

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

Office of the Secretary

**24 CFR Parts 26, 28, 30, 81, 200, 950,
965, and 3500**

[Docket No. FR-4022-P-01]

RIN 2501-AC19

**Streamlining Hearing Procedures;
Proposed Rule**

AGENCY: Office of the Secretary, HUD.
ACTION: Proposed rule.

SUMMARY: In response to the President's regulatory reform initiatives, this proposed rule would streamline and consolidate many of HUD's regulations containing hearing procedures. This rule also proposes several substantive changes to these regulations in order to improve the hearing process and to make the regulations more closely follow applicable statutes. This proposed rule would make the regulations easier for the public to use and understand.

DATES: *Comments due:* June 24, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Emmett N. Roden, Assistant General Counsel for Administrative Proceedings, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, S.W., Room 10251, Washington, D.C. 20410, telephone (202) 708-2350. (This is not a toll-free number.) Hearing- and speech-impaired persons may access this number via TTY by calling the Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Regulatory Reinvention

On March 4, 1995, President Clinton issued a memorandum to all Federal departments and agencies regarding regulatory reinvention. In response to this memorandum, the Department of Housing and Urban Development conducted a page-by-page review of its regulations to determine which can be

eliminated, consolidated, or otherwise improved. HUD has determined that this proposed rule is necessary to consolidate and streamline HUD's various sets of regulations containing hearing procedures. Therefore, this proposed rule would consolidate several sets of hearing procedures into one part, thereby eliminating approximately 20 pages of unnecessary regulations from the Code of Federal Regulations (CFR).

II. Background

**A. Hearings According to the
Administrative Procedure Act**

In this rule, HUD proposes to use 24 CFR part 26 to contain two sets of hearing regulations. The first set of regulations would contain all the procedures that currently appear in part 26. These procedures apply in HUD proceedings before a hearing officer, including administrative sanction hearings under part 24 and hearings with respect to actions by the Mortgagee Review Board under part 25. This proposed rule would not change the substance of any of these provisions, but it would set them apart so that they all appear within a new subpart A of part 26.

This proposed rule would add the second set of regulations to form a new subpart B. The regulations in subpart B would contain a relatively uniform set of hearing procedures for formal hearings according to the Administrative Procedure Act (5 U.S.C. 551 et seq.) (APA). By adding these uniform procedures to subpart B of part 26, HUD intends to consolidate as many of its hearing procedures as possible into one part. This should make HUD's hearing procedures easier to use and understand.

The hearing procedures in subpart B would apply to hearings under the Program Fraud Civil Remedies Act of 1986, the procedures for which currently appear in part 28. Subpart B would also apply to hearings in which HUD seeks civil money penalties, the procedures for which currently appear in part 30, and to hearings pursuant to the Interstate Land Sales Full Disclosure Act, the procedures for which currently appear in part 1720. HUD intends that subpart B will be used in hearings conducted pursuant to the APA, unless other statutory or regulatory provisions apply.

In addition to consolidating these hearing procedures into one part and making them uniform, this proposed rule would also make a number of changes in order to streamline pleadings and reduce administrative overhead. This proposed rule contains specific

time limits to ensure rapid disposition of cases (see, e.g., §§ 26.39, 26.42, 26.44, 26.50). The proposed rule also would clarify that parties must seek Secretarial review in order to exhaust their administrative remedies before seeking judicial review, thereby addressing the Supreme Court's decision in *Darby v. Cisneros*, 113 S.Ct. 2539 (1993). This proposed rule also incorporates the Federal Rules of Civil Procedure for certain aspects of discovery (see §§ 26.41(a), (c); § 26.43(b)).

HUD specifically invites the public to comment on these procedural changes that would be incorporated into part 26 subpart B, as well as ways in which HUD could further streamline its hearing procedures.

**B. Program Fraud Civil Remedies Act of
1986**

Part 28 of HUD's regulations contains the procedures for imposing civil penalties and assessments, pursuant to the Program Fraud Civil Remedies Act of 1986 (PFCRA), upon persons who make false or fraudulent claims or statements to Federal authorities. HUD established the regulations in part 28 on June 24, 1988 (53 FR 24000). The Department of Health and Human Services led a task force to draft a model regulation to implement PFCRA, and part 28 follows the model closely with only minor variations to accommodate HUD's organizational and program structure.

This proposed rule would streamline the provisions in part 28 by removing the hearing procedures, and by retaining in their place a cross-reference to the uniform hearing procedures in part 26 subpart B (see, e.g., § 28.40 of this proposed rule). This proposed rule would also streamline the substantive provisions of the PFCRA regulations by eliminating unnecessary language and by clarifying the remaining language, making these regulations easier to use and understand. In addition to these streamlining changes, HUD also proposes to shorten the decision process by removing the reconsideration of initial determinations.

C. Civil Money Penalties

HUD established the civil money penalties regulations in part 30 on May 22, 1991 (56 FR 23622). These regulations implemented several sections of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235; approved December 15, 1989), which authorized HUD to impose civil money penalties for unlawful conduct in connection with a broad array of programs.

In this rule, HUD proposes to streamline the regulations in part 30. As with the regulations in part 28 for PFCRA, this proposed rule would remove the hearing procedures from part 30, maintaining a cross-reference to the uniform hearing procedures in part 26 subpart B. In addition, this proposed rule would eliminate three of the civil money penalty panels that exist in the current regulations: the Housing Civil Penalties Panel (HCPP), the Government National Mortgage Association Civil Penalties Panel (GCPP), and the Departmental Civil Penalties Panel (DCPP) (see § 30.205 of the current regulations). HUD created these panels to review recommendations for and to propose civil money penalties. However, this proposed rule would provide that certain appropriate HUD officials would replace the panels in their authority to initiate actions for civil money penalties. For instance, in § 30.20 of this proposed rule, the General Counsel or his or her designee, rather than the DCP, may initiate a civil money penalty action against HUD employees who improperly disclose information. See also §§ 30.25 through 30.60 of this proposed rule.

In addition to the streamlining changes contained in this proposed rule, HUD proposes to revise and clarify the list of violations for Government National Mortgage Association (GNMA) issuers and custodians (§ 30.45 of this proposed rule). HUD also proposes to revise the list of violations applicable to mortgagees and lenders to include the misuse of loan proceeds and the failure to comply with settlement agreements with HUD (§ 30.35(a)(11) and (a)(15) of this proposed rule), and to expand the violation for failure to service Section 235 mortgages to include other housing programs (§ 30.35(a)(10) of this proposed rule).

This proposed rule would also revise part 30 to include the civil money penalties that were enacted as part of the Housing and Community Development Act of 1992 (Pub. L. 102-550; approved October 28, 1992). Specifically, the proposed rule would add provisions concerning failure to disclose lead-based paint (§ 30.60 of this proposed rule) and violations by mortgagees and lenders concerning loan guarantees for Indian Housing (§ 30.35(a)(14) of this proposed rule).

D. Conforming Changes

This proposed rule would also make necessary conforming changes, which are merely technical and nonsubstantive, to the following HUD regulations:

1. Government Sponsored Enterprises, 24 CFR part 81;

2. Participation and Compliance Requirements for Federal Housing Administration programs, 24 CFR 200.243;

3. Insurance Entities under the Indian Housing Programs, 24 CFR 950.190, and the Public Housing Programs, 24 CFR 965.205;

4. The Real Estate Settlement Procedures Act, 24 CFR part 3500.

III. Other Matters

National Environmental Policy Act

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(k) of HUD regulations, the policies and procedures contained in this proposed rule relate only to hearing procedures and administrative decisions, which do not constitute development decisions and do not affect the physical condition of a project area or building site. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule implements statutory authority intended to protect HUD's programs from abusive practices, but it will have no adverse or disproportionate economic impact on small businesses.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule does not have potential for significant impact on family formation, maintenance, and general well-being. No significant change in existing HUD policies or programs will result from promulgation of this proposed rule, as those policies and programs relate to family concerns. Therefore, the proposed rule is not subject to review under the Order.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under Section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the

distribution of power and responsibilities among the various levels of government. As a result, the proposed rule is not subject to review under the Order.

List of Subjects

24 CFR Part 26

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

24 CFR Part 28

Administrative practice and procedure, Claims, Fraud, Penalties.

24 CFR Part 30

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

24 CFR Part 81

Accounting, Federal Reserve System, Mortgagees, Reporting and recordkeeping requirements, Securities.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 950

Aged, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 965

Energy conservation, Government procurement, Grant programs—housing and community development, Lead poisoning, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements, Utilities.

24 CFR Part 3500

Consumer protection, Condominiums, Housing, Mortgages, Mortgage servicing, Reporting and recordkeeping requirements.

Accordingly, parts 26, 28, 30, 81, 200, 950, 965, and 3500 of title 24 of the Code of Federal Regulations are proposed to be amended as follows:

PART 26—HEARING PROCEDURES

1. The part heading for part 26 is revised to read as set forth above.

2. The authority citation for 24 CFR part 26 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

3. The heading of subpart A is revised to read, "Subpart A—Hearings Before Hearing Officers".

Subparts B, C, D, E, F, and G [Redesignated]

4. The headings for subparts B, C, D, E, F, and G are redesignated as undesignated center headings; and §§ 26.2 through 26.26 of subparts B, C, D, E, F, and G are redesignated as §§ 26.2 through 26.26 of subpart A.

5. A new subpart B is added to read as follows:

Subpart B—Hearings Pursuant to the Administrative Procedure Act

General

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- 26.28 Definitions.
- 26.29 Powers and duties of the Administrative Law Judge (ALJ).
- 26.30 Ex parte contacts.
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Subpart B—Hearings Pursuant to the Administrative Procedure Act

General

§ 26.27 Purpose and scope.

Unless otherwise specified in this part, the rules in this subpart B apply to hearings that HUD is required by statute to conduct pursuant to the Administrative Procedure Act (5 U.S.C. 554 *et seq.*).

§ 26.28 Definitions.

The following definitions apply to subpart B of this part:

Chief Docket Clerk means the Chief Docket Clerk of the Office of Administrative Law Judges at the following address: 409 3rd Street, S.W., Suite 320, Washington, D.C. 20024.

Complaint means the notice from HUD alleging violations of a HUD statute and/or regulation, citing the legal authority upon which it is issued, stating the relief HUD seeks, and informing a respondent of his or her right to file a response and to request an opportunity for a hearing before an Administrative Law Judge.

Response means the written response to a complaint, admitting or denying the allegations in the complaint and setting forth any affirmative defense and/or any mitigating factors or extenuating circumstances. A response is deemed a request for a hearing.

§ 26.29 Powers and duties of the Administrative Law Judge (ALJ).

Authority of the Administrative Law Judge (ALJ). The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made. The ALJ is authorized to:

- (a) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
- (b) Continue or recess the hearing in whole or in part for a reasonable period of time;
- (c) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
- (d) Administer oaths and affirmations;
- (e) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;
- (f) Rule on motions and other procedural matters;
- (g) Regulate the scope and timing of discovery;
- (h) Regulate the course of the hearing and the conduct of representatives and parties;
- (i) Examine witnesses;
- (j) Receive, rule on, exclude, or limit evidence;

(k) Upon motion of a party, take official notice of facts;

(l) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(m) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(n) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

§ 26.30 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 26.31 Disqualification of ALJ.

(a) An ALJ in a particular case may disqualify himself or herself.

(b) A party may file with the ALJ a motion for the ALJ's disqualification. The motion shall be accompanied by an affidavit alleging the grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the ALJ shall proceed no further in the case until the matter of disqualification is resolved.

§ 26.32 Parties to the hearing.

(a) *General*. The parties to the hearing shall be the respondent and HUD.

(b) *Rights of parties*. Except as otherwise limited by subpart B of this part, all parties may:

- (1) Be accompanied, represented, and advised by a representative;
- (2) Participate in any conference held by the ALJ;
- (3) Conduct discovery;
- (4) Agree to stipulations of fact or law, which shall be made part of the record;
- (5) Present evidence relevant to the issues at the hearing;
- (6) Present and cross-examine witnesses;
- (7) Present oral arguments at the hearing as permitted by the ALJ; and
- (8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 26.33 Separation of functions.

No officer, employee, or agent of the Federal Government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall, in that proceeding or any factually

related proceeding under subpart B of this part, participate or advise in the decision of the administrative law judge, except as a witness or counsel during the proceeding, or in its appellate review.

§ 26.34 Time computations.

(a) In computing any period of time under subpart B of this part, the time period begins the day following the act, event, or default and includes the last day of the period, unless the last day is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which case the time period includes the next business day. When the prescribed time period is seven days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

(b) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by an administrative law judge, the date of issuance is the date the order or decision is served by the Chief Docket Clerk.

(c) *Service by mail.* If a document is served by mail, five days shall be added to the time permitted for a response.

§ 26.35 Service and filing.

(a) *Filing.* All documents shall be filed with the Chief Docket Clerk, at the address listed in § 26.28. Filing may be by first class mail, delivery, facsimile transmission, or electronic means; however, the ALJ may place appropriate limits on filing by facsimile transmission or electronic means. All documents shall clearly designate the docket number and title of the proceeding.

(b) *Service.* One copy of all documents filed with the Chief Docket Clerk shall be served upon each party by the persons filing them and shall be accompanied by a certificate of service stating how and when such service has been made. Service may be made by delivery, first class mail, facsimile transmission, or electronic means; however, the ALJ may place appropriate limits on service by facsimile transmission or electronic means. Documents shall be served upon a party's address of residence or principal place of business, or, if the party is represented by counsel, upon counsel of record at the address of counsel. Service is complete when handed to the person or delivered to the person's office or residence and deposited in a conspicuous place. If service is by first-class mail, facsimile transmission or electronic means, service is complete upon deposit in the mail or upon electronic transmission.

§ 26.36 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) *Failure to comply with an order.* When a party fails to comply with an order, including an order compelling discovery, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, regard each matter about which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; or

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action under this part, the ALJ may dismiss the action or may issue an initial decision against the respondent.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document that is not filed in a timely fashion.

Prehearing Procedures

§ 26.37 Commencement of action.

An action under subpart B of this part shall commence with the Government's filing of a complaint, and a response thereto, as those terms are defined in § 26.28, with the Chief Docket Clerk. If the respondent fails to file a response, then the Government may file a motion for a default judgment, together with a copy of the complaint, in accordance with § 26.39.

§ 26.38 Motions.

(a) *General.* All motions shall state the specific relief requested and the basis therefor and, except during a conference or the hearing, shall be in writing. Written motions shall be filed and served in accordance with § 26.35.

(b) *Response to motions.* Unless otherwise ordered by the ALJ, a response to a written motion may be filed within 7 days after service of the motion. A party failing timely to

respond to a motion shall be deemed to have waived any objection to the granting of the motion.

§ 26.39 Default.

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 7 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

§ 26.40 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) Prehearing conferences may consider the following:

(1) Simplification of the issues;

(2) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents;

(3) Submission of the case on briefs in lieu of an oral hearing;

(4) Limitation of the number of witnesses;

(5) The exchange of witness lists and of proposed exhibits;

(6) Discovery;

(7) The time and place for the hearing; and

(8) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

§ 26.41 Discovery.

(a) Unless otherwise stated in subpart B of this part, discovery shall be conducted in accordance with the Federal Rules of Civil Procedure, except for Rule 26(a), (d) and (f).

(b) Discovery in Program Fraud Civil Remedies actions (24 CFR part 28), unless agreed to by the parties, shall be available only as ordered by the ALJ. The party opposing discovery shall have 10 days to respond to a motion for discovery. The ALJ shall grant a motion

for discovery only if he or she finds that discovery is necessary for the expeditious, fair, and reasonable consideration of the issues, is not unduly costly or burdensome, will not unduly delay the proceeding, and does not seek privileged information. The ALJ may grant discovery subject to a protective order under § 26.43. The request for approval sent to the Attorney General from the General Counsel or designee, as described in § 28.20 of this title, is not discoverable under any circumstances.

(c) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying. Nothing contained herein shall be interpreted to require the creation of a document.

(2) Requests for admissions.

(3) *Written interrogatories*. Such interrogatories shall be limited in number in accordance with Rule 33 of the Federal Rules of Civil Procedure.

(4) Depositions.

(d) *Motions to compel*. A party may file a motion to compel discovery. The motion shall describe the information sought, cite the opposing party's objection, and provide arguments supporting the motion. The opposing party may file a response to the motion, including a request for a protective order. The ALJ may issue an order compelling a response, issue sanctions pursuant to § 26.36, or issue a protective order. For purposes of paragraph (d) of this section, an evasive or incomplete answer to a request for discovery is treated as a failure to answer.

(e) Each party shall bear its own costs of discovery.

§ 26.42 Subpoenas.

(a) *General*. Upon written request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a deposition or hearing, and/or the production of documents. The request shall specify any documents to be produced and shall list the names and addresses of the witnesses.

(b) *Time of request*. A request for a subpoena in aid of discovery shall be filed in time to permit the conclusion of discovery 15 days before the date fixed for the hearing. A request for a subpoena to testify at the hearing shall be filed at least three days prior to the hearing, unless otherwise allowed by the ALJ for good cause shown.

(c) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(d) *Service and fees*. Subpoenas shall be served, and fees and costs paid to

subpoenaed witnesses, in accordance with Rule 45(b)(1) of the Federal Rules of Civil Procedure.

(e) *Motion to quash*. The individual to whom the subpoena is directed or a party may file a motion to quash the subpoena within 10 days after service, or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

§ 26.43 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, as provided for in Rule 26(c) of the Federal Rules of Civil Procedure.

Hearings

§ 26.44 General.

(a) *Time of hearing*. The hearing shall commence not later than 60 days following the filing of the complaint and response under § 26.37, unless the time is extended for good cause. The ALJ shall provide written notice to all parties of the reasons for any extension of time.

(b) *Location of hearing*. The hearing shall be held where the respondent resides or transacts business, or in such other place as may be agreed upon by the parties and the ALJ. Hearings for Program Fraud Civil Remedies Act cases shall be located in accordance with 31 U.S.C. 3803(g)(4).

(c) *Notice of hearing*. The ALJ shall issue a notice of hearing to all parties specifying the time and location of the hearing, the matters of fact and law to be heard, the legal authority under which the hearing is to be held, a description of the procedures for the conduct of the hearing, and such other matters as the ALJ determines to be appropriate.

(d) *Limitations for Program Fraud Civil Remedies Act cases*. The notice of hearing must be served upon the respondent within 6 years after the date on which the claim or statement is made. If the respondent fails to file a timely response to the Government's complaint, service of a default judgment under § 26.39 shall be regarded as a notice of hearing for purposes of this section. The statute of limitations may be extended by agreement of the parties.

(e) *Burden and standard of proof*. HUD shall prove the respondent's

liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(f) *Public hearings*. Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

§ 26.45 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. In order to be admissible, any written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

§ 26.46 Evidence.

(a) The ALJ shall admit any relevant oral or documentary evidence that is not privileged. The ALJ may, however, exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(b) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(c) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ in accordance with § 26.43.

§ 26.47 The record.

(a) The hearing will be recorded and transcribed. The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary or designee.

(b) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ in accordance with § 26.43.

§ 26.48 Posthearing briefs.

Posthearing briefs shall be filed only upon order by the ALJ.

§ 26.49 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the relief

granted. The ALJ shall consider such factors as may be set forth in applicable statutes and regulations.

(b) The ALJ shall serve the initial decision on all parties within 45 days after either the close of the record, or the expiration of time permitted for submission of posthearing briefs, whichever is later. The initial decision shall include a statement of each party's right to file a request for Secretarial review. The ALJ may extend the 45-day period for serving the initial decision in writing for good cause.

(c) If no appeal is timely filed with the Secretary or designee, the initial decision shall become the final agency action.

§ 26.50 Appeal to the Secretary.

(a) Except as otherwise set forth in paragraph (b) of this section, either party may file with the Secretary a petition for review within 30 days after the ALJ issues an initial decision. The Secretary or designee may extend the 30-day period for good cause. If the Secretary or designee does not act upon the petition for review within 90 days of its service, then the initial decision shall become final.

(b) *Appeals of Program Fraud Civil Remedies Act decisions (24 CFR part 28).* Only the respondent may file a petition for Secretarial review. The petition must be filed within 30 days after the ALJ issues the initial decision. The Secretary or designee may extend the 30-day period for good cause. If the Secretary or designee does not act upon the petition for review within 30 days of its service, then the initial decision shall become final.

(c) *Brief in support of petition.* The petition for review shall be accompanied by a written brief, not to exceed 10 pages, specifying exceptions to the initial decision and reasons supporting the exceptions.

(d) *Service.* The party submitting the petition for review shall serve a copy of the petition and brief in support on the other parties and on the Chief Docket Clerk.

(e) *Forwarding of the record.* Upon the filing of a petition for review, the ALJ shall forward the record of the proceeding to the Secretary or designee.

(f) *Brief in opposition.* Any opposing party may file a brief opposing review, not to exceed 10 pages, within 20 days of receiving the petition for review and accompanying brief. The brief in opposition shall be served on all parties.

(g) *Additional briefs.* If the petition is granted, then the Secretary or designee may order the filing of additional briefs.

(h) There is no right to appear personally before the Secretary or designee.

(i) There is no right to appeal any interlocutory ruling by the ALJ.

(j) In reviewing the initial decision, the Secretary or designee shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(k) The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Secretary or designee shall remand the matter to the ALJ for consideration of such additional evidence.

(l) The prohibitions of ex parte contacts in § 26.30 shall apply to contacts with the Secretary or designee.

(m) The Secretary or designee may affirm, reduce, reverse, compromise, remand, or settle any relief granted in the initial decision. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(n) The Secretary or designee shall promptly serve each party to the appeal with a copy of his or her decision and a statement describing the right to seek judicial review.

(o) *Judicial review.* Generally, a party must file a petition for judicial review within 20 days of service of the Secretary's determination, or the Secretary's determination shall become final and not subject to judicial review. In Program Fraud Civil Remedies Act matters (24 CFR part 28), the respondent shall have 60 days from the date that the determination is sent to the respondent in which to file a petition.

§ 26.51 Exhaustion of administrative remedies.

In order to fulfill the requirement of exhausting administrative remedies, a party must seek Secretarial review under § 26.50 prior to seeking judicial review of any initial decision issued under subpart B of this part.

§ 26.52 Judicial review.

Judicial review shall be in accordance with applicable statutory procedures and the procedures of the appropriate Federal court. The Government may not seek judicial review of an adverse determination of a Program Fraud Civil Remedies Act matter.

§ 26.53 Collection of civil penalties and assessments.

Collection of civil penalties and assessments shall be in accordance with applicable statutory provisions.

§ 26.54 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under §§ 26.52 or 26.53, or agreed upon in a compromise or settlement among the parties, may be collected by administrative offset under 31 U.S.C. 3716 or other applicable law. In Program Fraud Civil Remedies Act matters, an administrative offset may not be collected against a refund of an overpayment of Federal taxes then or later owing by the United States to the respondent.

6–8. Part 28 is revised to read as follows:

PART 28—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

Sec.

28.1 Purpose.

28.5 Definitions.

28.10 Basis for civil penalties and assessments.

28.15 Investigation.

28.20 Request for approval by the Justice Department.

28.25 Notice of civil penalty (and assessment).

28.30 Response.

28.35 Disclosure of documents.

28.40 Hearings.

28.45 Settlements.

Authority: 31 U.S.C. 3801; 42 U.S.C. 3535(d).

§ 28.1 Purpose.

This part:

(a) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to Federal authorities or to their agents; and

(b) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted pursuant to 24 CFR part 26, subpart B.

§ 28.5 Definitions.

The terms *ALJ* and *HUD* are defined in 24 CFR part 5.

Benefit means anything of value, including, but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan insurance or guarantee.

Claim means any request, demand, or submission:

(1) Made to HUD for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from HUD or to a party to a contract with HUD; or

(3) Made to HUD which has the effect of decreasing an obligation to pay or account for property, services, or money.

Knows or has reason to know means that a person has actual knowledge that a claim or statement is false, fictitious, or fraudulent; acts in deliberate ignorance of the truth or falsity of the claim or statement; or acts in reckless disregard of the truth or falsity of the claim or statement.

Person means any individual, partnership, corporation, association, private organization or entity.

Respondent means any person alleged to be liable for a civil penalty or assessment under § 28.25.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(1) With respect to a claim, to obtain approval or payment of a claim, or relating to eligibility to make a claim; or

(2) With respect to or relating to eligibility for a contract, bid, or proposal for a contract with; or a grant or cooperative agreement, loan, or benefit from; HUD, any State, any political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under the contract or the grant or cooperative agreement, loan, or benefit, or if the Government will reimburse the State, political subdivision, or party for any portion of the money or property under the contract or for the grant or cooperative agreement, loan, or benefit.

§ 28.10 Basis for civil penalties and assessments.

(a) *Claims.* (1) A civil penalty of not more than \$5,000 may be imposed upon a person who makes a claim that the person knows or has reason to know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by a written statement that either contains a material fact which is false, fictitious, or fraudulent; or omits a material fact which the person has a duty to include and is false, fictitious, or fraudulent as a result of the omission; or

(iii) Is for payment for the provision of property or services that the person has not provided as claimed.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to HUD, to a recipient, or to a party when the claim actually is made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of HUD, the recipient, or the party.

(4) Each claim for property, services, or money is subject to a civil penalty without regard to whether the property, services, or money actually is delivered or paid.

(5) *Limit on amount of claim.* Liability under this part shall not lie if the amount of money or value of property or services claimed exceeds \$150,000 as to each claim that a person submits. For purposes of paragraph (a) of this section, a group of claims submitted simultaneously as part of a single transaction shall be considered a single claim.

(6) *Assessment.* If the Government has made any payment, transferred property or provided services on a claim, then the Government may assess a person found liable up to twice the amount of the claim or portion of the claim that is determined to be in violation of paragraph (a)(1) of this section.

(b) *Statements.* (1) A civil penalty of up to \$5,000 may be imposed upon a person who makes a written statement that:

(i) The person knows, or has reason to know, contains a material fact which is false, fictitious, or fraudulent; or omits a material fact that the person has a duty to include and is false, fictitious, or fraudulent because of that omission; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to HUD when the statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of HUD.

(c) *Limit on liability.* If the claim or statement relates to low-income housing benefits or housing benefits for the elderly or handicapped, then a person may be held liable only if he or she has made the claim or statement in the course of applying for such benefits, with respect to his or her eligibility, or family's eligibility, to receive such benefits. For purposes of paragraph (c) of this section, housing benefits means any instance wherein funds administered by the Secretary directly or indirectly permit low-income families or elderly or handicapped

persons to reside in housing which otherwise would not be available to them.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) *Joint and several liability.* A civil penalty or assessment may be imposed jointly and severally where more than one person is determined to be liable.

§ 28.15 Investigation.

(a) *General.* HUD may initiate a Program Fraud Civil Remedies Act (31 U.S.C. 3801) case against a respondent only upon an investigation by the Inspector General or his or her designee.

(b) *Subpoena.* Pursuant to 31 U.S.C. 3804(a), the Inspector General or designee may require by subpoena the production of records and other documents. The subpoena shall state the authority under which it is issued, identify the records sought, and name the person designated to receive the records. The recipient of the subpoena shall provide a certification that the documents sought have been produced, that the documents are not available and the reasons they are not available, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(c) *Investigation report.* If the Inspector General or designee concludes that an action under the Program Fraud Civil Remedies Act may be warranted, her or she shall submit a report containing the findings and conclusions of the investigation to the General Counsel or his or her designee.

(d) The Inspector General may refer allegations directly to the Department of Justice for suit under the False Claims Act (31 U.S.C. 3730) or for other civil relief, or may postpone submitting a report to the General Counsel to avoid interference with a criminal investigation or prosecution. The Inspector General shall report violations of criminal law to the Attorney General.

§ 28.20 Request for approval by the Justice Department.

(a) If the General Counsel or designee determines that the investigation report supports an action under this part, he or she must submit a written request to the Department of Justice for approval to issue a notice under § 28.25.

(b) The request shall include a description of the claims or statements at issue; the evidence supporting the notice; an estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 28.10; any exculpatory or mitigating circumstances that may relate to the claims or

statements; and a statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 28.25 Notice of civil penalty (and assessment).

(a) *General.* Upon obtaining approval from the Department of Justice, the General Counsel or designee may issue a notice of civil penalty (and assessment, if appropriate) to the respondent. The notice shall be sent by certified mail, return receipt requested, or shall be personally served.

(b) *Notice.* The notice shall include:

(1) The allegations of liability against the respondent, including the statutory basis for liability, the claims or statements at issue, and the reasons why liability arises from those claims or statements;

(2) The amount of penalties and assessments for which the respondent may be held liable;

(3) That the respondent may request a hearing by submitting a written response to the notice;

(4) The address to which a response must be sent; and

(5) That failure to submit an answer within 30 days of receipt of the notice may result in the imposition of the maximum amount of penalties and assessments sought without right of appeal.

(c) A copy of this part 28 and of 24 CFR part 26, subpart B shall be included with the notice.

§ 28.30 Response.

(a) The respondent may submit a written response to HUD within 30 days of service of the notice of civil penalty. The response shall be deemed to be a request for hearing. The response should include the admission or denial of each allegation of liability made in the notice; any defense on which the respondent intends to rely; any reasons why the penalties and assessments should be less than the amount set forth in the notice; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) *Filing with the Administrative Law Judges.* The Department shall file the notice and response with the Chief Docket Clerk, Office of Administrative Law Judges. If no response is submitted, then the Department may file a motion for default judgment, together with a copy of the notice, in accordance with 24 CFR 26.39.

§ 28.35 Disclosure of documents.

Upon receipt of a notice of penalty, the respondent may, upon written

request to the General Counsel or designee, review any relevant and material nonprivileged documents, including any exculpatory documents, that relate to the allegations set out in the notice. Exculpatory information that is contained in a privileged document must be disclosed.

§ 28.40 Hearings.

(a) *General.* Hearings under this part shall be conducted in accordance with the procedures in 24 CFR part 26, subpart B.

(b) *Factors to consider in determining amount of penalties and assessments.* In determining an appropriate amount of civil penalties and assessments, the administrative law judge (ALJ) and, upon appeal, the Secretary shall consider and state in their opinions any mitigating or aggravating circumstances. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily double damages and a significant civil penalty should be imposed. The ALJ and the Secretary shall consider the following factors in determining the amount of penalties and assessments to be imposed:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the respondent's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;

(6) The relationship of the civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the respondent has engaged in a pattern of the same or similar misconduct;

(9) Whether the respondent attempted to conceal the misconduct;

(10) The degree to which the respondent has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;

(12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;

(13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;

(15) Whether the respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly;

(16) The need to deter the respondent and others from engaging in the same or similar misconduct; and

(17) Any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(c) *Stays ordered by the Department of Justice.* If at any time the Attorney General of the United States or an Assistant Attorney General designated by the Attorney General notifies the Secretary in writing that continuation of the Department's case may adversely affect any pending or potential criminal or civil action related to the claim or statement at issue, the ALJ or the Secretary shall stay the process immediately. The case may be resumed only upon receipt of the written authorization of the Attorney General.

§ 28.45 Settlements.

(a) The Department and the respondent may enter into a settlement agreement at any time prior to the issuing of a notice of final determination under 24 CFR 26.50.

(b) Failure of the respondent to comply with a settlement agreement shall be sufficient cause for resuming an action under this part, or for any other judicial or administrative action.

9-11. Part 30 is revised to read as follows:

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

Subpart A—General

Sec.

30.1 Purpose and scope.

30.5 Effective dates.

30.10 Definitions.

30.15 Application of other remedies.

Subpart B—Violations

30.20 Ethical violations by HUD employees.

30.25 Violations by applicants for assistance.

30.30 Urban Homestead violations.

- 30.35 Mortgagees and lenders.
- 30.40 Multifamily and Section 202 mortgagors.
- 30.45 GNMA issuers and custodians.
- 30.50 Interstate Land Sales violations.
- 30.55 Dealers or loan correspondents.
- 30.60 Failure to disclose lead-based paint hazards.

Subpart C—Procedures

- 30.65 Prepenalty notice.
- 30.70 Response to prepenalty notice.
- 30.75 Factors in determining appropriateness and amount of civil money penalty.
- 30.80 Notice of civil money penalty.
- 30.85 Response to the penalty notice.
- 30.90 Hearings.
- 30.95 Settlements.

Authority: 12 U.S.C. 1701q-1, 1703, 1723i, 1735f-14, 1735f-15; 15 U.S.C. 1717a; 42 U.S.C. 3535(d).

Subpart A—General

§ 30.1 Purpose and scope.

Unless provided for elsewhere in this title or under separate authority, this part implements HUD's civil money penalty provisions. The procedural rules for hearings under this part are set forth in 24 CFR part 26, subpart B.

§ 30.5 Effective dates.

(a) Under § 30.20, a civil money penalty may be imposed for violations occurring on or after May 22, 1991.

(b) Under §§ 30.25, 30.35, 30.40, 30.45, 30.50, and 30.55, but not § 30.35(a)(14), a civil money penalty may be imposed for any violations that occur on or after December 15, 1989.

(c) Under § 30.30, a civil money penalty may be imposed with respect to any property transferred for use under section 810 of the Housing and Community Development Act of 1974, as amended (12 U.S.C. 1706e), after January 1, 1981, to a state, a unit of general local government, or a public agency or qualified community organization designated by a unit of general local government, or a transferee of any such entity.

(d) Under § 30.35(a)(14), concerning loan guarantees for Indian housing, a civil money penalty may be imposed for violations occurring on or after October 28, 1992.

(e) Under § 30.60, a civil money penalty may be imposed for violations occurring on or after the following dates:

- (1) September 6, 1996, for owners of more than four residential dwellings; or
- (2) December 6, 1996, for owners of one to four residential dwellings.

§ 30.10 Definitions.

Since this part is primarily procedural, terms not defined in this section shall have the meanings given

them in relevant program regulations. Comprehensive definitions are in 24 CFR part 4 (Prohibition of Advance Disclosure of Funding Decisions) and 24 CFR part 12 (Accountability in the Provision of HUD Assistance). The terms *ALJ*, *Department*, *HUD*, and *Secretary* are defined in 24 CFR part 5.

Agent. Any person who acts on behalf of another person and includes officers, directors, partners and trustees.

Dealer. A seller, contractor or supplier of goods or services having a direct or indirect financial interest in the transaction between the borrower and the lender, and who assists the borrower in preparing the credit application or otherwise assists the borrower in obtaining the loan from the lender.

Knowing or Knowingly. Having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under subpart B of this part or under 24 CFR parts 4 or 12.

Loan correspondent. A lender or loan correspondent as defined at § 202.2 of this title.

Material or Materially. In some significant respect or to some significant degree.

Person. An individual, corporation, company, association, authority, firm, partnership, society, state, local government or agency thereof, or any other organization or group of people.

Respondent. A person against whom a civil money penalty action is initiated.

§ 30.15 Application of other remedies.

A civil money penalty may be imposed in addition to other administrative sanctions or any other civil remedy or criminal penalty.

Subpart B—Violations

§ 30.20 Ethical violations by HUD employees.

(a) *General*. The General Counsel, or his or her designee, may initiate a civil money penalty action against HUD employees who improperly disclose information pursuant to § 4.110 of this title.

(b) *Maximum penalty*. The maximum penalty is \$10,000 for each violation.

§ 30.25 Violations by applicants for assistance.

(a) *General*. The General Counsel, or his or her designee, may initiate a civil money penalty action against applicants for assistance, as defined in 24 CFR part 12, who knowingly and materially violate the provisions of § 12.32 (a), (b), or (c) of this title.

(b) *Maximum penalty*. The maximum penalty for each violation is \$10,000.

§ 30.30 Urban Homestead violations.

(a) *General*. The Assistant Secretary for Community Planning and Development, or his or her designee, or the Director of the Office of Technical Assistance and Management may initiate a civil money penalty action against persons who knowingly and materially violate section 810 of the Housing and Community Development Act of 1974, as amended (12 U.S.C. 1706e), or the provisions of 24 CFR part 590, in the use or conveyance of property made available under the Urban Homestead Program.

(b) *Maximum penalty*. The maximum penalty is either twice the amount of the gross profit realized from any impermissible use or conveyance of the property, or the amount of section 810 funds used to reimburse HUD, the Department of Veterans Affairs, the Resolution Trust Corporation, or the Farmers Home Administration (or its successor agency under Public Law 103-354) for the property, whichever is greater. If the property is still held by the violator, the gross profit shall include any appreciation between the amount the violator paid for the property and its current value as determined by an independent, HUD-qualified appraiser.

§ 30.35 Mortgagees and lenders.

(a) *General*. The Mortgagee Review Board may initiate a civil money penalty action against any mortgagee or lender who knowingly and materially:

(1) Violates the provisions listed in 12 U.S.C. 1735f-14(b);

(2) Fails to comply with the requirements of § 201.27(a) of this title regarding approval and supervision of dealers;

(3) Approves a dealer that has been suspended, debarred, or otherwise denied participation in HUD's programs;

(4) Makes a payment that is prohibited under § 202.12(p) of this title;

(5) Fails to remit, or timely remit, mortgage insurance premiums, loan insurance charges, or late charges or interest penalties;

(6) Permits loan documents for an FHA insured loan to be signed in blank by its agents or any other party to the loan transaction unless expressly approved by the Secretary;

(7) Fails to follow the mortgage assignment procedures set forth in §§ 203.650 through 203.664 of this title or in §§ 207.255 through 207.258b of this title.

(8) Fails to timely submit documents that are complete and accurate in connection with a conveyance of

property or a claim for insurance benefits, in accordance with §§ 203.365, 203.366, or 203.368 of this title;

(9) Fails to:

(i) Process requests for formal release of liability under an FHA insured mortgage;

(ii) Obtain a credit report, issued not more than 90 days prior to approval of a person as a borrower, as to the person's creditworthiness to assume an FHA insured mortgage;

(iii) Timely submit proper notification of a change in mortgagor or mortgagee as required by § 203.431 of this title;

(iv) Timely submit proper notification of mortgage insurance termination as required by § 203.318 of this title;

(v) Timely submit proper notification of a change in mortgage servicing as required by § 203.502 of this title; or

(vi) Report all delinquent mortgages to HUD, as required by § 203.332 of this title;

(10) Fails to service FHA insured mortgages, in accordance with the requirements of 24 CFR parts 201, 203, and 235;

(11) Fails to fund loans that it originated, or otherwise misuses loan proceeds;

(12) Fails to comply with the conditions relating to the assignment or pledge of mortgages as required by § 207.261 of this title;

(13) Fails to comply with the provisions of the Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq.), the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.), or the Fair Housing Act (42 U.S.C. 3601 et seq.);

(14) Violates the provisions of 12 U.S.C. 1715z-13a(g)(2) concerning loan guarantees for Indian housing;

(15) Fails to comply with the terms of a settlement agreement with HUD.

(b) *Continuing violation.* Each day that a violation continues shall constitute a separate violation.

(c) *Amount of penalty.* The maximum penalty is \$5,000 for each violation, up to a limit of \$1,000,000 for all violations committed during any one-year period. Each violation shall constitute a separate violation as to each mortgage or loan application.

§ 30.40 Multifamily and Section 202 mortgagors.

(a) *General.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against any mortgagor of property that includes five or more living units and is subject to a mortgage insured, coinsured, or held by the Secretary, who knowingly and materially commits a violation listed at 12 U.S.C. 1735f-15(b) or (c), or 12 U.S.C. 1701q-1(b) or (c).

(b) *Maximum penalty.* The maximum penalty for each violation of 12 U.S.C. 1735f-15(b) and 12 U.S.C. 1701q-1(b) is the amount of loss that the Secretary incurs at a foreclosure sale, or a sale after foreclosure, with respect to the property involved. The maximum penalty for each violation of 12 U.S.C. 1735f-15(c) and 12 U.S.C. 1701q-1(c) is \$25,000.

§ 30.45 GNMA issuers and custodians.

(a) *General.* The President of GNMA, or his or her designee, may initiate a civil money penalty action against a GNMA issuer or custodian that knowingly and materially violates any provision of 12 U.S.C. 1723i(b), title III of the National Housing Act, or any implementing regulation, handbook, guaranty agreement, or contractual agreement, or participant letter issued by GNMA, or fails to comply with the terms of a settlement agreement with GNMA.

(b) *Continuing violation.* Each day that a violation continues shall constitute a separate violation.

(c) *Amount of penalty.* The maximum penalty is \$5,000 for each violation, up to a limit of \$1 million during any one-year period. Each violation shall constitute a separate violation with respect to each pool of mortgages.

§ 30.50 Interstate Land Sales violations.

(a) *General.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against any person who knowingly and materially violates any provision of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.); the rules and regulations set forth at 24 CFR parts 1710, 1715, and 1720, or any order issued thereunder.

(b) *Continuing violation.* Each day that a violation continues shall constitute a separate violation.

(c) *Maximum penalty.* The maximum penalty is \$1,000, up to a limit for any particular person of \$1 million during any one-year period. Each violation shall constitute a separate violation as to each sale or lease or offer to sell or lease.

§ 30.55 Dealers or loan correspondents.

(a) *General.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against any dealer or loan correspondent who violates section 2(b)(7) of the National Housing Act (12 U.S.C. 1703). Such violations include, but are not limited to:

(1) Falsifying information on an application for dealer approval or reapproval submitted to a lender;

(2) Falsifying statements on a HUD credit application, improvement contract, note, security instrument, completion certificate or other loan document;

(3) Failing to sign a credit application if the dealer or loan correspondent assisted the borrower in completing the application;

(4) Falsely certifying to a lender that the loan proceeds have been or will be spent on eligible improvements;

(5) Falsely certifying to a lender that the property improvements have been completed;

(6) Falsely certifying that a borrower has not been given or promised any cash payment, rebate, cash bonus, or anything of more than nominal value as an inducement to enter into a loan transaction;

(7) Making a false representation to a lender with respect to the creditworthiness of a borrower or the eligibility of the improvements for which a loan is sought.

(b) *Continuing violation.* Each day that a violation continues shall constitute a separate violation.

(c) *Amount of penalty.* The maximum penalty is \$5,000 for each violation, up to a limit of \$1 million during any one-year period.

§ 30.60 Failure to disclose lead-based paint hazards.

(a) *General.* The Director of the Office of Lead-Based Paint Abatement and Poisoning Prevention, or his or her designee, may initiate a civil money penalty action against any person who knowingly violates 42 U.S.C. 4852d(b)(1) or any provision of 24 CFR part 35, subpart H.

(b) *Amount of penalty.* The maximum penalty is \$10,000 for each violation.

Subpart C—Procedures

§ 30.65 Prepenalty notice.

Whenever HUD intends to seek a civil money penalty, the official designated in subpart B of this part, or his or her designee (or the chairperson of the Mortgagee Review Board, or his or her designee, in actions under § 30.35), shall issue a written notice to the respondent. This prepenalty notice shall include the following:

(a) That HUD is considering seeking a civil money penalty;

(b) The specific violations alleged;

(c) The maximum civil money penalty that may be imposed;

(d) The opportunity to reply in writing to the designated program official within 30 days after receipt of the notice; and

(e) That failure to respond within the 30-day period may result in issuance of

a notice of civil money penalty under § 30.80 without consideration of any information that the respondent may wish to provide.

§ 30.70 Response to prepenalty notice.

The response shall be in a format prescribed in the prepenalty notice. The response shall include any arguments opposing the imposition of a civil money penalty that the respondent may wish to present.

§ 30.75 Factors in determining appropriateness and amount of civil money penalty.

In determining whether to seek a penalty, and the amount of such penalty, the officials designated in subpart B of this part shall consider the following factors:

(a) The gravity of the offense;
 (b) Any history of prior offenses. For violations under §§ 30.25, 30.35, 30.40, 30.45, 30.50, and 30.55, but not violations under § 30.35(a)(14), offenses that occurred prior to December 15, 1989 may be considered;

(1) The ability to pay the penalty;
 (2) The injury to the public;
 (3) Any benefits received by the violator;
 (4) The extent of potential benefit to other persons;
 (5) Deterrence of future violations;
 (6) The degree of the violator's culpability;
 (7) With respect to Urban Homestead violations under § 30.30, the expenditures made by the violator in connection with any gross profit derived; and
 (8) Such other matters as justice may require.

(c) In addition to the above factors, with respect to violations under §§ 30.40, 30.50, and 30.55, the Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, shall also consider:

(1) Any injury to tenants; and/or
 (2) Any injury to lot owners.

§ 30.80 Notice of civil money penalty.

(a) *General.* Upon the expiration of the period for the respondent to submit a response to the prepenalty notice, the official designated in subpart B of this part, or his or her designee (or the Mortgagee Review Board in actions under § 30.35) shall determine whether to seek a civil money penalty. Such determination shall be based upon a review of the prepenalty notice, the response, if any, and the factors listed at § 30.75. A determination by the Mortgagee Review Board to seek a civil money penalty shall be by a majority vote of the Board.

(b) *Notice.* If a determination is made to seek a civil money penalty, the official or his or her designee, or the Mortgagee Review Board, shall so notify the respondent, in writing. The notice shall state the following:

(1) The factual basis for the decision to seek a penalty;
 (2) The applicable civil money penalty statute;
 (3) The amount of penalty sought;
 (4) The right to submit a response in writing, within 15 days of receipt of the notice, requesting a hearing on any material fact in the notice, or on the appropriateness of the penalty sought;
 (5) The address to which a response must be sent;
 (6) That the notice shall serve as HUD's complaint if a hearing is requested; and
 (7) That the failure to submit a response may result in the imposition of the penalty in the amount sought.

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

(d) *Service of the notice.* The notice shall be served on the respondent by first class mail, personal delivery, or other means. In cases of violations by mortgagees and lenders of 12 U.S.C. 1735f-14(b)(1)(D) or (1)(F), or by GNMA issuers or custodians of 12 U.S.C. 1723i(b)(1)(G) or (1)(I), a copy of the notice shall be provided to the Attorney General.

§ 30.85 Response to the penalty notice.

(a) *General.* The respondent may submit to HUD a written response to the penalty notice within 15 days of its receipt. The response shall be considered a request for a hearing. The response should include the admission or denial of each allegation of liability made in the notice; any defense on which the respondent intends to rely; any reasons why the civil money penalty is not warranted or should be less than the amount sought in the notice; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) *Filing with the Administrative Law Judges.* HUD shall file the notice and response with the Chief Docket Clerk, Office of Administrative Law Judges. If no response is submitted, then HUD may file a motion for default judgment, together with a copy of the notice, in accordance with § 26.39 of this title.

§ 30.90 Hearings.

Hearings under this part shall be conducted in accordance with the procedures at 24 CFR part 26, subpart B.

§ 30.95 Settlements.

The officials listed at subpart B of this part, or their designees (or the Mortgagee Review Board for violations under § 30.35), are authorized to enter into settlement agreements of civil money penalty claims. Settlement agreements may be executed at any time prior to the issuing of a notice of final determination under § 26.50 of this title, and may include sanctions for failure to comply with the terms of the agreement.

PART 81—REGULATIONS IMPLEMENTING THE AUTHORITY OF THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OVER THE CONDUCT OF THE SECONDARY MARKET OPERATIONS OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION (FNMA)

12. The authority citation for 24 CFR part 81 continues to read as follows:

Authority: 12 U.S.C. 1451 *et seq.*, 1716-1723h, and 4501-4641; 42 U.S.C. 3535(d) and 3601-3619.

13. Section 81.46 is amended by revising the first sentence of paragraph (e)(1) to read as follows:

§ 81.46 Remedial actions.

* * * * *
 (e) * * * (1) Where a lender timely requests a hearing on a remedial action, a hearing shall be conducted before a HUD Administrative Law Judge (ALJ) and a final decision rendered in accordance with the procedures set forth in 24 CFR part 26, subpart B, to the extent such provisions are not inconsistent with subpart C of this part or FHEFSSA. * * *

* * * * *

14. Section 81.82 is amended by revising the second sentence of paragraph (b)(2) to read as follows:

§ 81.82 Cease-and-desist proceedings.

* * * * *

(b) * * *
 (2) *Administrative Law Judge.* * * *

The hearing shall be conducted in accordance with § 81.84 and, to the extent the provisions are not inconsistent with any of the procedures in this part or FHEFSSA, with 24 CFR part 26, subpart B.

* * * * *

15. Section 81.83 is amended by revising paragraph (d)(3) to read as follows:

§ 81.83 Civil money penalties.

* * * * *

(d) * * *
 (3) *Administrative Law Judge.* A HUD ALJ shall preside over any hearing

conducted under this section, in accordance with § 81.84 and, to the extent the provisions are not inconsistent with any of the procedures in this part or FHEFSSA, with 24 CFR part 26, subpart B.

* * * * *

16. Section 81.84 is amended by:

- Revising paragraph (b)(2);
- Revising paragraph (d);
- Amending the third sentence of paragraph (h)(1) by removing the reference to “§ 30.515”, and by adding in its place a reference to “§ 26.38”;
- Amending the first sentence of paragraph (j)(2) by removing the reference to “§ 30.910”, and by adding in its place a reference to “§ 26.51 (c)”;

and amending the second sentence of paragraph (j)(2) by removing the reference to “§ 30.910 (c) and (d)”, and by adding in its place a reference to “§ 26.51(f)”; to read as follows:

§ 81.84 Hearings.

* * * * *

(b) * * *

(2) Hearings shall be conducted by a HUD ALJ authorized to conduct proceedings under 24 CFR part 26, subpart B.

* * * * *

(d) *Procedure.* Hearings shall be conducted in accordance with the procedures set forth in 24 CFR part 26,

subpart B to the extent that such provisions are not inconsistent with any of the procedures in this part or FHEFSSA.

* * * * *

§ 81.85 [Amended]

17. In section 81.85(c)(1), the third sentence is amended by removing the reference to “§ 30.515”, and by adding in its place a reference to “§ 26.38”.

PART 200—INTRODUCTION

18. The authority citation for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1701–1715z–18; 42 U.S.C. 3535(d).

§ 200.243 [Amended]

19. In § 200.243, the second sentence of the introductory text of paragraph (a) is amended by adding the phrase “, subpart A,” after the phrase “24 CFR part 26”.

PART 950—INDIAN HOUSING PROGRAMS

20. The authority citation for 24 CFR part 950 continues to read as follows:

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437aa–1437ee, and 3535(d).

§ 950.190 [Amended]

21. In § 950.190, the last sentence of paragraph (e) is amended by adding the

phrase “, subpart A” after the phrase “24 CFR part 26”.

PART 965—PHA-OWNED OR LEASED PROJECTS—MAINTENANCE AND OPERATION

22. The authority citation for 24 CFR part 965 continues to read as follows:

Authority: 42 U.S.C. 1437, 1437a, 1437d, 1437g, and 3535(d). Subpart H is also issued under 42 U.S.C. 4821–4846.

§ 965.205 [Amended]

23. In § 965.205, the last sentence of paragraph (e) is amended by adding the phrase “, subpart A” after the phrase “24 CFR part 26”.

PART 3500—REAL ESTATE SETTLEMENT PROCEDURES ACT

24. The authority citation for 24 CFR part 3500 continues to read as follows:

Authority: 12 U.S.C. 2601 et seq.

§ 3500.17 [Amended]

25. In § 3500.17, paragraphs (n)(1) and (n)(4)(iii) are amended by removing the phrase “, subpart E,”.

Dated: March 12, 1996.

Henry G. Cisneros,

Secretary.

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