

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 24

[Docket No. FR-4505-F-01]

RIN 2501-AC61

Debarment, Suspension, and Limited Denial of Participation; Clarification of Procedures

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule clarifies two aspects of HUD's debarment, suspension, and limited denial of participation procedures. First, the rule clarifies that a debarring or suspending official may refer either disputed material facts or issues of law, or both to a hearing officer. Second, the rule clarifies the jurisdictional and procedural posture of a Limited Denial of Participation (LDP) when HUD subsequently issues a proposed debarment or suspension based on the same transaction(s) or conduct.

DATES: *Effective Date:* July 21, 2000.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background Information

HUD's current regulations at 24 CFR part 24, subparts C, D, and G, cover the administration of the debarment, suspension, and limited denial of participation (LDP) administrative remedies, respectively. Recent administrative decisions interpreting aspects of these regulations have indicated a need for additional clarification as to their intent and operation.

a. Scope of Referral

24 CFR 314(b)(2)(i) provides that a debarring official may refer "disputed material facts and issues of law to a hearing officer for findings of fact *and* conclusions of law." Section 413(b)(3) provides similar authority to a suspending official. This rule clarifies that under § 24.314(b)(2)(i) and § 24.413(b)(3), the debarring or suspending official, or a designee, has

complete discretion to: (1) refer only disputed material facts to a hearing officer for resolution; (2) provide facts to a hearing officer and request that the hearing officer only make conclusions of law based on those facts; or (3) request a hearing officer to make findings of fact *and* conclusions of law. The hearing officer's findings of fact or conclusions of law must then conform to the scope of the debarring or suspending official's referral.

b. Transfer of Jurisdiction

HUD's current regulation at 24 CFR 24.713(c) (entitled "Effect of suspension or debarment on limited denial of participation") covers the situation where HUD issues an LDP and then subsequently issues a proposed debarment or suspension based on the same transaction(s) or conduct. If a respondent contests the proposed debarment or suspension, § 24.713(c)(2) requires the consolidation of the LDP proceeding with the proposed debarment or suspension proceeding and requires the debarring or suspending official to issue a final decision for both causes. If the respondent does not contest the proposed debarment or suspension, § 24.713(c)(1) makes the final imposition of a debarment or suspension a final decision with respect to the LDP as well.

The intent of § 24.713(c) is to avoid separate LDP and debarment or suspension hearings, based on the same transaction(s) or conduct, coexisting for any period of time and to ensure that the consolidated proceeding is heard and decided under the debarment/suspension procedures. HUD revised its regulations governing debarments and suspensions in 1995 (60 FR 33049, June 26, 1995) to conform its procedures with other Federal agencies implementing the governmentwide common rule on debarments and suspensions. The intent of the 1995 revisions was to reduce the regulatory burden on HUD and participants in its programs by applying the revised procedures to all debarments and suspensions. Continuing to apply LDP procedures to a debarment or suspension into which an LDP had been consolidated under § 24.712(c)(2) would be inconsistent with that intent.

This final rule clarifies that if HUD issues an LDP and then subsequently issues a proposed debarment or suspension, which the debarring or suspending official determines is based on the same transaction(s) or conduct, and the respondent contests the proposed debarment or suspension, then the hearing officer responsible for hearing the LDP must immediately

divest jurisdiction over the LDP and transfer the administrative record of the case to the debarring or suspending official. The debarring or suspending official will then issue a final decision for both the LDP and the proposed debarment or suspension, pursuant to the hearing procedures governing debarments and suspensions.

This rule also clarifies that, when a proposed debarment or suspension is issued following an LDP, during the 30 day period that a respondent is given under the regulations to contest the proposed debarment or suspension, all administrative proceedings on the LDP, including discovery, are automatically stayed. This again clarifies the intent of the regulations that at no time should there be two proceedings occurring on separate procedural tracks—one for an LDP and another for a debarment or suspension—based on the same transaction(s) or conduct.

II. Small Entities and HUD Enforcement Actions

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 847, approved March 29, 1996) ("SBREFA") provides, among other things, for agencies to establish specific policies or programs to assist small entities. Small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. On May 31, 1998 (63 FR 28214), HUD published a **Federal Register** notice describing HUD's actions on implementation of SBREFA.

Section 223 of SBREFA requires agencies that regulate the activities of small entities to establish a policy or program to reduce or, *under appropriate circumstances*, waive civil penalties when a small entity violates a statute or regulation. Where penalties are determined appropriate, HUD's policy is to consider: (1) The nature of the violation (the violation must not be one that is repeated or multiple, willful, criminal or poses health or safety risks); (2) whether the entity has shown a good faith effort to comply with the regulations; and (3) the resources of the regulated entity. Depending upon the circumstances surrounding the violation, it is not HUD's intent to put any individual or entity out of business by the penalties or settlement amounts paid to the Federal Government.

With respect to the issuance of an LDP, debarment, or suspension, HUD is cognizant that section 222 of the SBREFA requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to "work with each agency with regulatory authority over small businesses to ensure that small business

concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel." To implement this statutory provision, the Small Business Administration has requested that agencies include the following language on agency publications and notices which are provided to small businesses concerns at the time the enforcement action is undertaken. The language is as follows: Your Comments Are Important

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

As HUD stated in its May 21, 1998 notice, HUD intends to work with the Small Business Administration to provide small entities with information on the Fairness Boards and National Ombudsman program, at the time enforcement actions are taken, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

III. Justification for Final Rulemaking

In general, HUD publishes a rule for public comment before issuing the rule for effect, in accordance with our regulations on rulemaking at 24 CFR part 10. Part 10, however, provides for an exception to this general rule when HUD finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1). HUD finds that good cause exists to publish this final rule for effect without first soliciting public comment because prior public procedure is unnecessary. This final rule only clarifies two aspects of HUD's debarment, suspension, and limited denial of participation procedures. This rule does not implement any substantive changes to these procedures.

IV. Findings and Certifications

Environmental Impact

The clarifying revisions contained in this final rule do not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition,

disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, this rule is categorically excluded from the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Secretary has reviewed this final rule before publication and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule would not have a significant economic impact on a substantial number of small entities. This final rule only clarifies two aspects of HUD's debarment, suspension, and limited denial of participation procedures. This rule does not implement any substantive changes to these procedures.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This final rule does not impose, within the meaning of the UMRA, any Federal mandates on any State, local, or tribal governments or on the private sector.

Federalism Impact

This final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132 (entitled "Federalism").

List of Subjects in 24 CFR Part 24

Administrative practice and procedure, Drug abuse, Government contracts, Government procurement, Grant programs, Loan programs, Reporting and recordkeeping requirements.

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

PART 24—GOVERNMENT DEBARMENT AND SUSPENSION AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORK-PLACE (GRANTS)

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

Authority: 41 U.S.C. 701 *et seq.*; 42 U.S.C. 3535(d); E.O. 12549, 51 FR 6370, 3 CFR, 1986

Comp., p. 189; E.O. 12689, 54 FR 34131, 3 CFR, 1989 Comp., p. 235.

2. Revise paragraph (b)(2)(i) of § 24.314 to read as follows:

§ 24.314 Debarring official's decision.

* * * * *

(b) * * *

(2) * * *

(i) The debarring official may refer either disputed material facts or issues of law, or both to a hearing officer for either findings of fact or conclusions of law, or both.

3. Revise paragraph (b)(3) of § 24.413 to read as follows:

§ 24.413 Suspending official's decision.

* * * * *

(b) * * *

(3) The suspending official may refer either disputed material facts or issues of law, or both to a hearing officer for either findings of fact or conclusions of law, or both.

4. Revise paragraph (c) of § 24.713 to read as follows:

§ 24.713 Opportunity to contest the limited denial of participation.

* * * * *

(c) *Effect of suspension or debarment on limited denial of participation.* If a respondent has submitted a request for a hearing pursuant to paragraph (a) of this section, and if the respondent has also received, pursuant to subpart C or D of this part, a notice of proposed debarment or suspension based on the same transaction(s) or conduct as the limited denial of participation, as determined by the debarring or suspending official, the following rules apply:

(1) During the 30 day period after the respondent receives a proposed debarment or suspension during which the respondent may elect to contest the debarment under § 24.314(a), or the suspension under § 24.412(a), all proceedings in the limited denial or participation, including discovery, are automatically stayed.

(2) If the respondent does not contest the proposed debarment pursuant to § 24.313(a), or the suspension pursuant to § 24.412(a), the final imposition of the debarment or suspension shall also constitute a final decision with respect to those parts of the limited denial of participation based on the same transaction(s) or conduct as the debarment or suspension, as determined by the debarring or suspending official.

(3) If the respondent does contest the proposed debarment pursuant to § 24.313(a), or the suspension pursuant to § 24.412(a), then:

(i) Those parts of the limited denial of participation based on the same

transaction(s) or conduct as the debarment or suspension, as determined by the debarring or suspending official, and the debarment or suspension shall be immediately consolidated before the debarring or suspending official;

(ii) Jurisdiction of the hearing officer under 24 CFR part 24, subpart G, to hear those parts of the limited denial of participation based on the same

transaction(s) or conduct as the debarment or suspension, as determined by the debarring or suspending official, shall be divested, and the hearing officer responsible for hearing the limited denial of participation shall transfer the administrative record to the debarring or suspending official; and

(iii) The debarring or suspending official shall hear the entire

consolidated case under the procedures governing debarments and suspensions, and shall issue a final decision as to both the limited denial of participation and the debarment or suspension.

Dated: June 14, 2000.

Andrew Cuomo,
Secretary.

[FR Doc. 00-15684 Filed 6-20-00; 8:45 am]

BILLING CODE 4210-32-P