National Association of Home Builders

1201 15th Street NW
Washington, DC 20005

T 800 368 5242
F 202 266 8400

www.nahb.org

Housing Finance & Regulatory Affairs

David L. Ledford
Executive Vice President

June 14, 2017

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

Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777 [Docket No. FR–6030–N–01]

On behalf of more than 140,000 members, the National Association of Home Builders (NAHB) submits these comments on the Department of Housing and Urban Development's (HUD) notice, "Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777." NAHB is a Washington, D.C.-based trade association that includes more than 700 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. NAHB's membership includes, among others, those who design, construct, and supply single family homes, build and manage multifamily projects, and remodel existing homes. Our builders are proud to construct over 80 percent of the units that provide shelter for this Nation's inhabitants.

BACKGROUND

HUD is inviting public comments to identify existing regulations that may be outdated, ineffective, or excessively burdensome. The Department is taking this initiative in accordance with two Executive Orders issued by President Trump. Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' directs, ''for every one new regulation issued, at least two prior regulations be identified for elimination.'' Likewise, E.O. 13777, ''Enforcing the Regulatory Reform Agenda,'' directs each agency to establish a Regulatory Task Force to evaluate existing regulations and identify those that may merit repeal, replacement, or modification.

HUD's goal in conducting the review is to make the Department's regulations more effective and less burdensome in achieving HUD's mission to create strong, sustainable, inclusive communities, and quality affordable homes for all. Of particular interest to the agency are rules that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary or ineffective;
- Impose costs that exceed benefits;
- Create serious inconsistencies or interfere with regulatory reform initiatives;
- Are the result of other directives that were rescinded or substantially modified;
- Can be modified, streamlined or eliminated with technology; or,
- Duplicate or conflict with requirements of another federal agency.

GENERAL COMMENTS

NAHB applauds the Administration's initiative to reduce unnecessary, duplicative, job-killing regulations that inhibit construction or preservation of affordable housing.

Regulatory costs are one of the most significant factors that drive the cost of a new home. On average, regulations imposed by all levels of government account for 24.3 percent of the sales price of a new single family home.[1] NAHB estimates that regulatory costs in an average home built for sale increased 29.8 percent from $65,224 to $84,671 since NAHB's 2011 study. Meanwhile, disposable income per capita in the U.S. increased 14.4 percent during that same time period, meaning that the average cost of regulation embodied in a new home rose more than twice as fast as the average American's ability to absorb it.

It is essential to ensure that consumers are not encumbered by the cost of excessive, redundant or unwarranted regulations that decrease housing affordability. When government-imposed fees or changes in regulations increase costs for a builder or developer, the final price of the home to the buyers will usually go up by more than the increase in the costs, as related costs, such as financing and broker commissions, also rise. Nationally, an increase of just $1,000 in the median new home price will leave 152,903 households priced out of the market.[2] This means that 152,903 U.S. households could qualify for a mortgage on the median-priced new home before, but not after, the price increases.

Considering the strong, inverse relationship between regulatory costs and housing affordability, NAHB is pleased to offer our recommendations for single family and multifamily rules that should be repealed or revised. Additionally, our comments will identify a number of proposed rules and policies that have not been finalized, but would impose significant costs that outweigh potential benefits. These potentially costly and unnecessary policies should be formally withdrawn to spare the housing industry unjustified regulatory expenses and to provide greater certainty about future expenses associated with FHA-insured and HUD-assisted housing.

EXISTING REGULATIONS

Affirmatively Furthering Fair Housing

Citations: HUD Final Rule: Affirmatively Furthering Fair Housing (FR-5173-F-04) RIN 2501-AD33 (07/16/2015)
24 CFR 5.150, § 5.151, § 5.152, § 5.154, § 5.156, § 5.158, §5.160, § 5.162, § 5.164, § 5.166, § 5.168, § 91.5, § 91.100, §91.105, § 91.110, § 91.115, § 91.205, § 91.215, § 91.220, § 91.225, §91.230, § 91.235, § 91.305, § 91.315, § 91.320, § 91.325, § 91.415, § 91.420, § 91.425, § 91.505, § 92.104, § 92.508, § 570.3, § 570.205, § 570.441, § 570.486, § 570.487, § 570.490, § 570.506, § 570.601, § 570.904, § 574.530, § 576.500, § 903.1, § 903.2, § 903.7, § 903.15, § 903.23

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[1] See "Government Regulation In the Price of a New Home" Special Studies, by Paul Emrath, Ph.D. Economics and Housing Policy, National Association of Home Builders May 2, 2016. The full study is available at www.nahb.org/costofregulation.

[2] See NAHB's 2016 "Priced Out" Estimates or "Rising Interest Rates, House Prices Push Thousands Out of the Market," December 13, 2016.

HUD's Affirmatively Furthering Fair Housing (AFFH) Rule became effective Aug. 17, 2015. The rule requires states, local governments and public housing agencies to conduct a formal fair housing planning process as a condition of receiving certain HUD funds.

Under the rule, program participants must show how they will meet their statutory obligation to "affirmatively further fair housing" by outlining steps they will take to combat discrimination. They also must take meaningful actions that address significant disparities in housing needs and in access to employment, transportation and other needs while reducing racial and economic segregation. Participants must submit an Assessment of Fair Housing (AFH) analysis which identifies patterns of racially concentrated areas of poverty and disproportionate housing needs; prioritizes fair housing goals; determines what actions are necessary to achieve those goals and sets a timetable for reaching them. The first round of participants began submitting their AHF analyses on Oct. 4, 2016. However, HUD has had to postpone submission deadlines for some participants due to the complicated and administratively burdensome implementation framework.

The rule may help remove some barriers to affordable housing, but this unprecedented federal intrusion into local land use decisions may have harmful unintended consequences. For example, if HUD does not approve a participant's AFH, the community's housing and community development funds are jeopardized. Also, localities may adopt harmful "quick fixes" like inclusionary zoning to satisfy HUD's continued emphasis on poverty de-concentration. In fact, our members report that policies which HUD highly promotes, such as inclusionary zoning, are misconstrued as federal mandates at the local level. As one NAHB member noted, "Sometimes even the suggestion [of inclusionary zoning] is all the local government staff needs to run with a program, and to 'get the housing done.' They don't realize how expensive, and hard it is to implement [inclusionary zoning] within a development."

Local Inclusionary zoning policies typically require developers to subsidize a percentage of total units within market-rate developments and to set income-based price controls for the subsidized units. Research indicates that inclusionary zoning is a complex market intervention requiring sophisticated administration by local governments that generally increases the price of market rate housing and is not effective in meeting housing demand or improving affordability.

Recommendations: Revise the Affirmatively Furthering Fair Housing Rule and accompanying Assessment of Fair Housing Tools to address concerns about the Rule's potential for inappropriate federal encroachment on local land use decisions and legitimate business practices, such as a landlord's refusal to accept rental subsidies. Suspend the submission deadlines for participants' AFH reports as the rule is revised and direct participants to follow previous polices for submitting an Analysis of Impediments.

Small Area Fair Market Rents (Small Area FMRs)

Citations: HUD Final Rule: "Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs" (FR–5855–F–03) RIN 2501–AD74 (11/16/2016)
24 CFR 888.113, §982.54, §982.503, §982.505, §982.507, §983.301, §983.302, §983.303 and §985.3

HUD's Section 8 Housing Choice Voucher (HCV) program provides rental subsidies to 2.2 million households. It is administered by public housing agencies (PHAs), and it allows tenants to choose their own housing in the private market. The amount of subsidy households can receive is limited by Fair Market Rents (FMRs). HUD publishes FMRs for all areas of the country by October 1 of each year, as required by law. PHAs establish the subsidy level for HCVs as a payment standard, which is generally set between 90 and 110 percent of the FMR for the area.

Procedures for calculating and implementing FMRs are complicated. Historically, HUD has published FMRs for entire metropolitan areas and, outside of metropolitan areas, individual counties. On November 16, 2016, HUD published a final rule that requires PHAs in 24 metropolitan areas to use Small Area Fair Market Rents (Small Area FMRs) in the Housing Choice Voucher Program. Small Area FMRs are based on ZIP codes rather than an entire metropolitan area. PHAs outside the designated areas would have the option to use Small Area FMRs. The final rule became effective January 17, 2017.

HUD asserted Small Area FMRs will deconcentrate voucher families residing in areas of high poverty because ZIP Code-based Small Area FMRs will allow for higher subsidies in desirable neighborhoods with greater opportunities for jobs, transportation and education. In theory, the higher subsidies in opportunity neighborhoods would be offset by lower subsidies when the Small Area FMR decreases in less desirable neighborhoods.

In fact, HUD's assertion that the system would cause households to move into ZIP codes with higher subsidies without increasing the average cost of a subsidy seems improbable. Instead, it is likely that the cost will increase, causing fewer households to receive assistance. Households unable to move out of ZIP codes where subsidies decline would also suffer. Additionally, reduced housing demand in these ZIP codes would likely lead to disinvestment, often in inner city neighborhoods where more, rather than less, investment in housing is needed.

Recommendations: Abandon the use of Small Area FMRs. Carefully review the potential impact of this regulation in light of the substantial budget cuts proposed to the HCV Program in its FY 2018 budget and the uncertainty in the rental markets created by this rule.

Davis Bacon and Related Acts

Citations:
24 CFR 200.33 Labor standards
29 CFR Part 1, Part 3 and Part 5
HUD Handbook 1344.1 REV-2, Federal Labor Standards Compliance in Housing and Community Development Programs, Chapter 3 Davis-Bacon Wage Decisions
HUD (OLSE) Labor Relations Letter No. LR-96-03 "Application of Department of Labor guidance concerning 'projects of a similar character'" to Guide Davis-Bacon Wage Determination Policies (12/02/1996)
U.S. Department of Labor Employment Standards Administration Wage and Hour Division All Agency Memorandum No. 130 "Application of the Standard of Comparison 'Projects of a Character Similar' Under The Davis-Bacon And Related Acts" (3/17/1978)
U.S. Department of Labor Employment Standards Administration Wage and Hour Division All Agency Memorandum No. 131 "Clarification of All Agency Memorandum No. 130" (7/14/1978)
Notice H 2015-09 Implementation of Electronic Submission of Davis-Bacon Wage Rate Certifications (10/5/2015)

HUD Mortgagee Letter 2015-25, Implementation of Electronic Submission of Davis Bacon Wage Rate Certifications (10/05/2015)

Davis-Bacon prevailing wage requirements apply to a number of HUD's programs, including FHA multifamily mortgage insurance programs for new construction and substantial rehabilitation. Several key steps in the wage determination process can be improved, but achieving such results will require an ongoing commitment from the senior leadership of both HUD and the U.S. Department of Labor (DOL).

Three of the most important Davis-Bacon policy issues that require inter-agency cooperation are resolution of split wage determinations on residential buildings, timing of wage rate determinations and simplifiying reporting for small and/or limited English proficient subcontractors.

Davis-Bacon Split Wage Determinations

Under Davis-Bacon, there are four basic categories of wage determinations based on the type of construction: residential, building, heavy and highway. Historically, HUD would issue one Davis-Bacon wage determination for multifamily properties if construction items (such as parking, club houses, streets etc.) are incidental in function to the overall character of the project, and if there is not a substantial amount of construction in the other categories. "Substantial" construction is defined under various handbooks and guidance documents as greater than 20 percent of total project cost and/or $1 million or more in terms of absolute cost.

For HUD residential multifamily deals (no more than four stories), construction items such as parking, roads, etc. were generally considered incidental to the covered FHA-insured multifamily residential projects. Except in the most extraordinary circumstances, the residential classification would not be altered by the cost of incidental items, even if their costs reached the "substantial" thresholds. Multiple wage determinations *could* be required when a project included separate and distinguishable components that fall into different construction categories and the components are not incidental to each other. However, multiple wage determinations on HUD multifamily jobs have been extremely rare.

Recently, a growing number of multifamily properties seeking FHA mortgage insurance report that HUD is assigning split wage decisions to residential properties[3] when construction items exceed $1 million in costs, even though the items historically have been treated as incidental construction. NAHB opposes use of the $1 million cost figure as a hard trigger for separate Davis-Bacon wage determinations on residential construction.

The implications of this development could make HUD's Section 221(d)(4) program administratively burdensome for builders and HUD staff. It could also make the 221(d)(4) program cost prohibitive for builders due to higher wages required under the non-residential construction categories. NAHB is concerned that erroneous wage determinations will jeopardize FHA-insured multifamily deals in the midst of an affordable housing crisis.

[3] Under Davis-Bacon classifications, a "residential" property cannot exceed four stories.

Recommendations: Reaffirm that the 1996 Labor Relations Letter No. LR-96-03 is the proper guidance to review DOL wage determination policies in the context of HUD multifamily housing programs. It states:

> “Generally, any housing development project (4 stories or less) is classified as "residential." This classification is not altered by the cost of incidental items, even if such costs exceed the guide(s) for "substantial." Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage schedules shall be issued for housing development projects. Multiple schedules shall not be issued because of the incidental items noted above and other similar items. HUD Field Labor Standards and Enforcement staff shall consult with the appropriate Headquarters Labor Standards and Enforcement representative in advance where the issuance of multiple schedules is contemplated for a housing development project.”

Develop policies with DOL to ensure incidental construction over $1 million does not trigger a separate Davis-Bacon wage determination for residential construction and to classify all multifamily buildings as residential construction.

<u>Timing of Davis-Bacon Wage Rate Determinations</u>

NAHB strongly urges HUD and the DOL to revise applicable rules and polices to bring more certainty to the Davis-Bacon wage determination process. When borrowers use FHA multifamily mortgage insurance for new construction or substantial rehabilitation, unexpected changes in Davis-Bacon wage rates that occur late in the application process may result in higher rents to tenants or even totally derail a project.

There is no predictability to the timing or variation in dollar amounts of Davis-Bacon wage rate modifications. Surveys may be done frequently or not for many years. Some wage rates are changed in response to union collective bargaining agreements, but timing is also unpredictable. For example, there were 18 modifications to the “building” category wage rates in Montgomery County, Maryland, during 2014. Sometimes the modifications are so extreme, it renders a feasible development impossible. A September 2012 wage rate determination for a number of counties in Ohio increased a variety of trades’ wage rates by 100 to 400 percent from the previous determination issued in 2010.

For these reasons, we request interagency cooperation between HUD and DOL to permit borrowers on FHA-insured multifamily developments to lock in the wage rate determination for individual projects as early in the application process as possible. Developers and builders risk considerable sums up-front just in preparing an FHA application; once they have received a firm commitment, the mortgage amount is set, and it becomes time-consuming and costly to make changes.

We suggest an appropriate time for locking in Davis-Bacon prevailing wages for a new construction or substantial rehabilitation multifamily project is when FHA accepts a lender’s application for a Firm Commitment. At the time HUD accepts a lender’s application, it deposits the application fee and issues a receipt. We recommend that the date on the receipt HUD issues to the lender be accepted as a government source for a date-certain to lock in the current prevailing wage rates.

Recommendation: Request a policy change from the DOL that enables HUD to lock in the Davis-Bacon prevailing wage rates at the time the FHA accepts an application for a firm commitment of multifamily mortgage insurance for new construction or substantial rehabilitation.

<u>Electronic Submission of Davis-Bacon Wage Rate Certifications</u>

The use of the Davis-Bacon Electronic Certification Submission Program, or Davis-Bacon ECSP, became mandatory for all Davis-Bacon payroll certification submissions after March 31, 2016 for certain projects that were less than 50 percent complete. This requirement applies to all FHA-insured construction loans, Section 542 Risk Share construction loans, health care construction loans (Section 232, 242 or Title XI) and to all Public Housing Authority construction loans, specifically including FHA-insured construction loans made through the Rental Assistance Demonstration (RAD) program.

Unfortunately, some builders and sub-contractors have experienced difficulties registering and long waiting periods for responses from the help-desk. Even worse, this requirement for electronic filing is having a disparate negative effect of excluding and deterring small subcontractors from participating in Davis-Bacon jobs when they lack the sophistication for the electronic filing or have limited English proficiency. This requirement also exacerbates the construction trade labor shortage by deterring subcontractors from accepting Davis-Bacon jobs.

Recommendations: Provide regulatory relief from the Davis-Bacon electronic reporting mandate, particularly for small and minority-owned contractors. Revise ML 2015-25 and Notice H 2015-09 to permit a paper filing option for any entity with no more than 50 employees and subject to Davis-Bacon reporting requirements. Translate the paper and electronic reporting forms into different languages under its Limited English Proficiency Initiative.

<u>Broadband Requirements</u>

Citations:
HUD Final Rule: “Narrowing the Digital Divide Through Installation of Broadband Infrastructure in HUD-Funded New Construction and Substantial Rehabilitation of Multifamily Rental Housing” Docket No. FR 5890–F–02 (FR 5890-F-02) RIN:2501-AD75 (12/20/2016)
§ 5.100, § 92.251, § 93.301, § 570.202, § 570.204, § 570.482, § 570.506, § 574.350, § 578.45, § 578.47, § 880.212, § 881.212, § 883.314, § 884.125, § 886.140, § 886.340, § 891.120, § 891.550 § 905.312, § 983.157
HUD Final Rule: “Modernizing HUD's Consolidated Planning Process to Narrow the Digital Divide and Increase Disaster Resilence” Docket No. FR 5891-F-02 (81 FR 90997) RIN 2506-AC41 (12/16/2016)
§ 91.100, § 91.105, § 91.110, § 91.115, § 91.200, § 91.210, § 91.300, § 91.310

HUD finalized two rules related to broadband capability. The first requires multifamily builders to provide broadband infrastructure for each unit. The second requires states and local governments to consider broadband capability as part of their consoldidated plans. NAHB asserts that these rules will increase burdens on multifamily buiders, property owners, and state and local governements.

Broadband Installation Requirement

In this final rule, HUD required installation of unit-based broadband infrastructure at the time of new construction or substantial rehabilitation of multifamily rental housing funded by HUD. The infrastructure must ensure broadband is accessible in each unit, but the owner is not required to pay for the high speed Internet itself. FHA multifamily mortgage insurance and loan guarantees are exempt from the requirement. Limited exclusions are also provided when installation of broadband infrastructure may not be feasible.

NAHB maintains that HUD's process for imposing this mandate is insufficient. First, HUD did not specifiy the costs of the technology. The final rule's preamble states, "The costs and benefits of this rule are difficult to quantify, but they can be described qualitatively." Likewise, HUD misapplied findings of NAHB's Multifamily Market Survey to argue that the rule codifies standard industry practice of providing in-unit broadband access. In fact, NAHB's study did not ask any questions dealing specifically with broadband access. We also remain concerned that the rule could lock builders into a specific technology infrastructure that may become obsolete.

Recommendation: Withdraw the broadband installation mandate.

Broadband in Consolidated Plans

HUD's Consolidated Plan is a planning mechanism designed to help States and local governments to assess their affordable housing and community development needs and to make data-driven, place-based investment decisions.The Consolidated Planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities that align and focus funding from HUD's formula block grant programs.

This rule amends HUD's Consolidated Plan regulations to require that jurisdictions consider two additional concepts in their planning efforts: broadband access and resilience to natural hazard risks.The first concept is how to address the need for broadband access for low- and moderate-income residents in the communities they serve.The rule requires States and localities that submit a Consolidated Plan to describe the broadband access in housing occupied by low- and moderate-income households. If low-income residents in the communities do not have such access, States and jurisdictions must consider providing broadband access to these residents in their decisions on how to invest HUD funds. The second concept added to the Consolidated Plan process requires jurisdictions to consider incorporating resilience to natural hazard risks, taking care to anticipate how risks will increase due to climate change, into development of the plan in order to begin addressing impacts of climate change on low- and moderate-income residents.

A State or locality's receipt of housing and community development funds depends on HUD's approval of their Consolidated Plans. However, the final rule requires duplicative consultation by planning departments in substantive areas outside of their expertise.There is a strong likelihood for unintended negative outcomes that adversely impact the costs of development and reduce housing affordability for low- and moderate-income families.

Recommendation: Begin new rulemaking to repeal these mandates.

Use of Criminal Records in Tenant Screening and Selection

Citations:
"HUD Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" (04/04/2016)
24 CFR 100.500
"Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions" Notice H 2015-10, Notice PIH 2015-19 (11/02/2015)
24 CFR 5.852, §5.854 §5.855 §5.856, §5.857 §5.861, §960.202, §960.203, §960.204, §960.205, §960.208, §966.4, §982.551, §982.552, §982.553, §982.554, §982.555

On November 2, 2015, HUD released guidance which prohibited the use of criminal arrest records in occupancy-related decisions for public and assisted housing. Subsequently, in April 2016, HUD's Office of General Counsel issued guidance that stated even using criminal conviction records may violate the Fair Housing Act (FHA). NAHB is concerned that these guidance documents are inconsistent with HUD's existing regulations for public and assited housing, which prohibit admission of sex offenders and establish screening / eviction policies for drug use or criminal activity.

OGC Guidance on Application of FHA Standards in Housing and Real-Estate Transactions

On April 4, 2016, HUD's Office of General Counsel recently issued guidance which stated using a prospective tenant or buyer's criminal record to make a decision about whether to rent or sell them a home may be a violation of the FHA. HUD concluded that arrest records are not an appropriate screening device because arrests alone do not prove unlawful conduct. Similarly, even a policy that restricts housing based on convictions may not be based on a legitimate interest. Instead, HUD directed housing providers review "the nature, severity and recency of criminal conduct" before making an adverse housing decision. Finally, if a housing provider's criminal history policy is legitimate and necessary, the provider would still be in violation of the FHA if the plaintiff can prove that a less discriminatory policy would also succeed.

Unfortunately, the guidance fails to address HUD's own regulations that allow housing providers to deny housing to sex offenders and those evicted from certain housing based on drug-related criminal activities, as well as other persons who have been involved with certain types of criminal activities.

Recommendations: Withdraw this guidance. Convene a stakeholder group to develop best practices to strike a balance between protecting individual rights and ensuring the safety of a community.

Excluding the Use of Arrest Records in Housing Decisions for Public and Assisted Housing

Notices H 2015-10 and PIH 2015-19 informed PHAs and owners of other federally assisted housing that arrest records may not be the basis for denying admission, terminating assistance or evicting tenants. The Notice also makes it clear that HUD does not require use of "One Strike" policies and that the due process rights of applicants and tenants must be safeguarded.

Recommendations: Revoke the guidance. Convene a stakeholder group to develop best practices to strike a balance between protecting individual rights and ensuring the safety of a community.

PROPOSED RULES / POLICIES THAT SHOULD NOT BE FINALIZED AS WRITTEN

Federal Floodplain Management

Proposed Rule: "Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard" *Federal Register* Docket No: FR–5717–P–01, RIN 2501-AD62 (10/28/2016) 24 CFR Parts 50, 55, 58 and 200

On October 28, 2016, in response to President Obama's Climate Action Plan, Executive Order 13690 and the Federal Flood Risk Management Standard (FFRMS), HUD proposed a rule to expand its floodplain management oversight. According to the proposal, single-family homes using FHA mortgage insurance would have to be elevated an additional two feet when they are built or substantially improved within the 100-year floodplain. Multifamily builders would face the added burden of the new two-foot elevation requirement when using FHA mortgage insurance for new construction or substantial rehabilitation projects both within the 100-year floodplain and in a horizontally expanded FFRMS floodplain area for which maps do not even exist. These flood risk measures would also apply unnecessary and expensive elevation and flood proofing requirements to projects that use federal grants, such as the HOME and Community Development Block Grant programs. The public comment period closed on December 27, 2016, and the rule was not finalized before President Trump took office.

If implemented, this proposal will unnecessarily increase the cost of constructing new multifamily rental and single family housing, inappropriately burden the private sector and jeopardize housing opportunities for low and moderate income families. It threatens access to FHA mortgage insurance for single-family home buyers and multifamily builders, and will jeopardize affordable housing opportunities for countless working class families. The rule will increase construction costs and project delays for single-family homes targeted for purchase using FHA programs intended to serve low- to moderate-income buyers. Additional elevation and flood-proofing requirements for multifamily properties using FHA mortgage insurance programs could make many projects infeasible due to increased construction costs and the inability to offset these costs through higher rents. In either case, the rule would prevent delivery of much-needed rental housing during the current affordable housing crisis.

Preliminary estimates suggest compliance with the proposed floodplain elevation requirements will increase construction costs for new HUD-insured or assisted multifamily projects by approximately five percent. Anticipated cost increases are due to the cost of elevating the property's site pad and associated infrastructure two feet above the 100-year BFE. Our members believe elevating the site pad and infrastructure will be necessary to comply with accessibility requirements under the Fair Housing Act, the Americans with Disabilities Act, the Architectural Barriers Act, and section 504 of the Rehabilitation Act of 1973. NAHB's estimates include the cost of raising the building, parking areas and driveways. It is clear that any delays associated with the new requirements, along with the increased construction costs, will pose a serious threat to housing affordability in communities across the country.

The rule will also impose significant elevation costs on single family homes built or substantially improved within the 100-year floodplain. The Regulatory Impact Analysis estimates the cost of elevating a single family home an additional two feet would add up to $5,074 to the total cost of construction. This increase is significant, particularly for median and lower-priced homes. Recalling NAHB's estimate that a $1,000 increase in the median new home price will leave 152,903 households priced out of the market, this proposal could price 764,515 households out of the market.

The proposal is inconsistent with FEMA's policies. Multifamily builders and developers will not know if they must comply with the new floodplain rules because maps of the expanded floodplain do not exist. Further, the draft rule is inconsistent with FEMA regulations under the National Flood Insurance Program. It creates unnecessary and expansive flood mitigation requirements beyond those established by FEMA, the agency with the expertise, funding and statutory directive to administer flood insurance and floodplain mapping programs.

Equally problematic, the proposal lacks a grandfathering provision for projects that are in the pipeline, and will generate surprise expenses and delays for single-family and multifamily projects that are already underway.

In his March 28, 2017, Executive Order on Promoting Energy Independence and Economic Growth, President Trump rescinded the Climate Action Plan. Since the Climate Action plan was rescinded, and this costly proposal sprung from that plan, we believe there is a very strong argument for withdrawing this proposed rule.

Recommendation: Withdraw the proposed rule, "Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard."

Mandatory Energy Benchmarking in HUD-Insured and Assisted Multifamily Properties

Citations: HUD Notice: "60-Day Notice of Proposed Information Collection: Energy Benchmarking," 81 FR 68446, Federal Register Docket No. FR–5913–N–27 (10/04/2016)
REV-2 Multifamily Accelerated Processing (MAP) Guide, 4430G
"Implementation of the CNA e Tool -- Delayed Implementation," Notice H 2017-04 (4/19/2017)

On October 4, 2016, HUD released a notice soliciting comments on its plans to require energy benchmarking and reporting for HUD-assisted and HUD-insured multifamily properties with more than 20 units and at least 12 months of utility data. Under the proposal, benchmarking data must be submitted through the EPA's ENERGY STAR Portfolio Manager. According to the announcement, the first scheduled submission date for a majority of assisted-housing respondents was estimated to occur in 2019.

Covered properties for this reporting requirement include:

- Multifamily housing properties insured under Sections 223(a)(7), 223(f), 221(d)(3) 221(d)(4), 220, 231, 236, and 241(a);
- Section 8 Housing Assistance Payment contracts;
- Section 202 & Section 811 Project Rental Assistance Contracts and Project Assistance Contracts; and

- Section 202 Senior Preservation Rental Assistance.

Owners of covered properties were encouraged to voluntarily submit water and energy benchmarking data to HUD on an annual basis, but will be *required to* submit benchmarking information on the following schedule, subject to revision:

- For HUD-assisted properties with a utility allowance, at the time of the every-three-year utility allowance baseline calculation;
- For HUD-assisted properties where there is no utility allowance, every third year at the time of financial statement submission;
- Prior to issuance of new FHA mortgage insurance under Sections 223(a)(7), 223(f), and 241(a);
- With a Capital Needs Assessment submission required by the Office of Asset Management and Portfolio Oversight in HUD's Office of Multifamily Housing Programs on a 10-year cycle; and
- As part of any enforcement action.

NAHB opposes this flawed mandate. There are strong arguments for withdrawing the proposal before it takes effect. If implemented, the mandate will require multifamily owners to divert limited funds to compliance costs. HUD has not provided a sufficient rationale for the mandate, especially in the case of FHA-insured, unassisted properties. In fact, HUD was well aware of the regulatory compliance challenges and burdens associated with this collection, particularly with respect to the ability of property owners and managers to obtain residents' utility data from utility companies. Finally, President Trump rescinded President Obama's Climate Action Plan, which was the basis for the information collection.

Rather than require multifamily owners to drain resources on compliance mandates, HUD should work with multifamily stakeholders to explore appropriate, cost-effective and voluntary energy efficiency incentives that have a simple payback period of 10 years.

Recommendations: Withdraw the information collection notice and revise the associated handbooks and notices to reflect that energy benchmarking mandates have been repealed.

<u>Section 3 Economic Opportunities for Low- and Very Low-Income Persons</u>

Citations: 24 CFR PART 135; HUD Proposed Rule, "Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses Through Strengthened 'Section 3' Requirements" Docket No. FR-4893-P-01, RIN: 2529-AA91, 80 FR 16519 (03/27/2015)

The Section 3 program requires recipients of covered funds to meet, to the greatest extent feasible, minimum hiring and contracting goals for low- and very-low income persons. The intention is to allow income qualified families who receive HUD housing assistance or live in the neighborhoods where HUD money is spent to benefit from job training, employment and contracting opportunities created by HUD construction funds.

Section 3 Requirements apply to:

- Public and Indian Housing assistance for development, operating, and modernization expenditures;

- Housing and Community Development projects that complete housing rehabilitation, housing construction, and other public construction;
- Direct recipients of covered HUD funds, their contractors and their subcontractors.

After operating under an Interim Rule for 20 years, HUD proposed a new regulation in 2015 to update and expand Section 3 requirements. On May 26, 2015, NAHB submitted comments which focused on the proposed rule's funding threshold that triggers Section 3 coverage, the potential to exacerbate current labor shortages, and compliance burdens for builders.

NAHB agreed that HUD's proposed threshold of at least $400,000 in aggregate annual expenditures is preferable to the current threshold (receipt of more than $200,000 in covered funding). To ensure that smaller projects, which will bear a disproportionate compliance burden, receive relief under this threshold, NAHB asked HUD to clarify that the threshold is annual expenditure of at least $400,000 in aggregate covered funding on construction and construction-related activities *per project*. We also expressed support for raising the threshold to $1 million in annual aggregate expenditure of covered funds *per project.* Alternatively, NAHB strongly urged HUD to consider setting the threshold at an annual aggregate expenditure of covered funding that is equal to or greater than 10 percent of the construction costs. In other words, if the developer has a $10 million contract and is using covered funding for 10 percent of the costs, Section 3 requirements are triggered.

Our comments also emphasized that relief is desperately needed from the administrative and cost burdens of Section 3 requirements. Members have had to hire staff or outside assistance just to comply with the current Section 3 paperwork requirements. Likewise, the compliance costs and potential liability for subcontractors deter vendors in tight labor markets from taking work when Section 3 applies. In markets with high construction activity and a shortage of vendors, subcontractors often pass over Section 3 jobs in favor of work that does not impose extra regulatory burdens on them. NAHB members report that vendors who will take the work charge a premium of six percent to ten percent or more. Because the paperwork burdens extend down through the levels of subcontractors, a main subcontractor may simply walk off the job if they do not get paid due to the noncompliance of their vendor. Hiring a replacement will cause further delays and run up costs.

Other construction delays occur because a significant amount of paperwork has to be approved upfront from the subcontractors before construction can begin. In our members' experiences, subcontractors often do not understand the Section 3 process and when they are busy, have no incentive to participate. Similarly, because LIHTC rules require construction to be completed within a limited period of time, any potential delays resulting from Section 3 requirements on HOME or CDBG funds used as gap financing gives developers pause about using covered funding in these deals. Considering the great need for affordable rental housing, it is essential that HOME and CDBG funds help expedite, rather than delay, construction of LIHTC properties.

Recommendations: Engage industry stakeholders in solution-oriented discussions that address the construction labor shortage and promote job opportunities for low-income men and women. Seek strategic partnerships with other federal agencies, states, local governments and private organizations to leverage training funds and workforce development expertise and minimize the burden on grant recipients.

FHA Project Approval for Single Family Condominiums

Citations:
Project Approval for Single Family Condominiums
81 FR 66585 (September 28, 2016)
Docket No. FR-5715-P-01
RIN 2502–AJ30
24 CFR Part 234: Condominium Ownership Mortgage Insurance
Mortgagee Letter (ML) 2011-22, "Condominium Project Approval and Processing Guide"
ML 2012-18; ML 2015-27; ML 2016-15
Federal Register: 81 FR 66565 (September 28, 2016)

FHA has proposed significant changes to its regulations governing the condominium approval process. Currently, comprehensive condominium requirements are contained in the Condominium Project Approval and Processing Guide, issued through Mortgagee Letter (ML) 2011-22 and subsequent revisions to the Guide announced in ML 2012-18, ML 2015-27 and ML 2016-15. The Proposed Rule, issued on September 28, 2016 (81 FR 66565), would make changes to the current regulatory requirements and transfer the regulations for condominium project approval from 24 CFR part 234 into 24 CFR part 203, as required by the Housing and Economic Recovery Act (HERA) of 2008.

Prohibition on Approval of Proposed and Under Construction Projects

One significant change of major concern to NAHB, is that the Proposed Rule would prohibit the approval of proposed and under construction condominium projects. Only condominium projects for which the construction on the project or legal phase, including buildings and infrastructure of the project or legal phase, is fully complete may be approved.

FHA's current approval process allows proposed or under construction condominium projects to be submitted for approval. The ability to approve condominium projects prior to completion benefits both home buyers and home builders since this allows a mortgage application to be processed while the condominium unit is being constructed and decreases the time required to close the loan after a unit is completed.

NAHB strongly opposes this portion of the proposal. Prohibition of approvals for proposed and under construction condominiums will impose significant burdens on home buyers and home builders in terms of delays and reduced availability of FHA financing. A lender will not be able to order an appraisal and begin processing a mortgage loan application until the first phase of the condominium is completed. This could result in delays in the purchase of FHA financed condominium units by at least 60 days or more.

Further, the proposal could ultimately cause builders and developers to eliminate FHA as a source of financing as developers may not be willing to offer FHA-insured loans since they could not pre-sell to buyers prior to approval of a project. The result will likely mean fewer condominium projects submitted for FHA-approval and home buyers interested in purchasing units in new condominium projects will not have FHA-insured loans as a financing option.

Recommendation: Withdraw the proposed prohibition and keep the current requirements for proposed and under construction projects.

Owner-Occupancy Requirements

In a separate, but related, action, on October 26, FHA published Mortgagee Letter 2016-15 which lowered the owner-occupancy requirement for existing condominium developments from the current 50 to 35 percent if the project meets certain capital reserve and documentation requirements. The change is in response to the mandate by the Housing Opportunity Through Modernization Act (HOTMA) directing FHA to specify a 35 percent owner- occupancy percentage requirement within 90 days of enactment of the law.

While FHA followed the letter of HOTMA by allowing the owner-occupancy requirement to be as low at 35 percent, NAHB believes it did not meet the spirit of the law when it added onerous conditions that are unlikely to be met by many condominium projects.

Recommendation: Remove the additional requirements and reduce the owner-occupancy requirement to 35 percent for all projects as Congress intended through the enactment of HOTMA.

CONCLUSION

Thank you for considering NAHB's comments. NAHB looks forward to working with HUD on efforts to reduce regulatory burdens on the private sector and improve efficiency in HUD's programs. Please direct any questions to Michelle Kitchen, Director of Multifamily Finance at 202-266-8352 or mkitchen@nahb.org.

Sincerely,

David L. Ledford

David L. Ledford
Executive Vice President