

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT****Office of the Secretary****24 CFR Part 29**

[Docket No. FR-3799-F-02]

RIN 2501-AB86

**Nonjudicial Foreclosure of Single
Family Mortgages****AGENCY:** Office of the Secretary, HUD.**ACTION:** Final rule.

SUMMARY: This rule makes final, with changes, the proposed amendments to title 24 CFR by the addition of a new part 29 that concerns nonjudicial foreclosure of single family mortgages. A proposed rule was published on April 7, 1995 (60 FR 17968). The rule implements the Single Family Mortgage Foreclosure Act of 1994 (the Act), codified at 12 U.S.C. 3751-3768, which authorizes the Secretary of Housing and Urban Development, as a matter of Federal law, to exercise a statutory nonjudicial power of sale with respect to any defaulted single family mortgage held by the Secretary under title I or II of the National Housing Act or under section 312 of the Housing Act of 1964.

It is important to note that the section numbers that are provided in this final rule differ from the section numbers that appeared in the proposed rule due to the abbreviation of the final rule so as not to duplicate provisions already set forth in the Act.

EFFECTIVE DATE: December 15, 1995.

FOR FURTHER INFORMATION CONTACT: Bruce S. Albright, Office of the General Counsel, Room 9258, Department of Housing and Urban Development, Washington, DC 20410, (202) 708-0303. A telecommunications device for the hearing impaired (TDD) is available at (202) 708-3259.

SUPPLEMENTARY INFORMATION: In the preamble to the proposed rule, the Department stated that it would give consideration to issuing a much briefer final rule to implement the Act. The Department has decided to publish an abbreviated final rule. Rather than repeat the provisions of the statute, the final rule contains only those provisions that are necessary for clarification of the statutory procedures, or provisions that address those areas that give the Secretary discretion to act. Of course, the statutory requirements apply whether they are repeated in the rule or not, and removal of the statutory requirements from the regulation does not affect their applicability. In addition to resulting in a more streamlined

regulation, the removal of statutory requirements makes rulemaking to update the language of the regulation whenever there is a change in the statutory language unnecessary.

The combined statutory and regulatory procedures for conducting nonjudicial foreclosures, which were contained in the proposed rule, have been placed in an appendix to this final rule and incorporate changes made in response to the comments received. The final rule will be codified in the Code of Federal Regulations; the appendix will not be codified. However, the appendix will be included in information to be provided to foreclosure commissioners, and which will be available to the public. HUD is striving to keep communications about requirements as clear, simple and timely as possible, and the guide in the appendix presents such a format.

By a delegation of authority published elsewhere in this issue of the Federal Register, the authority under the Act to appoint a foreclosure commissioner or commissioners and to fix the compensation of commissioners has been delegated to the General Counsel of HUD. This delegation of authority has been redelegated to the Field Assistant General Counsel.

By a "Notice of Application—Foreclosure Commissioners," which will be published at the same time as this rule or as soon thereafter as possible, the Department requests applications from parties who seek approval for designation to act as foreclosure commissioners under the Single Family Mortgage Foreclosure Act of 1994. The Department will also perform additional outreach in order to encourage interested parties to apply.

I. Changes Made at Final Rule Stage

In addition to removing text of the proposed rule that only repeated statutory language, a number of changes are made in this final rule. The definitions of "record" and "recorded" are clarified to include within their meaning the terms "file" and "filed." The requirement in § 29.101(d) of the proposed rule, that a copy of the designation of the foreclosure commissioner must be mailed with the Notice of Default and Foreclosure Sale, is removed. One item added by this final rule at § 29.103 is the information required to be provided in the notice is the recordation date of the mortgage. The presale reinstatement provisions of this rule, at § 29.107, are revised for consistency to use the term "adjourned" instead of "postponed." The date of the recording of the mortgage that was foreclosed is added to the required

recitals in the record of foreclosure and sale (§ 29.121).

II. Public Comments

The Department received nine public comments on the proposed rule during the 60 day comment period that ended on June 7, 1995. The comments were from two law firms, two financial institutions, two bar associations, one legal services organization, one title insurers' trade association, and one foreclosure trustees' association. The following discussion summarizes the comments and provides HUD's responses to those comments.

Comment: Support for the Act/Favoring the rule. One commenter stated that the proposal to create a uniform foreclosure remedy appeared to be in the best interest of all concerned parties. Another commenter supported the concepts outlined in the proposed rule, but felt that the rule could benefit from some "fine tuning."

Response: No response is necessary.

Comment: Scope of the final rule. One commenter commented that the final rule that is published should be a complete and final rule, rather than an abbreviated one. The commenter stated that there has been considerable confusion in the legal community about the codification of the nonjudicial foreclosure statute, given its enactment in an appropriations bill. The commenter said that while a HUD guidebook with the procedures for foreclosure commissioners to follow would be useful, the commenter believed that a complete and substantial final rule is justified because of the magnitude of changes embodied in this new procedure, the pre-emption of State law, and the national basis on which the statute is to be implemented.

Response: The Department is sensitive to the need for clear instructions in a format that is easily accessible. At the same time, the Department is concerned about excessive and unnecessary regulations, and is taking steps to contain the growth of regulations and reduce the number of regulations. The proposed rule repeated, for the most part, the authority granted to the Secretary in the statute. The Department has decided to publish an abbreviated final rule, which will be codified in the Code of Federal Regulations. However, to ensure adequate guidance to the public, an appendix to this final rule is also being published. The appendix will reflect the proposed rule, revised to incorporate comments.

Regarding concerns over the method of the statute's promulgation, the effectiveness and the codification of this

nonjudicial foreclosure statute in the United States Code are not affected because of the statute's promulgation in an appropriations act.

Comment: Title insurance. One commenter stated that requests to provide title insurance will be denied for properties where mortgages had been foreclosed under the provisions of the Act if, in reliance upon the statute, the State-imposed redemption period was ignored. Because of this, the commenter advised against implementation of this statutory authority.

Response: It is well settled that the Congress has the power to enact such pre-emptive statutes. Section 814(e) of the Act (12 U.S.C. 3763(e)) specifically provides that there shall be no right of redemption or right of possession based upon a right of redemption, in the mortgage or others subsequent to a foreclosure completed under the provisions of the Act. Pre-emption of the right of redemption is not new to foreclosures of Secretary-held mortgages. For example, section 204(l) of the National Housing Act, as amended, already pre-empts the right of redemption for those situations where a Secretary-held mortgage is foreclosed by the Secretary. The Department notes that title insurance is available under the Multifamily Mortgage Foreclosure Act (MMFA), which also pre-empts redemption rights.

Comment: Borrower protection/Process time. Three commenters noted that the period of time after sending the Notice of Default and Foreclosure Sale prior to the date of foreclosure was not sufficient time for a response from the mortgagor and for the default to be corrected. One commenter thought that what he found to be a brief period of time seemed to conflict with the preamble statement that "foreclosure will be commenced only after extensive attempts to correct the default." One commenter raised concerns that the rule had very few safeguards to protect affected borrowers, and recommended distinguishing between occupied and abandoned properties, which have differing degrees of deterioration. One commenter stated that there was no opportunity to dispute the claimed amount owed.

Response: The time from the sending of the Notice until the foreclosure is not unfair to the mortgagor, and does not preclude the mortgagor from correcting a default. In each case with a Title I, Title II or section 312 mortgage, the mortgagor has had ample opportunity to correct the default and avoid foreclosure. Prior notice has been sent to the mortgagor, a payment plan may have been entered into, and the mortgagor

has had the opportunity to contest the amount owed and been given the opportunity to convey the property to HUD without proceeding with foreclosure. The Notice of Default and Foreclosure Sale is only the culmination of a process whereby HUD has attempted to work with the debtor to resolve the default and to work out arrangements whereby foreclosure could be avoided.

A more detailed discussion, which follows, of the acquisition and servicing of Secretary-held mortgages illustrates the effort that the Department undertakes to assist homeowners avoid foreclosure.

Most Title II mortgages are acquired pursuant to section 230 of the National Housing Act. Under this section, a mortgagor who has defaulted on his mortgage due to circumstances outside his control may seek to have his mortgagee assign the mortgage to HUD to avoid foreclosure and attempt to save his home. If HUD finds that certain criteria are met, the mortgagee assigns the mortgage to HUD and collects the mortgage insurance benefits. Among the criteria is the requirement that the mortgagor be able to resume full monthly mortgage payments no later than the 37th month after the assignment, and must be able to pay the mortgage in full at the end of the mortgage term, which may be extended up to ten years to cover the arrearage. If the mortgagor cannot resume and continue making full monthly payments after 36 months, or fails to perform under the terms of a forbearance agreement, the Department initiates foreclosure. A mortgagor under this program who faces foreclosure has not just recently defaulted on his mortgage. Rather, he may have been in default for more than three years. The Department has been in contact with each such mortgagor to work out a solution to the default. When no resolution is worked out, it will be no surprise to the mortgagor that HUD is foreclosing.

A Title I home improvement loan that is secured by a security interest in the secured property is assigned to the Department for the payment of insurance benefits after default by the borrower. After a default, the lender attempts to work with the borrower to collect the delinquent payments. If the loan cannot be brought current, the loan balance is accelerated and the note and mortgage are assigned to HUD. It is important to note that the lender has a choice—it can proceed against the security and forego submitting a claim to HUD, or it can assign the loan to HUD and receive insurance benefits. Once HUD acquires the loan, it is sent to a

HUD Debt Management Center for collection activities. The Department attempts to work out payment plans with all Title I debtors, including those where HUD has a junior lien interest securing the Title I loans. Prior to issuing a Notice of Intent to Foreclose to a Title I debtor, the Debt Management Center has taken numerous steps to attempt to collect the delinquent debt. A series of demand letters is sent to the debtor requesting payment. The Debt Management Center reviews the account to see if a realistic payment plan can be implemented, or if assets are available that could liquidate the debt. Based on its review, the Debt Management Center may accept a compromise offer from the debtor. Again, because there have been numerous contacts with the mortgagor, it cannot be said that attempts at collection culminating with foreclosure surprise the Title I mortgagor and deprive him of the means to work out the problem.

Section 312 mortgage loans are serviced by a contract servicer, who also maintains close contact with the mortgagors. As with the Title I and Title II mortgagors, there are opportunities to work out default problems, and it is not until four official notices have been issued to the borrower over a 90-day period and all attempts to work with the borrower have failed, that the process begins for referral to the foreclosure commissioner. A delay of 30 to 60 days will occur before the section 312 loan reaches the foreclosure commissioner, during which time the borrower may have an opportunity to reinstate. Therefore, the borrower may have up to 150 days prior to the 21 day notice in which to bring the loan current or negotiate a forbearance agreement.

In short, internal procedures that the Department has in place which are used prior to initiating foreclosure provide that the mortgagor will have had numerous attempts to address the default under the mortgage, both with HUD staff and with the prior mortgagee. In addition, under the Title I, Title II and Section 312 servicing procedures, there are continuing opportunities to raise and resolve disputed amounts.

Comment: Time of notice. One commenter recommended that the mailing date of the notice should be closer to the date of the search of the records rather than the 45 days before the scheduled sale date, as provided in the proposed rule, to allow for adequate notice of lienholders who may file a lien between the 45 days (maximum time for search) and the 21 days (minimum time for notice to be sent).

Response: If the lienholder of such a lien does not receive notice, the lien

would remain and would have to be cleared. The Department believes that the occurrences of such liens during this time frame would be rare. Should experience show that this becomes a recurrent issue, the Department can request the foreclosure commissioners to make additional searches of the records prior to the 21 day mailing of the notices. The Department also notes that searches actually may be conducted less than 45 days before the sale and the notice may be sent further in advance than 21 days. HUD may also adjust the number of days in the Instructions to be issued to foreclosure commissioners.

Comment: Due process/Retroactive effect of statute. One commenter attached a memorandum from a Title Insurance Company that expressed concerns about the applicability of the Act to mortgages executed prior to the Act's enactment as well as to the absence of a requirement for a hearing before an impartial tribunal prior to foreclosure.

Another commenter raised questions about the retroactive application of the statute. The commenter felt that retroactive application would hurt mortgagors who relied on the availability of their State's foreclosure procedures when entering into their mortgages, and that failure to honor those procedures could raise due process concerns. In addition, the commenter said that persons most adversely affected are those who requested HUD assignments of their mortgage before the new regulation, relying on HUD foreclosure procedures identical to those in their State.

Response: Regarding the retroactive application of the statute, the Department notes that similar questions were raised with regard to multifamily mortgages foreclosed pursuant to the Multifamily Mortgage Foreclosure Act of 1981 (MMFA). The MMFA's retroactive effect has been upheld in court. In addition, the Department emphasizes that it is clear that Congress intended that the Act have retroactive effect. For example, the Act covers the foreclosure of section 312 loans made by the Secretary, although the authority to make such loans was repealed by section 289 of the Cranston-Gonzalez National Affordable Housing Act in 1990.

With regard to the comment about mortgagors relying on certain foreclosure procedures, the Department questions whether mortgagors, upon entering into mortgage contracts, actually consider what foreclosure procedures will be used in the event of default. Furthermore, the Department emphasizes that mortgagors whose

mortgages are in default and that are assigned to the Department under section 230 of the National Housing Act (and it is these mortgages that constitute almost all of the mortgages that will be foreclosed under this Act and regulation) generally receive forbearance relief for a number of years that greatly exceeds the amount of time that would be expended if the mortgages had not been assigned and had been foreclosed earlier by mortgagees using the State foreclosure procedures.

Regarding the comment that the mortgagor should have an informal hearing before a foreclosure is initiated under these procedures, the Department is not insensitive to the need to deal with mortgagors fairly and to give them opportunities to correct deficiencies and to question the amount owed. As discussed previously, foreclosure of a Secretary-held mortgage does not come as a surprise to any mortgagor. A mortgagor whose mortgage is held by HUD has been in contact with the Department in regard to forbearance, reduced payment plans and other assistance before foreclosure is initiated. A foreclosure occurs only as a last resort when the mortgagor is unable or unwilling to make mortgage payments.

Comment: Notice of new procedures. One commenter urged that if the statute and rule are to be applied retroactively, mortgagors who have HUD-insured mortgages should be given actual notice of the new procedure immediately and again, if there is a default, at the time information about the assignment program is provided. The commenter urged that HUD wage an aggressive public information campaign, including a bilingual information booklet.

Response: The Department plans to give notice of the new foreclosure procedures to all single-family mortgagors whose mortgages are held by the Secretary. The Department also intends to inform each mortgagor accepted into the Title II Assignment program that this new procedure may be used to foreclose the HUD-held mortgage if foreclosure becomes necessary. The Department also intends to require new language to be added to the Title II security instruments used by mortgagees to provide that if the Department acquires the mortgage, the nonjudicial foreclosure procedures may be used. The Department will not separately notify all Title II mortgagors whose existing mortgages are insured (rather than held) by HUD-FHA of the new procedures, but those mortgagors will be informed if they default on their insured mortgage loans and are accepted into the assignment program.

Comment: Other foreclosure procedures. One commenter asserted that the rule would increase the amount of time, add requirements, and increase the costs associated with a foreclosure in the commenter's State, where a nonjudicial procedure for foreclosure is already in place under State law. The commenter stated that the rule would adversely affect lending practices in his State. The commenter urged that the new procedures should be limited to judicial foreclosure States, and should only apply to HUD-held loans, and not insured loans.

Response: The commenter has expressed a common misconception about this rule. The Act, and hence the rule, applies to mortgage loans that were previously insured, and are held by HUD as a result of an assignment in exchange for the payment of insurance benefits. The rule also applies to secured Title I loans, Section 312 mortgage loans and some Title II loans that were made with the Secretary as mortgagor. It does not apply to mortgages presently insured by HUD. In addition, the statute gives the Secretary the option of using this new procedure or using any other procedures available under State or Federal law.

Comment: Reinstatement. One commenter stated that the pre-sale reinstatement as a matter of right should not be limited to a single instance, but should be permitted at any time before the sale.

Response: The authority for this regulatory provision is contained in the statute, see 12 U.S.C. 3759(a)(2). As previously noted, the mortgages in question are in default, and have been in default for long periods of time. The mortgagors in such instances have been informed previously by the Department that HUD would foreclose unless their accounts were brought current, or their accounts had been brought current and then fell behind again repeatedly. The statute seeks to curb such abuses.

Comment: Deficiency judgment. A commenter raised the concern that a borrower would have to take action to set aside an unfair deficiency judgment.

Response: The deficiency judgment provisions in the statute and the regulations are not automatic. The Secretary has discretion about referring a case for a deficiency judgment action.

Comment: Fees. The Department was urged to conduct a study to determine what would be a reasonable fee for outside services in conducting foreclosures of HUD-held mortgages. The commenter noted that on two previous occasions, the Department had contracted for management of its foreclosure processes and had accepted

bids that were unreasonably low, with unsatisfactory results.

Response: Under a Delegation and Redefinition of Authority published elsewhere in this issue of the Federal Register, HUD's Field Assistant General Counsel will have authority to designate foreclosure commissioners under the Act and to determine compensation. It is anticipated that the foreclosure commissioners will generally be local law firms or other entities.

Compensation will be determined by each Field Assistant General Counsel based upon information received and recommendations made to them about what constitutes reasonable compensation for handling foreclosures in particular geographic areas. In these and other ways, procedures under the Act are considerably different from procedures referred to by the commenter that were previously used for HUD's single family mortgage foreclosures.

Comment: Guidebook availability. One commenter stated that making a guidebook available to the public would be invaluable inasmuch as questions would arise concerning why the foreclosure was not being done in conformity with State law, and would serve as the only viable resource of information for anyone who wished to learn about the HUD nonjudicial foreclosure process.

Response: The Department believes that such a guidebook is not necessary because the guidelines are contained in the appendix to this final rule.

Comment: Definitions. One commenter felt that the definition of "owner" was too broad, and suggested that the term should be limited to a recorded interest in the property.

Response: The definition in the proposed rule is derived from the statute.

Comment: Designation of foreclosure commissioner. One commenter recommended selecting foreclosure commissioners from the U.S. Foreclosure Network, an organization whose members must meet certain criteria of professionalism.

Response: Members of this organization may apply pursuant to the procedures established under the Notice of Application that is being published in the Federal Register.

Comment: Natural person as foreclosure commissioner. Concern was expressed by one commenter about having a natural person act as a foreclosure commissioner and potential problems arising, such as death or illness. The commenter recommended using a natural person only if another

type of qualified legal entity was not available.

Response: The statute authorizes the designation of a natural person or an entity that is not a natural person, and the Department will proceed accordingly in designating foreclosure commissioners. Other statutory provisions set forth procedures for designating substitute foreclosure commissioners, if necessary. Should a foreclosure commissioner who is a natural person die, become ill, or should another problem arise, the Field Assistant General Counsel may always designate a substitute foreclosure commissioner.

Comment: Copy of designation. Two commenters observed that attaching a copy of the designation of the foreclosure commissioner to the Notice of Default and Foreclosure Sale does not seem necessary and involves additional costs.

Response: Attachment of a copy of the designation is not a statutory requirement. Because the Notice of Default and Foreclosure Sale must include the name, address and telephone number of the foreclosure commissioner, HUD will not require attachment of the designation with each notice.

Comment: Notice of Default and Foreclosure Sale. One commenter asked if the notice should set forth the name of the trustee if the security instrument being foreclosed is a deed of trust.

Response: The foreclosure commissioner named by HUD will function as a substitute trustee in the place of any previously named trustee.

Comment: One commenter recommended that the notice should indicate that the sale is made without covenant or warranty.

Response: This will be included in the Instructions to the foreclosure commissioner.

Comment: A commenter suggested that the notice should state the recording date of the mortgage rather than the "date of the mortgage."

Response: The statute provides at 12 U.S.C. 3757(5) that the Notice of Default and Foreclosure shall contain "the date of the mortgage * * *." Providing the recordation date as well as the execution date may be useful, and this requirement has been added to the abbreviated rule (§§ 29.103 and 29.121) and appendix (Secs. 7 and 17).

Comment: A commenter suggested that there should be clarification of the words "earliest principal installment remaining wholly unpaid," noting that most installments are principal and interest, and it would seem that even a

partially unpaid installment should be reflected.

Response: Statutory language provides for "the due date of the earliest installment payment remaining wholly unpaid * * *." (emphasis added).

Comment: A commenter suggested that the amount or percentage of the deposit that would be required, and the time that the winning bidder has to pay the balance of the purchase price, should be specified in the final rule.

Response: These points will be covered in other guidance that is to be given to the foreclosure commissioners and to HUD Field Offices. It is not covered in the final rule, which is an abbreviated rule.

Comment: Service of Notice of Default and Foreclosure. One commenter noted that in paragraph (a) of § 29.109 of the proposed rule, the term "filing" appears to refer to recording. Since the term "recording" is used later, it should be used consistently. The commenter also pointed out that there may be a question whether the Notice of Default would be filed "in the manner authorized for filing a notice of an action."

Response: The statute uses the terms "filed" and "filing" and in this context, they are used interchangeably with "record" and "recorded." Nevertheless, to avoid confusion, the terms "record" and "recorded" are used in the Appendix.

Comment: A commenter noted that in paragraph (b)(1)(i) of § 29.109 of the proposed rule, the "last known address" should be defined as the last address known to the Secretary or the foreclosure commissioner.

Response: "Last known address" is statutory language. The meaning has been clarified, as suggested, in the appendix which follows this final rule.

Comment: A commenter noted in subparagraph (b)(1)(ii) of § 29.109 of the proposed rule, that sending notice to "all subsequent mortgagors of record" would be unnecessary since they would no longer have an interest and a current address would not be available.

Response: The statute at 12 U.S.C. 3758(2)(A)(ii) requires notice to "[a]ll mortgagors of record or other persons who appear on the basis of the record to be liable for part or all of the mortgage debt * * *." This provision is contained in the appendix, and HUD will request foreclosure commissioners to attempt to effectuate service of notice by mail to the original mortgagor and subsequent mortgagors of record, unless HUD has released them from any obligation under the note and mortgage.

Comment: A commenter stated that notice to senior lienholders would seem unnecessary.

Response: The statute at 12 U.S.C. 3758(2)(A)(iv) provides that service of notice of the foreclosure sale shall be served upon all persons holding liens of record upon the secured property as the record existed 45 days before that date originally set for the foreclosure sale.

Comment: The commenter suggested that consistently posting a notice of the foreclosure sale on the property would avoid questions of proper notice, rather than the limited posting required if the property contains multiple dwelling units or the occupants of the security property are unknown.

Response: HUD is concerned that posting notice on the property for every foreclosure might lead to vandalism and increased deterioration of the property. The posting provisions are contained in the statute to ensure additional notice under limited circumstances. This same issue arose when this statutory language was drafted and it was noted that posting of notice is not a universal requirement.

Comment: A commenter raised concerns about the proof of mailing date. The commenter stated that proof of mailing would be difficult to establish if the commissioner used a postage meter. It was suggested that the commissioner could be required to prepare an affidavit of mailing.

Response: Under 12 U.S.C. 3758(2)(A), "[t]he notice of foreclosure sale shall be sent by certified or registered mail, postage prepaid and return receipt requested * * * ." The post office stamped receipt of the mailing, with the postal date stamp, is adequate proof of the mailing of the notice.

Comment: One commenter raised concerns about the cost of publishing the Notice of Default and Foreclosure Sale, and questioned whether publication accomplished any purpose.

Response: This is a statutory requirement.

Comment: Presale reinstatement. One commenter observed that paragraph (b) of § 29.111 of the proposed rule refers to a sale postponement of 14 days and says that notice of the rescheduled sale shall be served as described in § 29.109 of the proposed rule. However, § 29.109 requires three weeks of publication. The commenter suggested that § 29.115 of the proposed rule, which deals with adjournment or cancellation of a sale, should be referenced rather than § 29.109, which deals with service of the Notice of Default and Foreclosure Sale.

Response: The commenter is correct and an appropriate change has been made to § 29.107(d) of this final rule, which also specifies that the sale may be cancelled in addition to being

postponed. Conforming changes have been made to the appropriate provisions contained in the appendix.

Comment: Adjournment or Cancellation of Sale. One commenter suggested eliminating the cost of publication required by paragraph (c) of proposed § 29.115 by providing for an oral postponement as well as mail notification to bidders who had submitted sealed bids.

Response: This is a statutory requirement.

Comment: One commenter noted that paragraph § 29.115(c) of the proposed rule uses the word "adjourned," instead of "postponed," which is the term used in § 29.111(b) of the proposed rule.

Response: This provision is now contained in both § 29.107(d) and the appendix, and "adjourned" has been substituted for "postponed".

Comment: Disposition of Sale Proceeds. One commenter questioned the use of surplus funds from the sale in paragraph (a)(3) of § 29.121 of the proposed rule for payments of liens that are prior to the mortgage being foreclosed. The commenter stated that this would seem to conflict with the provisions of many security documents and probably is not what would be considered to be normal practice.

Response: This is a statutory requirement. In many cases, these prior liens will be in the nature of taxes, water and sewer liens, and the like. For Title I loans that are foreclosed, the liens may be senior mortgages.

Comment: A commenter suggested that a period of time for which records of the sale should be kept should be specified.

Response: The department's instructions to the foreclosure commissioners may specify the period of time for record retention.

Comment: Record of Foreclosure and Sale. One commenter noted that in subparagraph (a)(3) of § 29.127 of the proposed rule, the date the mortgage was recorded should be used rather than the date of the mortgage.

Response: This requirement is statutory; see 12 U.S.C. 3764(a)(2). However, the Department agrees that this additional information would be useful, and this is included in this final rule at § 29.121 and in the appendix.

Comment: One commenter suggested that it seems to be unnecessary to attach the names and addresses of the parties to whom notice was mailed, as set forth in subparagraph (a)(4) of § 29.127 of the proposed rule, as long as a recital relative to the proper mailing of notices is included in the other recitals.

Response: This is a statutory requirement. See 12 U.S.C. 3764(a)(3).

Comment: Recordation of affidavit and addendum. One commenter stated that the recitations contained in § 29.127(a) of the proposed rule should be recorded in the public records. The current language of the proposed rule may be interpreted to read that the commissioner can make the recitations in an affidavit or addendum, which need not be recorded with the deed. The commenter recommended that this language should be clarified to make it clear that the information should be recorded in the public records, in the deed or an affidavit or addendum to the deed.

Response: It is the Department's intent that this information be recorded, whether contained in the deed itself, or an affidavit or addendum. This will be clarified in the instructions to the commissioners.

Comment: Effect of sale. Section 29.127(c) of the proposed rule provides that a sale made and conducted under the provisions of the Act shall bar the interest of any person whose interest was not docketed or recorded before the date on which the notice of the foreclosure sale "was first served by publication." One commenter suggested that for consistency, this wording might be replaced with the wording set forth in § 29.109(b)(1).

Response: This is a statutory requirement. See section 816(3) of this Act.

III. Other Matters

Environmental Impact

In accordance with 40 CFR 1508.4 of the CEQ regulations and 24 CFR 50.20 of the HUD regulations, the policies and actions in this document are determined not to have the potential of having a significant impact on the quality of the human environment and therefore further environmental review under the National Environmental Policy Act is not necessary.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule before publication and, by approving it, certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The final rule is limited to implementation of statutory authority for the nonjudicial foreclosure of HUD-held single family mortgages, and there are no unusual procedures that would need to be complied with by small entities.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, the Family, has determined that this final rule would not have potential significant impact on family formation, maintenance, and general well-being, and thus is not subject to review under the Order. The final rule implements procedures for the nonjudicial foreclosure of HUD-held single family mortgages. These procedures would impact those families who would be required to vacate more quickly than under other procedures. However, this impact is expected to be small, and would be offset by the benefit to families to the extent that these procedures decrease the risk to single-family housing of vandalism, fire loss, depreciation, and damage and waste, and the attendant adverse effects on the neighborhoods in which the properties are located.

Executive Order 12512, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that although this final rule would have an effect on States or their political subdivisions, and the relationship between the Federal government and the States, the provisions of this final rule do not have "federalism implications" within the meaning of the Order because the authorizing statute provides for the preemption of State law.

List of Subjects in 24 CFR Part 29

Foreclosures, Mortgages.

Accordingly, title 24 CFR is amended by adding a new part 29, consisting of subparts A and B, to read as follows:

PART 29—NONJUDICIAL FORECLOSURE OF SINGLE FAMILY MORTGAGES**Subpart A—General**

Sec.

- 29.1 Purpose, scope and applicability.
29.3 Definitions.

Subpart B—Procedures

- 29.101 Designation of foreclosure commissioner and substitute commissioner.
29.103 Notice of default and foreclosure sale.
29.105 Service of Notice of Default and Foreclosure Sale.
29.107 Presale reinstatement.
29.109 Conduct of sale.
29.111 Adjournment or cancellation of sale.
29.113 Foreclosure costs.
29.115 Disposition of sales proceeds.
29.117 Transfer of title and possession.
29.119 Redemption rights.

- 29.121 Record of foreclosure and sale.
29.123 Deficiency judgment.

Authority: 12 U.S.C. 1715b, 3751–3768; 42 U.S.C. 1452b, 3535(d).

Subpart A—General**§ 29.1 Purpose, scope and applicability.**

(a) *Purpose.* The purpose of this part is to implement requirements for the administration of the Single Family Mortgage Foreclosure Act of 1994 (the Act), 12 U.S.C. 3751–3768, that clarify, or are in addition to, the requirements contained in the Act.

(b) *Scope.* The Secretary may foreclose on any defaulted single family mortgage described in the Act regardless of when the mortgage was executed.

(c) *Applicability.* The Secretary may, at the Secretary's option, use other procedures to foreclose defaulted single family mortgages, including judicial foreclosure in State or Federal Court, and nonjudicial foreclosures under State law or any other Federal law. This part applies only to foreclosure procedures authorized by the Act and not to any other foreclosure procedures the Secretary may use.

§ 29.3 Definitions.

The definitions contained in the Act (at 12 U.S.C. 3752) shall apply to this part, in addition to and as further clarified by the following definitions. As used in this part—

Act means the Single Family Mortgage Foreclosure Act of 1994.

County means a political subdivision of a State or Territory of the United States, created to aid in the administration of State law for the purpose of local self government, and includes a parish or any other equivalent subdivision.

Mortgage is as defined in the Act except that the reference to property as "(real, personal or mixed)" means "any property (real or mixed real and personal)."

Mortgage Agreement is as defined in the Act, and also means any other similar instrument or instruments creating the security interest in the real estate for the repayment of the note or debt instrument.

Mortgagor is a defined in the Act, except that the reference to "trustee" mean "trustor."

Record; Recorded means to enter or entered in public land record systems established under State statutes for the purpose of imparting constructive notice to purchasers of real property for value and without knowledge, and includes "register" and "registered" in the instance of registered land, and "file" and its variants in the context of

entering documents in public land records.

Secretary means the Secretary of Housing and Urban Development, acting by and through any authorized designee exclusive of the foreclosure commissioner.

Security Property is as defined in the statute except that the reference to property as "(real, personal or mixed)" means "any property (real or mixed real and personal)."

Subpart B—Procedures**§ 29.101 Designation of foreclosure commissioner and substitute commissioner.**

(a) The Secretary may designate foreclosure commissioners, including substitute commissioners, as set forth in the Act.

(b) The method of selection and determination of the qualifications of the foreclosure commissioner shall be at the discretion of the Secretary. The execution of a designation pursuant to this section shall be conclusive evidence that the commissioner selected has been determined to be qualified by the Secretary. The designation is effective upon execution.

§ 29.103 Notice of default and foreclosure sale.

(a) The foreclosure commissioner shall commence the foreclosure under the procedures set forth in the Act.

(b) The Notice of Default and Foreclosure Sale (Notice) shall include, in addition to the provisions as required by the Act:

(1) The foreclosure commissioner's telephone number;

(2) The legal description of the security property as contained in the mortgage instrument;

(3) The date the mortgage was recorded;

(4) Identification of the failure to make payment, including the entire amount delinquent as of a date specified, a statement generally describing the other costs that must be paid if the mortgage is to be reinstated, the due date of the earliest principal installment payment remaining wholly unpaid as of the date on which the notice is issued upon which the foreclosure is based, or a description of any other default or defaults upon which foreclosure is based, and the acceleration of the secured indebtedness; and

(5) The bidding and payment requirements for the foreclosure sale, including the time and method of payment of the balance of the foreclosure purchase price, that all deposits and the balance of the purchase

price shall be paid by certified or cashier's check, and that no deposit will be required of the Secretary when the Secretary bids at the foreclosure sale.

§ 29.105 Service of Notice of Default and Foreclosure Sale.

(a) The Notice of Default and Foreclosure Sale shall be served in accordance with the provisions of the Act. When notice is sent by mail, multiple mailings are not required to be sent to any party with multiple capacities, e.g., an original mortgagor who is the security property owner and lives in one of the units. The date of the receipt for the postage paid for the mailing may serve as proof of the date of mailing of the notice.

(b) Notice need not be mailed to any mortgagors who have been released from all obligations under the mortgage.

§ 29.107 Presale reinstatement.

(a) The foreclosure commissioner shall withdraw the security property from foreclosure and cancel the foreclosure sale only in accordance with the provisions of the Act and as more fully provided in this section, in regard to presale reinstatements.

(b) To obtain a presale reinstatement in cases involving a monetary default, there must be tendered to the foreclosure commissioner before public auction is completed all amounts which would be due under the mortgage agreement if payments under the mortgage had not been accelerated and all costs of foreclosure incurred for which payment from the proceeds of foreclosure is provided in the Act, and the foreclosure commissioner must find that there are no nonmonetary defaults; provided, however, that the Secretary may refuse to cancel a foreclosure sale pursuant to this paragraph if the current mortgagor or owner of record has, on one or more previous occasions, caused a foreclosure of the mortgage, commenced pursuant to this part or otherwise, to be canceled by curing a default.

(c) To obtain a presale reinstatement in cases involving a nonmonetary default:

(1) The foreclosure commissioner, upon application of the mortgagor before the date of foreclosure sale, must find that all nonmonetary defaults are cured and that there are no monetary defaults; and

(2) There must be tendered to the foreclosure commissioner before public auction is completed all amounts due under the mortgage agreement (excluding all amounts which would be due under the mortgage agreement if the mortgage payments had been

accelerated), including all amounts of expenditures secured by the mortgage and all costs of foreclosure incurred for which payment would be made from the proceeds of foreclosure as provided in the Act.

(d) Before withdrawing the security property from foreclosure, the foreclosure commissioner shall notify the Secretary of the proposed withdrawal by telephone or other telecommunication device and shall also provide the Secretary with a written statement of the reasons for the proposed withdrawal along with all documents submitted by the mortgagor in support of the proposed withdrawal. Upon receipt of this statement, the Secretary shall have ten (10) days in which to demonstrate why the security property should not be withdrawn from foreclosure, and if the Secretary makes this demonstration, the property shall not be withdrawn from foreclosure. The Secretary shall provide the mortgagor with a copy of any statement prepared by the Secretary in opposition to the proposed withdrawal at the same time the statement is submitted to the foreclosure commissioner. If the Secretary receives the foreclosure commissioner's written statement less than 10 days before the scheduled foreclosure sale, the sale shall automatically be adjourned for 14 days, during which time it may be cancelled. Notice of the re-scheduled sale, if any, shall be served as described in § 29.111.

§ 29.109 Conduct of sale.

(a) The foreclosure sale shall be conducted in a manner and at a time and place as identified in the Notice of Default and Foreclosure Sale and in accordance with the provisions of the Act.

(b) The foreclosure commissioner shall attend the foreclosure sale in person or, if the commissioner is not a natural person, through a duly authorized employee. If more than one commissioner has been designated, at least one shall attend the sale.

(c) In addition to bids made in person at the sale, the foreclosure commissioner shall accept written one-price sealed bids from any party, including the Secretary, for entry by announcement at the sale so long as those bids conform to the requirements described in the Notice of Default and Foreclosure Sale. The foreclosure commissioner shall announce the name of each such bidder and the amount of the bid. The commissioner shall accept oral bids from any party, including parties who submitted one-price sealed bids, if those oral bids conform to the requirements in the Notice of Default

and Foreclosure Sale. Before the close of the sale the commissioner shall announce the amount of the high bid and the name of the successful bidder. If the successful bidder fails to comply with the terms of the sale, the HUD Field Office representative will provide instructions to the commissioner about offering the property to the second highest bidder, or having a new sale, or other instruction at the discretion of the HUD representative.

(d) *Prohibited participants.* Relatives of the foreclosure commissioner who may not bid include parents, siblings, spouses and children. A related business entity that may not bid or whose employees may not bid is one whose relationship (at the time the foreclosure commissioner is designated and during the term of service as foreclosure commissioner) with the entity of the foreclosure commissioner is such that, directly or indirectly, one entity formulates, directs, or controls the other entity; or has the power to formulate, direct, or control the other entity; or has the responsibility and authority to prevent or promptly to correct, the offensive conduct of the other entity.

(e) *Auctioneers.* If the commissioner employs an auctioneer to conduct the foreclosure sale, the auctioneer must be a licensed auctioneer, an officer of State or local government, or any other person who commonly conducts foreclosure sales in the area in which the security property is located.

§ 29.111 Adjournment or cancellation of sale.

(a) The foreclosure commissioner may, before or at the time of the foreclosure sale, adjourn or cancel the foreclosure sale in accordance with the provisions of the Act. The publication of Notice of Default and Foreclosure Sale, revised pursuant to the Act, may be made on any of three consecutive days prior to the revised date of foreclosure sale so long as the first publication is made at least seven days before the date to which the sale has been adjourned. The commissioner shall, in the case of a sale adjourned to a later date, mail a copy of the revised Notice of Default and Foreclosure Sale to the Secretary at least seven days before the date to which the sale has been adjourned.

(b) When a substitute commissioner is designated by the Secretary to replace a previously designated foreclosure commissioner, the sale shall continue without prejudice unless the substitute commissioner finds, in that commissioner's sole discretion, that continuation of the foreclosure sale will unfairly affect the interests of the

mortgagor. Any such finding shall be in writing. If the substitute commissioner makes such a finding, the substitute commissioner shall cancel or adjourn the sale.

§ 29.113 Foreclosure costs.

A commission may be allowed to the foreclosure commissioner notwithstanding termination of the sale or appointment of a substitute commissioner before the sale takes place.

§ 29.115 Disposition of sales proceeds.

The foreclosure commissioner will keep such records as will permit the Secretary to verify the costs claimed, and otherwise to enable the Secretary to audit the foreclosure commissioner's disposition of the sale proceeds.

§ 29.117 Transfer of title and possession.

(a) If the Secretary is the successful bidder, the foreclosure commissioner shall issue a deed to the Secretary upon receipt of the amount needed to pay the costs of tax liens and prior liens, as set forth in 12 U.S.C. 3762 (a)(2) and (a)(3). If the Secretary is not the successful bidder, the foreclosure commissioner shall issue a deed to the purchaser or purchasers upon receipt of the entire purchase price in accordance with the terms of the sale as provided in the Notice of Default and Foreclosure Sale.

(b) The register of deeds or other appropriate official in the county where the property is located shall, upon tendering of the customary recording fees, accept all instruments pertaining to the foreclosure which are submitted by the foreclosure commissioner for recordation. The instruments to be accepted shall include, but not be limited to, the foreclosure commissioner's deed. If the foreclosure commissioner elects to include the recitations required under the Act (12 U.S.C. 3764) in an affidavit or an addendum to the deed, the affidavit or addendum shall be accepted along with the deed for recordation. The Clerk of the Court or other appropriate official shall cancel all liens as requested by the foreclosure commissioner.

§ 29.119 Redemption rights.

Only for purposes of redemption rights under the Act, a foreclosure shall be considered completed upon the date and at the time of the foreclosure sale.

§ 29.121 Record of foreclosure and sale.

The statements regarding the foreclosed mortgage required to establish a sufficient record shall include the date the mortgage was recorded. The statements regarding the service of the Notice of Default and

Foreclosure Sale shall include the names and addresses of the persons to whom the Notice was mailed and the date on which the Notice was mailed, the name of the newspaper in which the Notice was published and the dates of publication, and the date on which service by posting, if required, was accomplished.

§ 29.123 Deficiency judgment.

If the price at which the security property is sold at the foreclosure sale is less than the unpaid balance of the debt secured by such property after disposition of sale proceeds in accordance with the order of priority provided under the Act, the Secretary may refer the matter to the Attorney General who may commence an action or actions against any and all debtors to recover the deficiency, unless such an action is specifically prohibited by the mortgage.

Dated: October 20, 1995.

Henry G. Cisneros,
Secretary.

[The following appendix to part 29 will not be codified in title 24 of the Code of Federal Regulations.]

Appendix to Part 29: Nonjudicial Foreclosure of Single Family Mortgages—Guide

Item

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1. Purpose

The purpose of this guide is to present, in a single document, the statutory and regulatory requirements of the Single Family Mortgage Foreclosure Act of 1994 (the Act), 12 U.S.C. 3751–3768. Although it presents the regulatory and statutory requirements in a combined format, this guide is a secondary source for these requirements. The Code of Federal Regulations (CFR), at 24 CFR part 29, is the primary, governing source for regulatory requirements, and the Act is the primary, governing source for statutory requirements.

The Act creates a uniform Federal remedy for foreclosure of certain single family mortgages which are held by the Secretary of Housing and Urban Development pursuant to Title I of the National Housing Act, 12 U.S.C. 1702 *et seq.*, Title II of the National Housing Act, 12 U.S.C. 1707 *et seq.*, or Section 312 of the Housing Act of 1964, 42 U.S.C. 1452b (as it existed before repeal). The Secretary's powers under the Act to appoint a foreclosure commissioner or commissioners and substitute commissioners, and to fix the compensation of commissioners have been delegated to the HUD General Counsel.

The availability of uniform and more expeditious procedures, with no right of redemption in the mortgagor or others, for the foreclosure of these mortgages by the Department, will ameliorate the negative consequences of the disparate State laws under which mortgages covering one- to four-family residential properties are foreclosed on behalf of HUD. The long periods of time that are required under State law to complete foreclosure of such mortgages lead to deterioration in the condition of the properties involved, necessitate substantial Federal holding expenditures, increase the risk of vandalism, fire loss, depreciation, damage, and waste with respect to the properties, and adversely affect the neighborhoods in which the properties are located. These consequences seriously impair the ability of HUD to protect Federal financial interests in the properties and frustrate attaining the objectives of the underlying Federal program authority. Use of this nonjudicial foreclosure procedure will also reduce unnecessary litigation, which contributes to already overcrowded court calendars, by removing many foreclosures from the courts.

2. Scope and Applicability

(a) Scope. Under the Act, HUD may foreclose on any defaulted single family mortgage (as defined in section 3 of this appendix), encumbering real estate in any State regardless of when the mortgage was executed.

(b) Applicability. HUD, at its discretion, may use other procedures to foreclose defaulted single family mortgages, including judicial foreclosure in State or Federal Court, and nonjudicial foreclosures under State law or any other Federal law.

3. Definitions

As used in this guide—

Act means the Single Family Mortgage Foreclosure Act of 1994.

Bona fide purchaser means a purchaser for value in good faith and without notice of any adverse claim, and who acquires the security property free of any adverse claim.

County means a political subdivision of a State or Territory of the United States, created to aid in the administration of state law for the purpose of local self-government, and includes a parish or any other equivalent subdivision.

Mortgage means a deed of trust, mortgage, deed to secure debt, security agreement, or any other form of instrument under which any property (real or mixed real and personal), or any interest in property

(including leaseholds, reversionary interests, and any other estates under applicable State law), is conveyed in trust, mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.

Mortgage agreement means the note or debt instrument and the mortgage instrument, deed of trust instrument, trust deed, or any other similar instrument or instruments creating the security interest in the real estate for the repayment of the note or debt instrument, including any instrument incorporated by reference therein and any instrument or agreement amending or modifying any of the foregoing.

Mortgagor means the debtor, obligor, grantor, or trustor named in the mortgage agreement and, unless the context otherwise indicates, includes the current owner of record of the security property whether or not such owner is personally liable on the mortgage debt.

Owner means any person who has an ownership interest in the property and includes heirs, devisees, executors, administrators, and other personal representatives, and trustees of testamentary trusts if the owner of record is deceased.

Person includes any individual, group of individuals, association, partnership, corporation, or organization.

Record; Recorded means to enter or entered in public land record systems established under State statutes for the purpose of imparting constructive notice to purchasers of real property for value and without actual knowledge, and includes "register" and "registered" in the instance of registered land, and "file" and its variants in the context of entering documents in public land records.

Secretary means the Secretary of Housing and Urban Development, acting by and through any authorized designee exclusive of the foreclosure commissioner.

Security property means the property (real or mixed real and personal) or an interest in property (including leaseholds, life estates, reversionary interests, and any other estates under applicable law), together with fixtures and other interests subject to the lien of the mortgage under applicable law.

Single family mortgage means a mortgage that covers property on which there is located a 1- to 4-family residence, and that:

(1) Is held by the Secretary pursuant to title I or title II of the National Housing Act (12 U.S.C. 1701 et seq.); or

(2) Secures a loan obligated by the Secretary under section 312 of the Housing Act of 1964 as it existed before the repeal of that section by section 289 of the Cranston-Gonzalez National Affordable Housing Act. A mortgage securing such a loan that covers property containing nonresidential space and a 1- to 4-family dwelling is not subject to foreclosure under the Act.

State means:

- (1) The several States;
- (2) The District of Columbia;
- (3) The Commonwealth of Puerto Rico;
- (4) The United States Virgin Islands;
- (5) Guam;
- (6) American Samoa;

(7) The Northern Mariana Islands; and
(8) Indian tribes, meaning any Tribe, band, group or nation, including Alaskan Indians, Aleuts, and Eskimos, and any Alaskan Native Village of the United States that is considered an eligible recipient under Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450) or was considered an eligible recipient under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221) before repeal of that Act. Eligible recipients under the Indian Self-Determination and Education Assistance Act are determined by the Bureau of Indian Affairs.

4. Designation of Foreclosure Commissioner

(a) The Secretary may designate a person or persons to serve as a foreclosure commissioner for the purpose of foreclosing single family mortgages, and such a foreclosure commissioner has a nonjudicial power of sale as provided under the Act.

(b) The foreclosure commissioner, if a natural person, must be a resident of the State in which the security property is located and, if not a natural person, the foreclosure commissioner must be duly authorized to transact business under laws of the State in which the security property is located. No person shall be designated as a foreclosure commissioner unless that person is determined by the Secretary to be responsible, financially sound, and competent to conduct a foreclosure. The method of selection and determination of the qualifications of the foreclosure commissioner are at the discretion of the Secretary, and the execution of a designation pursuant to the Act is conclusive evidence that the commissioner selected has been determined to be qualified by the Secretary.

(c) The Secretary designates a foreclosure commissioner by executing a written designation stating the name and business or residential address of the commissioner, except that if a person is designated in his or her capacity as an official or employee of a government or corporate entity, such a person may be designated by his or her unique title or position instead of by name. The designation is effective upon execution.

(d) The Secretary may designate, with or without cause, a substitute foreclosure commissioner to replace a previously designated foreclosure commissioner, by the procedure contained in paragraph (c) of this item.

(1) A substitution of the foreclosure commissioner may be made at any time prior to the time of the foreclosure sale, and the foreclosure shall continue without prejudice, unless the substitute commissioner, in that commissioner's sole discretion, finds that continuation of the foreclosure sale will unfairly affect the interests of the mortgagor. Any such finding must be in writing. If the substitute commissioner makes such a finding, the substitute commissioner will cancel the foreclosure sale, or adjourn the sale as explained in item 11 of this appendix.

(2) If a substitute commissioner is designated, a copy of the written notice of the designation referred to in paragraph (c) of this item must be served:

(i) By mail, as described in item 8 of this appendix, (except that the minimum time

periods between mailing and the date of the foreclosure sale do not apply); or

(ii) In any other manner which, in the substitute foreclosure commissioner's sole discretion, is conducive to achieving timely notice of such substitution.

5. Prerequisites to Foreclosure

(a) The Secretary may commence foreclosure of a single family mortgage under the Act upon the breach of a covenant or condition in the mortgage agreement.

(b) No foreclosure under the Act may be commenced unless any previously pending judicial or nonjudicial proceeding that has been separately instituted by the Secretary to foreclose the mortgage in a manner other than under the Act has been withdrawn, dismissed, or otherwise terminated.

(c) The Secretary will not institute any separate foreclosure proceeding concerning a property while it is the subject of a foreclosure pursuant to the Act.

(d) The Act does not preclude the Secretary from enforcing any right, other than foreclosure, under applicable Federal or State law, including any right to obtain a monetary judgment, or foreclosing under the Act if the Secretary has obtained or is seeking any other remedy available pursuant to Federal or State law, or under the mortgage agreement.

6. Commencement of Foreclosure

If the Secretary determines that the prerequisites to foreclosure set forth in item 5 of this appendix are satisfied, the Secretary may direct the foreclosure commissioner to commence foreclosure of the mortgage. Upon such request, the foreclosure commissioner will commence foreclosure of the mortgage in accordance with item 7 of this appendix.

7. Notice of Default and Foreclosure Sale

The commissioner commences the foreclosure by serving a Notice of Default and Foreclosure Sale. The Notice sets forth the name, address and telephone number of the foreclosure commissioner and the date on which the Notice was issued, along with the following information:

(a) The current mortgagee (that is, the Secretary), the original mortgagee (if other than the Secretary), and the original mortgagor.

(b) The street address or a description of the location of the security property and the legal description of the security property as contained in the mortgage instrument.

(c) The date of the mortgage, the date the mortgage was recorded, the office in which the mortgage is recorded, and the liber and folio numbers or other appropriate description of the location of recordation of the mortgage.

(d) Identification of the failure to make payment, including the entire amount delinquent as of a date specified, a statement generally describing the other costs that must be paid if the mortgage is to be reinstated, the due date of the earliest principal installment payment remaining wholly unpaid as of the date on which the Notice is issued upon which the foreclosure is based, or a description of any other default or defaults upon which foreclosure is based, and the acceleration of the secured indebtedness.

(e) The date, time, and location of the foreclosure sale.

(f) A statement that the foreclosure is being conducted in accordance with the Act.

(g) A description of the types of costs, if any, to be paid by the purchaser upon transfer of title.

(h) The bidding and payment requirements for the foreclosure sale, including the amount and method of deposit to be required at the foreclosure sale, and the time and method of payment of the balance of the foreclosure purchase price. The Notice must state that all deposits and the balance of the purchase price must be paid by certified or cashier's check. The Notice must also state that no deposit will be required of the Secretary when the Secretary bids at the foreclosure sale.

(i) Any other appropriate terms of sale or information as the Secretary may determine.

8. Service of Notice of Default and Foreclosure Sale

The foreclosure commissioner will serve the Notice of Default and Foreclosure Sale upon the following persons and in the following manner, and no additional notice will be required to be served, notwithstanding any notice requirements of any State or local law:

(a) Filing the notice. The Notice of Default and Foreclosure Sale must be filed not less than 21 days before the date of the foreclosure sale in the manner authorized for filing a notice of an action concerning real property according to the law of the State in which the security property is located, or if none, in the manner authorized by Section 3201 of title 28, United States Code.

(b) Notice by mail. (1) The Notice must be sent by certified or registered mail, postage prepaid, return receipt requested, to the following (except that multiple mailings are not required to be sent to any party with multiple capacities, e.g., an original mortgagor who is the security property owner and lives in one of the units):

(i) The current security property owner of record, as the record existed 45 days before the date originally set for the foreclosure sale, whether or not the notice describes a sale adjourned as provided in the Act. The Notice must be mailed not less than 21 days before the date of the foreclosure sale to the current owner at the last address known to the Secretary or the foreclosure commissioner or, if none, to address of the security property, or, at the discretion of the foreclosure commissioner, to any other address believed to be that of the current owner.

(ii) The original mortgagor and all subsequent mortgagors of record or other persons who appear on the basis of the record to be liable for part or all of the mortgage debt, as the record existed 45 days before the date originally set for the foreclosure sale, whether or not the Notice describes a sale adjourned as provided in the Act, except that the Notice need not be mailed to any mortgagors who have been released from all obligations under the mortgage. Notice under paragraph (b) of this item must be mailed not less than 21 days before the date of the foreclosure sale to the last known address of the mortgagors or, if

none, to the address of the security property, or, at the discretion of the foreclosure commissioner, to any other address believed to be that of such mortgagors.

(iii) All dwelling units in the security property, whether or not the Notice describes a sale adjourned as provided in this part. Notice under paragraph (b) of this item shall be mailed not less than 21 days before the date of the foreclosure sale. If the names of the occupants of the security property are not known to the Secretary, or if the security property has more than one dwelling, the Notice must be posted at the security property not less than 21 days before the foreclosure sale.

(iv) All persons holding liens of record upon the security property, as the record existed 45 days before the date originally set for the foreclosure sale, whether or not the notice describes a sale adjourned as provided in the Act. Notice under this paragraph (b) of this item must be mailed not less than 21 days before the date of the foreclosure sale to each such lienholder's address of record, or, at the discretion of the foreclosure commissioner, to any other address believed to be that of such lienholder.

(2) Notice by mail is deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the notice is returned. The date of the receipt for the postage paid for the mailing may serve as proof of the date of mailing of the notice.

(c) Publication. (1) A copy of the Notice of Default and Foreclosure Sale must be published once a week during three successive calendar weeks before the date of the foreclosure sale. Such publication must be in a newspaper or newspapers having general circulation in the county or counties in which the security property being sold is located. A legal newspaper that is accepted as a newspaper of legal record in the county or counties in which the security property being sold is located is a newspaper having general circulation for the purposes of this paragraph.

(2) If there is no newspaper of general circulation published at least weekly in the county or counties in which the security property being sold is located, copies of the Notice of Default and Foreclosure Sale must be posted, not less than 21 days before the date of the foreclosure sale, at the courthouse of any county or counties in which the security property is located and at the place where the sale is to be held.

9. Presale Reinstatement

(a) Except as provided in paragraph (d) of item 4 of this appendix, paragraph (b) of this item, and item 11 of this appendix, the foreclosure commissioner will withdraw the security property from foreclosure and cancel the foreclosure sale only if:

(1) The Secretary directs the foreclosure commissioner to do so before or at the time of the sale; or

(2) The foreclosure commissioner finds, upon application of the mortgagor not less than three business days before the date of the sale, that the default or defaults upon which the foreclosure is based did not exist at the time of service of the Notice of Default and Foreclosure Sale; or

(3) In the case of a foreclosure involving a monetary default, there is tendered to the foreclosure commissioner before public auction is completed all amounts that would be due under the mortgage agreement if payments under the mortgage had not been accelerated, all costs of foreclosure incurred for which payment from the proceeds of foreclosure is provided in item 13 of this appendix, and the foreclosure commissioner finds that there are no nonmonetary defaults; provided, however, that the Secretary may refuse to cancel a foreclosure sale pursuant to this subparagraph if the current mortgagor or owner of record has, on one or more previous occasions, caused a foreclosure of the mortgage, commenced pursuant to the Act or otherwise, to be canceled by curing a default; or

(4) In the case of a foreclosure involving a nonmonetary default:

(i) The foreclosure commissioner, upon application of the mortgagor before the date of foreclosure sale, finds that all nonmonetary defaults are cured and that there are no monetary defaults; and

(ii) There is tendered to the foreclosure commissioner before public auction is completed all amounts due under the mortgage agreement (excluding all amounts which would be due under the mortgage agreement if the mortgage payments had been accelerated), including all amounts of expenditures secured by the mortgage and all costs of foreclosure incurred for which payment would be made from the proceeds of foreclosure.

(b) Before withdrawing the security property from foreclosure under paragraphs (a)(2), (a)(3), or (a)(4) of this item, the foreclosure commissioner must notify the Secretary of the proposed withdrawal by telephone or other telecommunication device and must also provide the Secretary with a written statement of the reasons for the proposed withdrawal along with all documents submitted by the mortgagor in support of the proposed withdrawal. Upon receipt of this statement, the Secretary has ten (10) days in which to demonstrate why the security property should not be withdrawn from foreclosure, and if the Secretary makes this demonstration, the property will not be withdrawn from foreclosure. The Secretary will provide the mortgagor with a copy of any statement prepared by the Secretary in opposition to the proposed withdrawal at the same time the statement is submitted to the foreclosure commissioner. If the Secretary receives the foreclosure commissioner's written statement less than 10 days before the scheduled foreclosure sale, the sale will automatically be adjourned for 14 days, during which time it may also be canceled. Under these circumstances, notice of the rescheduled sale, if any, will be served as described in item 11(c) of this appendix.

(c) If the foreclosure commissioner cancels the foreclosure, the mortgage will continue in effect as though acceleration had not occurred.

(d) Cancellation of a foreclosure sale will have no effect on the commencement of a subsequent foreclosure proceeding.

(e) The foreclosure commissioner must file a notice of cancellation in the same place and

manner provided for filing the Notice of Default and Foreclosure Sale as provided in item 8 of this appendix.

10. Conduct of Sale

(a) The foreclosure sale will be conducted in a manner and at a time and place as identified in the Notice of Foreclosure and Sale and more fully described in this item. The sale will be scheduled for a date 30 or more days after the due date of the earliest unpaid installment as described in item 7(d) of this appendix, or the earliest occurrence of a nonpayment default. The sale will be held at public auction and must be scheduled to being at a time between the hours of 9:00 a.m. and 4:00 p.m. local time. The sale will be scheduled for a place where foreclosure real estate auctions are customarily held in the county or counties in which the property to be sold is located, or at a courthouse therein, or at or on the property to be sold. If the security property is situated in two counties, the sale may be held in any one of the counties in which any part of the security property is situated.

(b) The foreclosure commissioner will conduct the foreclosure sale in a manner that is fair to both the mortgagor and the Secretary (see item 12 of this appendix), and consistent with the provisions of the Act.

(c) The foreclosure commissioner will attend the foreclosure sale in person or, if the commissioner is not a natural person, through a duly authorized employee. If more than one commissioner has been designated, at least one must attend the sale.

(d) In addition to bids made in person at the sale, the foreclosure commissioner will accept written one-price sealed bids from any party, including the Secretary, for entry by announcement at the sale so long as those bids conform to the requirements described in the Notice of Default and Foreclosure Sale. The foreclosure commissioner will announce the name of each bidder and the amount of the bid. The commissioner will accept oral bids from any party, including parties who submitted one-price sealed bids, if those oral bids conform to the requirements in the Notice of Default and Foreclosure Sale. Before the close of the sale, the commissioner will announce the amount of the high bid and the name of the successful bidder.

(e) Notwithstanding the provisions of paragraph (d) of this item, neither the foreclosure commissioner nor any relative, related business entity, or employee is permitted to bid in any manner on the security property subject to the foreclosure sale, except that the foreclosure commissioner or an auctioneer may be directed by the Secretary to enter a bid on the Secretary's behalf. Relatives of the foreclosure commissioner who may not bid include parents, siblings, spouses and children. A related business entity that may not bid or whose employees may not bid is one whose relationship (at the time the foreclosure commissioner is designated and during the term of service as foreclosure commissioner) with the entity of the foreclosure commissioner is such that, directly or indirectly, one entity formulates, directs, or controls the other entity; or has the power to formulate, direct, or control the

other entity; or has the responsibility and authority to prevent, or promptly to correct, the offensive conduct of the other entity.

(f) The commissioner may serve as an auctioneer, or the commissioner may employ an auctioneer to conduct the sale. If the commissioner employs an auctioneer to conduct the foreclosure sale, the auctioneer must be a licensed auctioneer, an officer of State or local government, or any other person who commonly conducts foreclosure sales in the area in which the security property is located. The commissioner will compensate an auctioneer from the proceeds of the commission described in item 13(e) of this appendix.

(g) The foreclosure commissioner may require a bidder to make a deposit in an amount or percentage set by the foreclosure commissioner and stated in the Notice of Default and Foreclosure Sale before the bid is accepted.

(h) A successful bidder at the foreclosure sale who fails to comply with the terms of the sale may be required to forfeit the cash deposit or, at the election of the foreclosure commissioner after consultation with the Secretary, will be liable to the Secretary for any costs incurred as a result of such failure. If the successful bidder fails to comply with the terms of the sale, the HUD Field Office representative will provide instructions to the commissioner about offering the property to the second highest bidder, or having a new sale, or other instruction at the discretion of the HUD representative.

11. Adjournment or Cancellation of Sale

(a) The foreclosure commissioner may, before or at the time of the foreclosure sale, adjourn or cancel the foreclosure sale if the foreclosure commissioner determines, in the foreclosure commissioner's discretion, that:

(1) Circumstances are not conducive to a sale which is fair to the mortgagor and the Secretary, or

(2) Additional time is necessary to determine whether the security property should be withdrawn from foreclosure, as provided in item 9 of this appendix.

(b) The foreclosure commissioner may adjourn a foreclosure sale to a later hour the same day by announcing or posting, at the original place of sale, the new time and place of the foreclosure sale, which must be held between 9 a.m. and 4 p.m. at the original place of sale.

(c) Except as provided in paragraph (b) of this item, the foreclosure commissioner may adjourn a foreclosure sale for not less than 9 and not more than 31 days, in which case the foreclosure commissioner must serve a Notice of Default and Foreclosure Sale that is revised to state that the foreclosure sale has been adjourned to a specified date between the hours of 9:00 a.m. and 4:00 p.m. The revised Notice may include any other information the foreclosure commissioner deems appropriate. Such Notice must be served by publication and mailing as provided in item 8 of this appendix, except that publication may be made on any of three consecutive days prior to the revised date of foreclosure sale, as long as the first publication is made at least seven days before the revised sale date. Mailing may be made

at any time at least seven days before the date to which the foreclosure sale has been adjourned. The commissioner must also, in the case of a sale adjourned to a later date, mail a copy of the revised Notice of Default and Foreclosure Sale to the Secretary at least seven days before the date to which the sale has been adjourned.

12. Validity of Sale

Any foreclosure sale held in accordance with the Act and its regulations is conclusively presumed to have been conducted in a fair, legal, and reasonable manner. The sale price is conclusively presumed to be reasonable and equal to the fair market value of the property.

13. Foreclosure Costs

The following foreclosure costs are paid from the sale proceeds, or from other available sources if sales proceeds are insufficient, before satisfaction of any other claim to the sale proceeds:

(a) Advertising costs and postage expenses incurred in giving notice described in items 8 and 11 of this appendix.

(b) Mileage by the most reasonable road distance for posting notices described in item 8 of this appendix, and for the foreclosure commissioner's or auctioneer's attendance at the sale. The mileage is paid at the rate provided in 28 U.S.C. 1821.

(c) Reasonable and customary costs incurred for title and lien record searches.

(d) The necessary out-of-pocket costs incurred by the foreclosure commissioner for recording documents.

(e) A commission for the foreclosure commissioner (if the foreclosure commissioner is not an employee of the United States) for the conduct of the foreclosure in an amount to be determined by the Secretary. A commission may be allowed to the foreclosure commissioner notwithstanding termination of the sale or appointment of a substitute commissioner before the sale takes place.

14. Disposition of Sale Proceeds

(a) The proceeds of the foreclosure sale are paid out in the following order:

(1) To cover the costs of foreclosure described in item 13 of this appendix.

(2) To pay valid tax liens or assessments on the security property as provided in the Notice of Default and Foreclosure Sale.

(3) To pay any liens recorded before the recording of the foreclosed mortgage which are required to be paid in conformity with the Notice of Default and Foreclosure Sale.

(4) To pay service charges and advances for taxes, assessments, and property insurance premiums which were made under the terms of the foreclosed mortgage.

(5) To pay the interest due under the mortgage debt.

(6) To pay the unpaid principal balance secured by the mortgage (including expenditures for the necessary protection, preservation, and repair of the security property as authorized under the mortgage agreement and interest thereon if provided in the mortgage agreement).

(7) To pay any late charges or fees.

(b) Any surplus proceeds from a foreclosure sale will be applied, after

payment of the items described in paragraph (a) of this item, in the order as follows:

(1) To pay any liens recorded after the foreclosed mortgage in the order of priority under the law of the State in which the security property is located.

(2) To pay the surplus to the mortgagor.

(c) If the person to whom surplus proceeds are to be paid cannot be located, or if the surplus available is insufficient to pay all claimants and the claimants cannot agree on the allocation of the surplus, or if any person claiming an interest in the mortgage proceeds disagrees with the foreclosure commissioner's proposed disposition of the disputed proceeds, the foreclosure commissioner may deposit the disputed funds with a legally authorized official or court. If a procedure for the deposit of disputed funds is not available, and the foreclosure commissioner files a bill of interpleader or is sued as a stakeholder to determine entitlement to such funds, the foreclosure commissioner's necessary costs in taking or defending such action are deductible from the disputed funds.

(d) The foreclosure commissioner will keep such records as will permit the Secretary to verify the costs claimed, and otherwise to enable the Secretary to audit the foreclosure commissioner's disposition of the sale proceeds.

15. Transfer of Title and Possession

(a) If the Secretary is the successful bidder, the foreclosure commissioner will issue a deed to the Secretary upon receipt of the amount needed to pay the costs of tax liens and prior liens. See items 14(a)(2) and (a)(3) of this appendix.

(b) If the Secretary is not the successful bidder, the foreclosure commissioner will issue a deed to the purchaser or purchasers upon receipt of the entire purchase price in accordance with the terms of the sale as provided in the Notice of Default and Foreclosure Sale.

(c) The deed or deeds issued by the foreclosure commissioner shall be without warranty or covenants to the purchaser or purchasers. Notwithstanding any State law to the contrary, delivery of a deed by the foreclosure commissioner is a conveyance of the property and constitutes passage of good and marketable title to the mortgaged property. No judicial proceedings are required ancillary or supplementary to the procedures provided under the Act and its regulations to assure the validity of the conveyance or confirmation of such conveyance. The purchaser of property under the Act is presumed to be a bona fide purchaser.

(d) A purchaser at a foreclosure sale held pursuant to the Act is entitled to possession upon passage of title under paragraph (c) of this item, subject to any interest or interests that are not barred, as described in item 18, below. Any person remaining in possession of the property after the passage of title is deemed a tenant at sufferance subject to eviction under applicable law.

(e) If a purchaser dies before execution and delivery of the deed conveying the property to the purchaser, the foreclosure commissioner will execute and deliver the

deed to a legal representative of the decedent purchaser's estate upon payment of the purchase price in accordance with the terms of sale. Such delivery to the representative of the purchaser's estate will have the same effect as if accomplished during the lifetime of the purchaser.

(f) When the foreclosure commissioner conveys the property to the Secretary, no tax may be imposed or collected with respect to the foreclosure commissioner's deed, including any tax customarily imposed upon the deed instrument or upon the conveyance or transfer of title to the property.

(g) The register of deeds or other appropriate official in the county where the property is located must, upon tendering of the customary recording fees, accept all instruments pertaining to the foreclosure which are submitted by the foreclosure commissioner for recordation. The instruments to be accepted include, but are not limited to, the foreclosure commissioner's deed. If the foreclosure commissioner elects to include the recitations described in item 17(a) of this appendix, in an affidavit or an addendum to the deed as described in item 17(b) of this appendix, the affidavit or addendum must be accepted for recordation. Failure to collect or pay a tax as described in paragraph (f) of this item are not grounds for refusing to record such instruments, for failing to recognize such recordation as imparting notice, or for denying the enforcement of such instruments and their provisions in any State or Federal Court.

(h) The Clerk of the Court or other appropriate official must cancel all liens as requested by the foreclosure commissioner.

16. Redemption Rights

(a) There is no right of redemption, or right of possession based upon a right of redemption, in the mortgagor or others subsequent to a foreclosure completed pursuant to the Act. In regard to the pre-emption of State laws regarding rights of redemption, a foreclosure is considered completed upon the date and at the time of the foreclosure sale.

(b) Section 204(l) of the National Housing Act, 42 U.S.C. 1710(l), and section 701 of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. 1452c, do not apply to mortgages foreclosed under the Act.

17. Record of Foreclosure and Sale

(a) The foreclosure commissioner must include in the recitals of the deed to the purchaser, or in an affidavit or addendum to the deed, the following items:

(1) The date, time, and place of the foreclosure sale.

(2) A statement that the foreclosed mortgage was held by the Secretary.

(3) The date of the foreclosed mortgage, the date of the recording of the mortgage that was foreclosed, the office in which the mortgage was recorded, and the liber and folio numbers or other appropriate description of the recordation of the mortgage.

(4) The details of the service of the Notice of Default and Foreclosure Sale, including the names and addresses of the persons to

whom the Notice was mailed and the date on which the Notice was mailed, the name of the newspaper in which the Notice was published and the dates of publication, and the date on which service by posting, if required, was accomplished.

(5) The date and place of filing the Notice of Default and Foreclosure Sale.

(6) A statement that the foreclosure was conducted in accordance with the provisions of the Act and with the terms of the Notice of Default and Foreclosure Sale.

(7) The name of the successful bidder and the amount of the successful bid.

(b) The foreclosure commissioner may, in his or her discretion, make the recitations in paragraph (a) of this item in the deed or in an affidavit or addendum to the deed, either of which is to be recorded with the deed as provided in the Act.

(c) The items set forth in paragraph (a) of this item are prima facie evidence of the truth of such facts in any Federal or State court and evidence a conclusive presumption in favor of bona fide purchasers and encumbrancers for value without notice. Encumbrancers for value include liens placed by lenders who provide the purchaser with purchase money in exchange for a security interest in the newly-conveyed property.

18. Effect of Sale

A sale made and conducted as prescribed in the Act to a bona fide purchaser bars all claims upon, or with respect to, the property sold for the following persons:

(a) Any person to whom the Notice of Default and Foreclosure Sale was mailed as provided under the Act, and the heir, devisee, executor, administrator, successor or assignee claiming under any such person.

(b) Any person claiming any interest in the property subordinate to that of the mortgage if such person had actual knowledge of the foreclosure sale.

(c) Any person claiming any interest in the property whose assignment, mortgage, or other conveyance was not duly recorded or filed in the proper place for recording or filing, or whose judgment or decree was not duly docketed or filed in the proper place for docketing or filing, before the date on which the notice of the foreclosure sale was first served by publication, as described in item 8(c) of this appendix, and the executor, administrator, or assignee of such a person.

(d) Any person claiming an interest in the property under a statutory lien or encumbrance created subsequent to the recording or filing of the mortgage being foreclosed, and attaching to the title or interest of any person designated in any of the foregoing paragraphs.

19. Computation of Time

Periods of time provided for in the Act are calculated in consecutive calendar days including the day or days on which the actions or events occur, or are to occur. Any such period of time includes the day on which an event occurs or is to occur.

20. Deficiency Judgment

If the price at which the security property is sold at the foreclosure sale is less than the unpaid balance of the debt secured by such

property after deducting payments in the order described in item 14 of this appendix, the Secretary may refer the matter to the Attorney General who may commence an action or actions against any and all debtors to recover the deficiency, the only limitation on such action being a prohibition against pursuit of a deficiency that is specifically set forth in the mortgage.

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