reasons stated throughout this letter, do not face additional needlessly increased costs.

IX. Automatic Update to Nonunion Prevailing Wage Rates

In its proposal, WHD provides a mechanism to regularly update nonunion prevailing wage rates based on the BLS' Employment Cost Index (ECI).[48] Specifically, non-collectively bargained wage rates may be adjusted based on ECI data every 3 years, or until the next survey results in a new general wage determination.

NAHB agrees a mechanism to trigger updates to grossly outdated wage rates should be put in place, but the method in which the agency proposes to determine these updates is arbitrary and inconsistent with its use of the underlying data used for the ECI. NAHB is not endorsing BLS data as the preferred replacement for prevailing wage surveys at this time, but there is blatant inconsistency in not utilizing BLS

[46] *AGC, ABC sue Labor Department over Davis-Bacon wages in Nevada*, Construction Dive, Oct. 12, 2021, https://www.constructiondive.com/news/agc-abc-sue-labor-department-over-davis-bacon-wages-in-nevada/607935/ (Accessed April 12, 2022).
[47] *Id.*
[48] 87 Fed. Reg. at 15,700.

data to calculate wage determinations while using that same data to formulate recurring updates to outdated wage rates.

As stated throughout this letter, WHD's Davis-Bacon wage methodology is greatly flawed, and while this revision addresses the issue of outdated wage rates, this change still allows a flawed methodology to persist. The agency has instead established a precedent for indexing prevailing wage rates based on misrepresentative data, implying there will be less incentive within WHD to conduct wage surveys moving forward. Such a result is unacceptable.

X. Revising Additional Definitions Under the DBRA Regulations

a. The Definition of "Site of the Work" Brings Increased Cost and Instability to What Should be a Cost-Effective, Predictable Process

The proposal to include additional classifications of workers and other sectors (i.e., modular construction, manufacturing, certain transportation personnel) via the revised "site of the work" definition raises additional concerns. Namely, these firms who manufacture and supply modular building components are able to do so where the product is crafted in a controlled environment and can be achieved in a cost-effective manner. However, the construction industry faces severe disruptions all along the supply chain, and further adding to these issues is the agency's needless expansion of Davis-Bacon requirements to this sector of the industry.

Foremost, WHD's attempt to expand the definition of the "site of the work" by way of its proposed regulation is plainly foreclosed by the decisions of the federal Courts of Appeals, which have uniformly held that the statutory language limiting DBRA requirements to those workers "employed directly upon the site of the work" is unambiguous and prohibits any such extension. As the U.S. Circuit Court of Appeals for the District of Columbia held clearly and explicitly in its seminal *Midway* decision, "the Act covers only mechanics and laborers who work *on the site* of the federally-funded public building or public work, not mechanics and laborers employed *off-site*, such as suppliers, material-men, and material delivery truckdrivers, regardless of their employer." *Building and Construction Trades Dep't, AFL-CIO v. US Dep't of Labor Wage Appeals Board*, 932 F.2d 985, 992 (D.C. Cir. 1991) (emphases in original). *See also id.* at 991 (examining legislative history showing that off-site workers, including those who constructed "pre-fabricated" component buildings, were meant to be excluded from coverage under the Act). Other circuit courts examining this question have come to the identical conclusion. *See, e.g., Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1453 (D.C. Cir. 1994) ("The statutory phrase 'employed directly employed upon the site of the work' means 'employed directly upon the site of the work.'"); *LP Cavett Company v. US Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996) (truck drivers hauling asphalt from batch plant to construction project were not employed "directly on the site of the work"). The Department's effort to evade this conclusion by vague reference to "modern methods" of construction[49] is unavailing and wholly insufficient to overcome this conclusion.

The proposal raises significant practical concerns as well. As is the case with subcontractors on projects, builders may experience issues with many of their manufacturing and/or modular construction partners

[49] 87 Fed. Reg. at 15,731.

who are newly covered under this definition as they may opt to refuse work to avoid the additional burdens the DBRA requirements bring. By subjecting off-site construction and manufacturing businesses and others not previously covered to Davis-Bacon requirements, the agency effectively takes away the affordability aspect and hinders predictability by deterring these businesses from working with builders on covered projects. With companies refusing to work on these contracts, the industry would face a complete supply chain elimination of these products and cripple manufactured and modular housing firms.

WHD also explicitly references off-site transportation workers during the discussion of this definition, yet given the vague guidance that will result from the revised interpretation of "site of the work," the confusion of coverage is increased exponentially when a business owner who has no prior experience with Davis-Bacon coverage must assess whether his/her drivers are or are not covered. There is no set or average time in which a driver delivering off-site materials must be on a site. Once the materials are securely removed from a truck or other vehicle, the driver typically leaves the site. Depending on the deliverables, that time can vary from a few minutes to hours. For example, prefabricated concrete walls must be carefully lifted from the truck (usually using a crane) and placed around areas of the site that call for them – a process that can last hours, depending on the quantity of materials and sizes of the panels and jobsite. Contrast this with a truck delivering materials, such as wooden panels or roof trusses. There, the worker simply needs to lift the truck bed and can quickly, though still carefully, remove the items within minutes. NAHB is concerned a blanket policy of indiscriminate enforcement will occur, where material provider firms will suffer unjustified burdens as the result of ambiguous guidance from the agency.

Finally, WHD has proposed this revision without properly calculating the scope of Davis-Bacon coverage under the new definition. As noted in the NPRM, DOL does not have data to determine how many of these small firms exist and welcomes data and information on the extent to which small firms would newly be applying Davis-Bacon and what potential compliance costs they could incur.[50] WHD remove this provision from consideration until a sufficient economic analysis can be produced and appropriate discussions are held with potentially impacted businesses so that the agency can fully understand the impacts and consider alternatives.

Given the reasons stated above, NAHB strongly urges WHD to remove the provisions redefining "site of the work" and not extend coverage of these burdensome requirements to additional businesses. Should the agency move forward with this provision, it must provide detailed, accessible guidance that clearly defines "significant portion;" additional detail clarifying coverage of certain transportation personnel; and resources to assist newly covered establishments with their compliance obligations.

[50] 87 Fed. Reg. at 15,779-80.

b. WHD Must Properly Clarify Definitions Addressing Employment Status and Employer Classification

Following rescission of the Department's 2020 joint employer rule, which clarified the factors the Department would use to determine joint-employer status, the definition of "employed" in the proposed rule raises questions and issues as to joint employer liability that leaves multifamily builders uncertain under the current policies of their obligations on multi-employer worksites. As noted, multifamily builders are highly dependent on subcontractors – separate entities whose workers are skilled in a particular craft that the general contractor may lack or find cost-effective to utilize – to perform work on various aspects of a project.

Moreover, homebuilders employ individuals whose primary functions are to supervise and manage the process of constructing homes, the relationships among businesses on a multi-employer worksite, and many of the administrative tasks associated with the construction process. Successful delivery of homes is inextricably tied to the ability to promptly schedule the work of different trades and manage issues that could result in production delays. However, by clarifying the scope of "employment" to apply in the context of wage surveys and determinations and certified payrolls, WHD seemingly removes the defining line between general contractor and subcontractor liability by implying a relationship "regardless of any contractual relationship alleged to exist between the contractor and such person."[51] There is a similar concern with the proposed definitions of "prime contractor" and "subcontractor."

Courts have decided construction sites are unique examples of multiemployer worksites, and many of the usual factors used to establish a joint employer relationship are not applicable in this setting. *See e.g., Matter of Ovadia v. Office of the Indus. Bd of Appeals*, 19 N.Y.3d 138, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202 (2012) (explaining that "in the typical general contractor subcontractor context, a general contractor is not an employer of its subcontractors employees;" examining unique nature of construction industry; and concluding that under common law definition construction general contractor was not joint-employer of workers employed by its subcontractor). NAHB submits that the proposed expansion of joint employer liability is in contravention of legal precedent and instead places the onus almost solely on the general contractor for subcontractor noncompliance. WHD should reject this approach and clarify in a final rule that "joint employer" status will be governed by the Fair Labor Standards Act case law that has been decided in the various circuits and that is currently enforced by the Department more broadly.

c. The Revisions to "Public Building" or "Public Work" Need Clarification on Triggering Davis-Bacon Coverage

WHD's proposed revisions to its "public building" or "public work" definition leave many unanswered questions for the business community and will likely lead to confusion among contracting agencies. First, unlike the "significant portion" language to establish coverage in its "site of the work" definition, the agency sets no parameters for the amount of or degree to which work is performed that would trigger Davis-Bacon requirements for buildings where a portion is "carried on by authority of…a Federal agency to serve the interest of the general public."[52] NAHB recommends providing similar criteria to determine

[51] 87 Fed. Reg at 15,792.
[52] 87 Fed. Reg. at 15,793.

Davis-Bacon coverage on buildings not exclusively owned, leased by, or to be used by a federal agency but may be considered a public work under the new definition.

Alternatively, a policy could be implemented for triggering Davis-Bacon requirements on these types of works where a dollar-amount of cost percentage of construction work is reached for that particular portion of a building or work, as is the current practice of issuing split wage determinations on covered projects. For example, if a building that is not wholly defined as a public building undergoes construction work, but a portion of the building receiving construction work falls under the revised definition, Davis-Bacon requirements should only be triggered if the costs to perform work on that specific portion of the building exceeds a reasonable dollar amount or cost percentage (such as the $2.5 million or 20% of total cost thresholds for split wage determinations).

Second, WHD claims to clarify rather than change existing coverage requirements under this definition.[53] However, confusion among contracting agencies may arise when there is an inconsistent interpretation of the section relating to the added language on portions of a building or work, as well as the misunderstood reading of a project "sufficiently" serving the public interest to qualify as a public work but not meeting additional criteria. *See District of Columbia v. Dep't of Labor,* 819 F.3d 444 (D.C. Cir. 2016). Indeed, a similar issue arose in the *District of Columbia* case cited above. There, the court held that the project was not a "public work" within the meaning of Davis-Bacon for two reasons. First, the government entity (the District of Columbia) was not a party to the construction and only rented the land to the developers. *Id.* At 446. Second, the court held that to "qualify as a public work, a project must possess at least one of the following two characteristics: (i) public funding for the project's construction or (ii) government ownership or operation of the completed facility, as with a public highway or public park." *Id.* In addition, the court stated, "It bears emphasis, moreover, that in the 80 years since its enactment, the Davis-Bacon Act has *never* been applied to a construction project … that is privately funded, privately owned, and privately operated." *Id.* At 446 (emphasis in original). Accordingly, in that case, the court determined the project was *not* covered by the Davis-Bacon Act.

District of Columbia v. Dep't of Labor makes clear that Davis-Bacon Act coverage requirements apply to "public works" (either those projects which construction are publicly-funded or those which are owned or operated by the government) and *not* projects that merely serve the "public interest" in some amorphous and undefined way.

Finally, WHD should issue interagency guidance that clearly defines when parties involved in a contract for construction are covered by Davis-Bacon coverage, as opposed to parties merely engaged in lease and/or development agreements, regardless of the degree to which a project serves the public interest. By cleaning up the language in the rule and issuing interagency guidance, WHD will allow the regulated community to better understand when their projects are covered, and when they are not.

XI. Adoption of State and Local Wage Rates for Federal and Federally Assisted Projects

If finalized, the proposed rule would allow the adoption of state and local wage rates for federal projects if certain criteria are met. In combination with the removal of the cross-consideration bar for rural and

[53] 87 Fed. Reg. at 15,726.

metropolitan areas, NAHB is concerned these revisions go against DOL's intention to determine the most representative wages for a given area.

On frequent occasions, DOL must expand its geographic scope in determining wage rates, typically starting at the county level and progressing to data collection from a group of surrounding counties, a "super group" of counties within the same state, or, ultimately, even statewide. According to the GAO Report, more than 65% of residential wage rates for metropolitan areas were issued at the "super group" or statewide level incorporating data from either all metropolitan or all rural counties in the state.[54]

While there is some concern over the use of larger areas for wage determinations, the bigger issue is the adoption of wage rates from those large areas, such as super groups or statewide, if DOL removes the bar on cross-consideration of rural and metropolitan data. Should a wage rate that is determined at the super group level or higher be adopted, the agency does not provide a clear understanding of whether it would adopt a single rate that combines both metropolitan and rural data or separate wage rates for each of the county classifications. As noted, NAHB urges DOL to maintain the bar on cross-consideration of rural and metropolitan wage rates and, in doing so, require that state and local wage rates must comply with that criteria to be adopted for federal projects.

XII. Using DBRA-Covered Project Wage Rates for Building and Residential Wage Determinations

In determining prevailing wage rates for building and residential construction rates, DOL policy states it will not use wage rates for federal and federally assisted projects for these two categories of construction unless there is insufficient data for non-federal project rates; WHD may consider survey data from Federal projects in the county if such data is available. While WHD is not proposing specific revisions to this policy, NAHB recommends the agency maintain its policy of not factoring in Davis-Bacon wage rates from covered projects in its initial calculation of prevailing wages.[55]

XIII. Additional Concerns for Covered Residential Construction Projects

As the first comprehensive review in roughly 40 years, WHD unfortunately overlooked several critical aspects to the DBRA regulations that, if revised, would not only positively affect multifamily construction, but would also translate to victories for both employees and employers in commercial, infrastructure and other categories of construction. The agency is strongly urged to consider the following.

a. DOL Should Simplify Wage Determination Assignments for Multifamily Properties

DBRA applies to multifamily new construction and substantial rehabilitation projects financed with FHA-insured mortgages. Historically, HUD assigned the residential wage determination to multifamily projects with four stories or less in accordance with Labor Relations Letter (LR) 96-03. LR 96-03 stated that, except in the most extraordinary circumstances, related construction items such as club houses, roads, parking and land scaping should be considered incidental to the multifamily housing project and the residential classification of a project should not be altered. In other words, LR-96-03 generally assumed an apartment

[54] *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, U.S. Government Accountability Office, March 2011, https://www.gao.gov/assets/gao-11-152.pdf (Accessed April 21, 2022).
[55] 87 Fed. Reg. at 15,708.

project of four stories or less was "residential" construction, and it would only receive the single "residential" Davis-Bacon wage determination.[56]

In late 2013, DOL directed HUD to use the applicable DOL-Wage and Hour Division guidance, All Agency Memoranda Number (AAM) 130 and 131,[57] instead of LR-96-03 to determine if more than one Davis-Bacon wage determination (i.e. split wage determinations) should be assigned to a project. As a result, many FHA-insured multifamily projects were assigned multiple wage determinations, which significantly increased administrative burdens for builders and HUD staff, caused unpredictable and often last-minute cost increases and caused unnecessary construction delays.

In an effort to minimize the impacts of AAM 130 and 131, in 2020, DOL issued AAM Number 236,[58] which raised the dollar threshold for substantial construction to $2.5 million before triggering a split wage. Although NAHB supported AAM Number 236, businesses cannot rely on subregulatory text. Importantly, AAM Number 236 notes that the agency will annually re-evaluate its $2.5 million threshold. This rulemaking is an opportunity to codify the existing dollar threshold, or ideally a higher threshold, and to mandate that the figure be indexed for inflation.

Raising the dollar threshold to $2.5 million has reduced the number of projects that are assigned split wage determinations. However, NAHB has already described the supply chain interruptions, labor shortages, inflationary pressures and other factors that are driving up construction costs. Therefore, NAHB strongly recommends that DOL raise the threshold to <u>at least</u> $5 million, require annual indexing for inflation, and codify the guidance.

Moreover, NAHB strongly urges DOL to include provisions in the final rule that assign the residential wage determination to all DBRA-covered multifamily properties, regardless of the number of stories in the building(s). In addition to moving all multifamily construction projects to the residential construction category, the final rule should instruct the contracting agency to assume that all construction items (*i.e.*, parking garages, clubhouses, *etc*.) are incidental to the apartment complex, and will not trigger a separate additional wage determination. This policy would ensure that all DBRA-covered multifamily properties receive only the one residential wage determination.

b. Davis-Bacon Wages Should be Set as Early as Possible for a DBRA-Covered Multifamily Project

NAHB strongly recommends that the final rule lock in Davis-Bacon prevailing wages for a DBRA-covered multifamily project on the date of the borrower's application for DBRA-covered funding or mortgage insurance. For example, multifamily housing providers who apply for FHA multifamily mortgage insurance

[56] Projects can receive residential, building, highway and/or heavy wage determinations.
[57] In general, AAM 130 and AAM 131 directed that a "substantial "construction item could be assigned its own separate wage determination from the project. Also, the construction item could be considered "substantial" construction if its cost exceeded 20 percent of the total project cost or $1 million dollars.
[58] U.S. Department of Labor, All Agency Memorandum Number 236 Updating the $1 million Threshold for Multiple Davis-Bacon Wage Determinations (Dec. 14, 2020).

under the Section 221(d)(4) program[59] base their applications on anticipated costs at the time of application. Locking in the prevailing wage rates that were in effect on the date of the application is the best way to provide practical and predictable prevailing wage rates.

The timing for wage determination assignments also needs improvement. Under current practices, revised or split wage determinations can be issued a matter of days--or even hours--before a Section 221(d)(4) FHA Multifamily Mortgage Insurance deal is scheduled for initial endorsement. When this happens, the borrower and lender must scramble to either significantly rework the deal or walk away from it. In some cases, cost increases from these changes can make the project infeasible.

WHD's proposal in Section 1.6 Use and Effectiveness of Wage Determinations does not address multifamily builders' and borrowers' concerns about the disruptive, unanticipated cost increases due to revised wage determinations that are assigned late in the application process. Under the proposed rule, a revised wage determination is effective for projects assisted under the National Housing Act if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first. Similarly, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever comes first.

Therefore, NAHB strongly urges WHD to revise its rule so that DBRA-covered multifamily projects are assigned the wage determinations as close as possible to the date of the borrower's application for the covered funding or mortgage insurance. Alternatively, DOL could simply assign the covered property a residential wage determination and assume all construction items are incidental, so that split wage determinations are not assigned at all.

c. Various Compliance Burdens Discourage Participation on DBRA-Covered Projects and Wage Surveys

On the issue of employee representation in wage determinations, multiple wage rates analyzed in the GAO report found nearly one half of the rates were determined by no more than one dozen workers within each job classification.[60] NAHB member testimony during the April 25, 2022, SBA roundtable indicated interest among builders to complete WHD's Form WD-10, also known as the Report of Construction Contractor's Wage Rates, and have their employee's wage rates represented in the calculation of their local prevailing wages. However, the primary deterrent in submitting WD-10 forms is not a lack of interest among businesses, but the complexity of the form and lack of dedicated human resources or administrative staff that would allow owners to avoid incurring costs to participate in this process.

At the same time, submitting Form WHD-347 for weekly payroll certifications poses a great burden on multifamily builders and their subcontractors – especially those who cannot meet the standards set by the contracting agency without incurring significant costs. Many of NAHB's multifamily builders who

[59] The FHA Section 221(d)(4) program is covered by DBRA. See note 2, supra.
[60] U.S. Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, March 2011, https://www.gao.gov/assets/gao-11-152.pdf (Accessed April 21, 2022).

participate in DBRA-covered programs report that they have had to hire staff or outsource to handle the DBRA administrative and compliance responsibilities.

WHD itself also experiences considerable burdens, as past reports indicated the processing of these certifications can take months before further action is taken.[61] NAHB submits that the Statement of Compliance alone could suffice as documentation for compliance. Contractors would still be on record of stating their compliance and the burden for agency staff to review these statements would be significantly decreased compared to the full WHD-347 form. Inexplicably, WHD instead decided to continue a pattern of placing undue burdens on builders and creating an unnecessary workload among DOL regional offices. WHD has missed a significant opportunity to make needed improvements and NAHB urges it to consider amendments to address these issues.

NAHB is very concerned that the additional DBRA paperwork and compliance burdens may also have a disparate negative effect of excluding and deterring small "mom and pop" subcontractors from participating in covered projects when they lack the resources necessary to comply or have limited English proficiency. Builders continue to face supply shortages, worker shortages and other costly delays. These burdens are further exacerbated when subcontractors, which are essential to the homebuilding industry, choose not to accept work or quit during a DBRA-covered project due to compliance costs, legal liability, and/or administrative burdens. NAHB strongly urges WHD to revisit its regulatory burden estimates and realistically estimate the impact of these proposed changes on small businesses. Once this information has been compiled, DOL should change its process accordingly.

Finally, NAHB does not condone willful noncompliance, but WHD should not assume that honest mistakes are blatant or intentional noncompliance. Therefore, NAHB urges the agency to recognize contractors' good-faith efforts in complying with the various regulatory burdens as part of working on a DBRA-covered project and provide clear, concise guidance to help these businesses avoid punishment for noncompliance.

XIV. Conclusion

For each of the reasons set forth above, the NPRM should be substantially modified – not only to alleviate administrative burdens and keep unnecessary costs low, but also to be consistent with the stated mission of this administration to increase the production and supply of affordable, quality housing. WHD must find workable solutions to the overly burdensome regulatory requirements under the DBRA while implementing a wage methodology that is representative of wage rates in a given area, provides competitive wages to workers, and helps to address the worker shortage within construction by attracting individuals to the industry.

Given the brief comment period to provide substantive feedback, in combination with the lack of outreach from WHD to residential construction, NAHB urges WHD to hold public hearings to allow stakeholders to submit meaningful feedback to the agency before it finalizes the rule. Allowing the residential construction sector an opportunity to provide firsthand experience would better equip WHD with the understanding of the impact DBRA provisions have on these businesses so that it is better able to

[61] *Id.*

formulate workable solutions and finalize a rule that meets the needs of the construction industry and the Department.