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MORTGAGE BANKERS ASSOCIATION

December 8, 2020

The Honorable Patrick Pizzella  
Deputy Secretary  
U.S. Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

Re: Meeting Request on Davis-Bacon and HUD/FHA Multifamily Housing Programs

Dear Deputy Secretary Pizzella:

The Mortgage Bankers Association (MBA)<sup>1</sup> is writing to request a meeting with you to discuss the application of the Davis-Bacon Act to Federal Housing Administration (FHA)-assisted multifamily projects and the issue of split-wage decisions. We believe that the Department of Labor (DOL) can take actions to resolve that issue.

**The issue of split-wage decisions.**

Historically, FHA-assisted multifamily rental construction and substantial rehabilitation projects of not more than four stories, have been assigned only single, **Residential** prevailing wage rate schedules under the Davis-Bacon Act.

In a departure from that prior policy and practice over the past three years, however, FHA multifamily projects now are routinely assigned multiple wage schedules ("split-wage decisions," e.g., Highway, Heavy and/or Building wage schedules in addition to a Residential wage schedule). As a result, split-wage decisions, which have historically been rare, are now the norm.

As our members can explain in greater detail, split-wage decisions increase the cost of construction and rehabilitation of apartment buildings; trigger surprises, appeals, and delays; and create operational difficulties that can make it hard to find contractors willing to work on FHA housing projects. For example, split-wage decisions can require a developer to pay the same worker at different rates to do the same work on the same day, in different parts of the development.

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mba.org](http://www.mba.org).

There appear to be two root causes of this increase in split-wage decisions.

- **The Wage and Hour Division (WHD) has departed from long-standing policy of generally favoring single-wage rate decisions for Residential projects.<sup>2</sup>**
- **The \$1 million threshold under All Agency Memorandum 131 (AAM 131) that has been applied without adjustment since 1978 has become critically out-of-date.**

We would appreciate an opportunity for MBA staff and affected MBA members to meet with you to discuss this problem in detail and how DOL could resolve this issue.

**Recommendation 1: Reaffirm long-standing policy favoring single wage schedules.**

WHD has defined Residential construction projects for Davis-Bacon purposes to include “those involving the construction, alteration, or repair of ... apartment buildings of no more than four (4) stories in height,” including “all incidental items such as site work, parking areas, utilities, streets and sidewalks.”<sup>3</sup>

Consistent with this definition, long-standing policy and practice favors assigning single, Residential wage schedules for FHA multifamily projects, including incidental items of work. That policy and practice are reflected in a HUD Handbook issued in 2012, as follows:

The primary component, which determines the character of work, is the housing. Elements such as site work, parking areas, etc., are incidental items and are included within the definition of residential construction. Generally, any housing development (four stories or less) is classified as “residential.” This classification is not altered by the cost of incidental items, even if such costs reach the threshold guides (above) for “substantial.” Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage decisions shall be assigned for housing development projects of four stories or less.<sup>4</sup>

That long-standing policy and practice is also reflected in a 1996 HUD Labor Letter, which was prepared “with the cooperation and advice of the DOL”:

HUD policy and practice is consistent with [All Agency Memoranda] 130 and 131 in that HUD seeks to identify the (one) category of construction that best suits the proposed

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<sup>2</sup> The Wage and Hour Division of the Department of Labor prescribes standards and procedures for federal agencies like the Department of Housing and Urban Development that administer federal programs that are subject to Davis-Bacon requirements. HUD’s Office of Field Policy and Management/Davis-Bacon and Labor Standards Division administers and enforces Davis-Bacon requirements at HUD.

<sup>3</sup> AAM 130, p. 4 (March 17, 1978); available at [ALL AGENCY MEMORANDUM NO. 131 & 130 \(dol.gov\)](https://www.dol.gov/eis/whd/agency/131-130).

<sup>4</sup> HUD Handbook 1344.1 Rev 2; Chapter 3, p. 3-4 (Feb. 2012); available at: [https://www.hud.gov/program\\_offices/administration/hudclips/handbooks/sech/13441](https://www.hud.gov/program_offices/administration/hudclips/handbooks/sech/13441).

work and issues the (one) corresponding Davis-Bacon wage determination. Most HUD-assisted projects fit cleanly in a single construction category and incidental items are not “substantial.” As a result, the issuance of multiple schedules has been rare for HUD-assisted construction projects and would represent a departure from the norm.<sup>5</sup>

As described above, WHD increasingly departed from that long-standing policy and practice over the past three years. Notably, the change occurred through a series of WHD actions overturning HUD single-wage determinations and denials of appeals of split-wage decisions, without any notice of the rationale for that change in direction. As a result of that change, almost every FHA-assisted multifamily project now receives split-wage decisions.

We believe that DOL could resolve this issue now and in the future by issuing a confirmation that the prior policy and practice favoring single, Residential wage schedules for FHA-assisted Residential multifamily projects has not changed.

**Recommendation 2: Increase the \$1 million threshold for FHA-assisted projects.**

AAM 131 provides that separate wage schedules may be issued if the cost of items of work that are of a different character are more than 20 percent of the total work or, for “very large” projects, if the cost of items of work of a different character are “sufficiently substantial” to warrant separate wage schedules, even though they do not exceed 20 percent of the total project cost.<sup>6</sup>

WHD has historically paired the 20 percent general threshold with a threshold of \$1 million. The \$1 million threshold quantifies when items of work are so “significantly substantial” to warrant separate wage schedules even though they do not exceed 20 percent of the total project cost. Because \$1 million is 20 percent of \$5 million, the \$1 million threshold applies only to “very large” projects of over \$5 million.

Despite changes in the value of dollar since AAM 131 was issued in 1978, the \$1 million qualification of “significantly substantial” has remained static. To provide some context, FHA’s underwriting guide for multifamily projects includes a section on “large loans,” which it defines as loans of \$75 million or above. (The \$1 million threshold equals 1.33 percent of \$75 million.)

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<sup>5</sup> HUD Labor Letter No. LR-96-03, Sec. III (Dec. 2, 1996); available at [https://www.hud.gov/program\\_offices/davis\\_bacon\\_and\\_labor\\_standards/olr\\_9603](https://www.hud.gov/program_offices/davis_bacon_and_labor_standards/olr_9603).

<sup>6</sup> AAM 131, p. 2 (July 14, 1978) (“Generally, multiple schedules are issued if the construction items are substantial in relation to project cost -- more than approximately 20 percent. Only one schedule is issued if construction items are “incidental” in function to the overall character of a project (e.g., paving of parking lots or an access road on a building project), and if there is not a substantial amount of construction in the second category. Note, however, that 20 percent is a rough guide. For example, when a project is very large, items of work of a different character may be sufficiently substantial to warrant a separate schedule even though these items of work do not specifically amount to 20 percent of the total project cost.”); available at [ALL AGENCY MEMORANDUM NO. 131 & 130 \(dol.gov\)](#).

We believe that DOL could address this issue by establishing a process to adjust the \$1 million threshold for inflation since July 1978 using the Consumer Price Index (CPI) issued by the Bureau of Labor Statistics. The CPI is commonly incorporated into collective bargaining agreements to increase wages to keep up with inflation,<sup>7</sup> and the Department of Labor notes that “collective bargaining agreements that tie wages to the CPI cover over 2 million workers.”<sup>8</sup> Therefore, the CPI would be well tailored to similarly adjust the AAM 131 threshold for determining when multiple wage schedules are required under the Davis-Bacon Act.<sup>9</sup>

Applying the CPI to reflect changes in the value of a dollar since July 1978 would adjust the \$1 million quantification of “sufficiently substantial” to a more reasonable \$3.96 million (as of October 2020).<sup>10</sup> Establishing a process to adjust that threshold would help ensure that it does not again become out-of-date with the passage of time.

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MBA has previously brought these issues to the attention of WHD Administrator Cheryl Stanton and her staff, as well as to HUD personnel responsible for applying Davis-Bacon to HUD housing projects and HUD Multifamily personnel. We appreciate the considerable time and attention that DOL and HUD personnel have spent on these Davis-Bacon issues to date. While the issue of split-wage decisions for FHA multifamily projects remains, we believe that DOL is well positioned to resolve it.

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<sup>7</sup> See *How to Use the Consumer Price Index for Escalation*, Bureau of Labor Statistics; available at <https://www.bls.gov/cpi/factsheets/escalation.htm>.

<sup>8</sup> See *Frequently Asked Questions*, US Department of Labor; available at <https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=92&topicid=6&subtopicid=116>.

<sup>9</sup> See *How to Use the Consumer Price Index for Escalation*, note 7 above, for additional detail on the use of the CPI to adjust for inflation.

<sup>10</sup> See *Bureau of Labor Statistics Inflation Calculator*; available at [CPI Inflation Calculator \(bls.gov\)](https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/); see also *Consumer Price Index Data from 1913 to 2020*, Bureau of Labor Statistics; available at <https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/>.

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We would be pleased to meet at your convenience. Your office should feel free to reach out to Bruce Oliver at 202-557-2840 or [boliver@mba.org](mailto:boliver@mba.org).

Sincerely,

A handwritten signature in black ink, appearing to read "R. D. Broeksmit". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert D. Broeksmit, CMB  
President and Chief Executive Officer  
Mortgage Bankers Association

cc: The Honorable Cheryl Stanton, Administrator, Wage and Hour Division, Department of Labor

Christina Brown, Director of Regulatory Reform, Department of Housing and Urban Development

Benjamin DeMarzo, Assistant Deputy for Field Policy and Management, Department of Housing and Urban Development