

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 30

[Docket No. FR-5081-F-02]

RIN 2501-AD23

Civil Money Penalties: Certain Prohibited Conduct

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises HUD's regulations that govern the imposition of civil money penalties. Specifically, this rule revises the definitions of "material or materially" and adds a definition of "ability to pay," which is one factor used in determining the appropriateness of the amount of any civil money penalty. Additionally, this rule requires respondents, in their responses to the prepenalty notice, to specifically address the factors used in determining the appropriateness and amount of civil money penalty. This rule also allows government counsel to file complaints on behalf of the Mortgagee Review Board and departmental officials. Finally, this rule makes other minor clarifying changes. This final rule follows publication of an October 17, 2008, proposed rule, but makes no changes at this final rule stage.

DATES: *Effective Date:* February 17, 2009.

FOR FURTHER INFORMATION CONTACT:

Dane Narode, Associate General Counsel for Program Enforcement, Department of Housing and Urban Development, 1250 Maryland Avenue, SW., Suite 200, Washington, DC 20024-0500; telephone number 202-708-2350 (this is not a toll-free number), or e-mail address Dane.M.Narode@hud.gov. Hearing- or speech-impaired individuals may access the telephone number listed above by calling the toll-free Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background—The October 17, 2008, Proposed Rule

HUD's civil money penalties regulations are located in 24 CFR part 30. In general, 24 CFR part 30 outlines the procedures and requirements that concern violations, prepenalty notices, and complaints.

On October 17, 2008, at 73 FR 61754, HUD published a rule that proposed to define "ability to pay" and to revise the definition of "material" or "materially" in § 30.10. Additionally, the rule

proposed to revise § 30.35 to delete failure to comply with "the terms of a settlement agreement with HUD" from the list of actions for which the Mortgagee Review Board may initiate a civil money penalty action against a mortgagee or lender. HUD also proposed clarifications regarding acts that may constitute unsatisfactory management, violations of a housing assistance payments contract, the required contents of a prepenalty notice, and the procedures for responding to prepenalty notices. The rule also proposed to clarify that the respondent's ability to pay is presumed unless specifically raised by the respondent as an affirmative defense or mitigating factor, the complaint under § 30.85 will be issued by government counsel on behalf of the government officials authorized to issue such complaints, and a respondent may request a hearing within 15 days of receipt of the complaint.

II. This Final Rule

The October 17, 2008, proposed rule provided a 60-day public comment period, which closed on December 16, 2008. HUD received no public comments in response to the proposed rule. At this final rule stage, HUD adopts the proposed rule without change.

III. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. There are no anti-competitive discriminatory aspects of the rule with regard to small entities, and there are no unusual procedures that would need to be complied with by small entities. All entities, small or large, will be subject to the same potential penalties as established by statute and implemented by this rule. The statute does not provide an exemption for small entities. Therefore, this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

In accordance with 24 CFR 50.19(c)(6) of HUD's regulations, this rule involves the Department's regulations

implementing civil money penalty statutes. In accordance with 24 CFR 50.19(c)(1) of HUD's regulations, this rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, this final rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule affects only persons who fail to comply with the Department's requirements, it does not have federalism implications, and it does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

Small Business Concerns Related to Board Enforcement Actions

HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to "work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel." To

implement this statutory provision, the Small Business Administration has requested that federal agencies include the following language on agency publications and notices that are provided to small business concerns at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], you will find the necessary comment forms at www.sba.gov/ombudsman or call 1-888-REG-FAIR (1-888-734-3247).

In accordance with its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD will include the language cited above on notices implementing enforcement actions, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

List of Subjects in 24 CFR Part 30

Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Mortgages, Penalties.

■ For the reasons discussed in the preamble, HUD amends 24 CFR part 30 as follows:

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

■ 1. The authority citation for 24 CFR part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q–1, 1703, 1723i, 1735f–14, 1735f–15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z–1 and 3535(d).

■ 2. Revise § 30.1 to read as follows:

§ 30.1 Purpose and scope.

Unless provided for elsewhere in this title or under separate authority, this part implements HUD's civil money penalty provisions. The procedural rules for hearings under this part are those applicable to hearings in accordance with the Administrative Procedure Act, as set forth in 24 CFR part 26.

■ 3. Amend § 30.10 by adding, in alphabetical order, the definition of “*Ability to pay*” and revising the definition of “*Material or Materially*” to read as follows:

§ 30.10 Definitions.

* * * * *

Ability to pay. Determined based on an assessment of the respondent's resources available both presently and prospectively from which the Department could ultimately recover the total award, which may be predicted based on historical evidence.

* * * * *

Material or Materially. Having the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree.

* * * * *

■ 4. Amend § 30.35 by removing paragraph (a)(14) and by redesignating paragraph (a)(15) as (a)(14).

■ 5. Revise § 30.45(d) to read as follows:

§ 30.45 Multifamily and section 202 or 811 mortgagors.

* * * * *

(d) *Acceptable management.* For purposes of this rule, management acceptable to the Secretary under 12 U.S.C. 1735f–15(c)(1)(B)(xiv) shall include:

- (1) Fiscal management in accordance with HUD regulations and requirements;
- (2) Handling of vacancies and tenantry in accordance with HUD regulations and requirements;
- (3) Handling of rent collection in accordance with HUD regulations and requirements;
- (4) Maintenance in accordance with HUD regulations and requirements;
- (5) Compliance with HUD regulations and requirements on tenant organization; and
- (6) Any other matters that pertain to proper management in accordance with HUD regulations and requirements.

* * * * *

■ 6. In § 30.68(b), revise paragraph (b) introductory text to read as follows:

§ 30.68 Section 8 owners.

* * * * *

(b) *General.* The Assistant Secretary for Housing—Federal Housing Commissioner, or his or her designee, or the Assistant Secretary for Public and Indian Housing, or his or her designee, may initiate a civil money penalty against any owner, any general partner of a partnership owner, or any agent employed to manage the property that has an identity of interest with the owner or the general partner of a partnership owner of a property receiving project-based assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) for a knowing and material breach of a

housing assistance payments contract. Examples of covered violations include, but are not limited to, the following:

* * * * *

■ 7. Revise § 30.70 to read as follows:

§ 30.70 Prepenalty notice.

(a) Prior to determining whether to issue a complaint under § 30.85, the official designated in subpart B of this part, or his or her designee (or the chairperson of the Mortgagee Review Board, or his or her designee, in actions under § 30.35), shall issue a written notice to the respondent. This prepenalty notice shall include the following:

- (1) That HUD is considering seeking a civil money penalty;
- (2) The specific violations alleged;
- (3) The maximum civil money penalty that may be imposed;
- (4) The opportunity to reply in writing to the designated program official within 30 days after receipt of the notice;
- (5) That failure to respond within the 30-day period may result in issuance of a complaint under § 30.85 without consideration of any information that the respondent may wish to provide; and
- (6) That if a complaint is issued under § 30.85, the respondent may request a hearing before an administrative law judge in accordance with § 30.95.

(b) *Obligation to preserve documents.* Upon receipt of the prepenalty notice, the respondent is required to preserve and maintain all documents or data, including electronically stored data, within his or her possession or control that may relate to the violations alleged in the prepenalty notice. The Department shall also preserve such documents or data upon the issuance of the prepenalty notice.

■ 8. Revise § 30.75 to read as follows:

§ 30.75 Response to prepenalty notice.

(a) The response shall be in a format prescribed in the prepenalty notice. The response shall address the factors set forth in § 30.80 and include any arguments opposing the imposition of a civil money penalty that the respondent may wish to present.

(b) In any case where respondent seeks to raise ability to pay as an affirmative defense or argument in mitigation, the respondent shall provide documentary evidence as part of its response.

■ 9. Revise § 30.80 to read as follows:

§ 30.80 Factors in determining amount of civil money penalty.

After determining that a respondent has committed a violation as described

in Subpart B of this part that subjects the respondent to liability under this part, the officials designated in subpart B of this part shall consider the following factors to determine the amount of penalty to seek against a respondent, if any:

- (a) The gravity of the offense;
- (b) Any history of prior offenses;
- (c) The ability to pay the penalty, which ability shall be presumed unless specifically raised as an affirmative defense or mitigating factor by the respondent;
- (d) The injury to the public;
- (e) Any benefits received by the violator;
- (f) The extent of potential benefit to other persons;
- (g) Deterrence of future violations;
- (h) The degree of the violator's culpability;
- (i) With respect to Urban Homestead violations under § 30.30, the expenditures made by the violator in connection with any gross profit derived; and
- (j) Such other matters as justice may require.
- (k) In addition to the above factors, with respect to violations under §§ 30.45, 30.55, 30.60, and 30.68, the Assistant Secretary for Housing—Federal Housing Commissioner, or his or her designee, or the Assistant Secretary for Public and Indian Housing, or his or her designee, shall also consider:
 - (1) Any injury to tenants; and/or
 - (2) Any injury to lot owners.
- (l) HUD may consider the factors listed in paragraphs (a) through (k) of this section to determine the appropriateness of imposing a penalty under § 30.35(c)(2); however, HUD cannot change the amount of the penalty under § 30.35(c)(2).

■ 10. In § 30.85, revise paragraphs (b) introductory text, (c), and (d) and add paragraph (e) to read as follows:

§ 30.85 Complaint.

* * * * *

(b) If a determination is made to seek a civil money penalty, government counsel shall issue a complaint to the respondent on behalf of the officials listed at subpart B of this part or the Mortgagee Review Board for violations under § 30.35. The complaint shall be served upon respondent and simultaneously filed with the Office of Administrative Law Judges, and shall state the following:

* * * * *

(c) A copy of this part and of 24 CFR part 26, subpart B, shall be included with the complaint.

(d) *Service of the complaint.* The complaint shall be served on the respondent by first class mail, personal delivery, or other means.

(e) Before taking an action under §§ 30.35 for violation of 12 U.S.C. § 1735f–14(b)(1)(D) or (F), 30.36, or 30.50 for violation of 12 U.S.C. 1723i(b)(1)(G) or (I), the Secretary shall inform the Attorney General of the United States, which may be accomplished by providing a copy of the complaint. The Secretary shall include in the body of the complaint a statement confirming that this action was taken.

■ 11. In § 30.90, revised paragraph (a), redesignate paragraph (b) as (c), and revise the new paragraph (b) to read as follows:

§ 30.90 Response to the complaint.

(a) *Request for a hearing.* If the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for a hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the complaint, as required by statute. This mandated period cannot be extended.

(b) *Answer.* In any case in which the respondent has requested a hearing, the respondent shall serve upon HUD and file with the Office of Administrative Law Judges a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause. The answer shall include the admission or denial of each allegation of liability made in the complaint; any defense on which the respondent intends to rely; any reasons why the civil money penalty should be less than the amount sought in the complaint, based on the factors listed at § 30.80; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

* * * * *

■ 12. Revise § 30.95 to read as follows:

§ 30.95 Hearings.

Hearings under this part shall be conducted in accordance with the procedures applicable to hearings in accordance with the Administrative Procedure Act, set forth in 24 CFR part 26.

■ 13. Revise § 30.100 to read as follows:

§ 30.100 Settlement of a civil money penalty action.

The officials listed at subpart B of this part, or their designees (or the Mortgagee Review Board, or designee, for violations under § 30.35), are authorized to enter into settlement agreements resolving civil money penalty actions that may be brought under part 30.

Dated: January 9, 2009.

Roy A. Bernardi,
Deputy Secretary.

[FR Doc. E9–851 Filed 1–14–09; 8:45 am]

BILLING CODE 4210–67–P