

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 30

[Docket No. FR-4399-P-01]

RIN 2501-AC56

## Amendments to HUD's Civil Money Penalty Regulations

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement sections 561 and 562 of the Multifamily Assisted Housing Reform and Affordability Act of 1997. These sections concern HUD's ability to impose civil money penalties. Section 561 expands the list of parties and violations subject to civil money penalties related to multifamily properties. Section 562 authorizes HUD to impose civil money penalties for violations of Section 8 project-based housing assistance payments contracts. This proposed rule would implement these sections by revising HUD's civil money penalty regulations.

**DATES:** *Comments Due Date:* August 25, 2000.

**ADDRESSES:** Address all comments concerning this proposed rule to the Rules Docket Clerk, Office of the General Counsel, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500. Comments should refer to the docket number and title listed above. A copy of each comment submitted will be available for public inspection and copying weekdays between 7:30 a.m. and 5:30 p.m. at the above address. Comments submitted by facsimile (FAX) will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** Dane M. Narode, Deputy Chief Counsel for Administrative Proceedings, Departmental Enforcement Center, U.S. Department of Housing and Urban Development, 1250 Maryland Avenue, Suite 200, Washington, DC 20024; telephone (202) 708-2350 (this is not a toll-free number). Hearing-or speech-impaired persons may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. The Multifamily Assisted Housing Reform and Affordability Act of 1997

On October 27, 1997, President Clinton signed into law the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Public Law 105-65, title V, 111 Stat. 1384-1424)

(the Multifamily Reform Act). One of the stated purposes of the Multifamily Reform Act was "to grant additional enforcement tools to use against those who violate agreements and program requirements, in order to ensure that the public interest is safeguarded and that Federal multifamily housing programs serve their intended purposes" (section 511(b)(9)).

In line with this purpose, the Multifamily Reform Act amended the National Housing Act (12 U.S.C. 1702 *et seq.*) and the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (the 1937 Act) to expand HUD's enforcement authority. Specifically, section 561 amended section 537 of the National Housing Act (captioned "Civil money penalties against multifamily mortgagors") (12 U.S.C. 1735f-15), and section 562 added a new section 29 to the 1937 Act (captioned "Civil Money Penalties Against Section 8 Owners") (42 U.S.C. 1437z-1).

This proposed rule would revise HUD's regulations at 24 CFR part 30 (captioned "Civil Money Penalties: Certain Prohibited Conduct") to implement sections 561 and 562. The regulatory revisions that would be made by this proposed rule are described below.

#### II. Section 561 of the Multifamily Reform Act of 1997

Section 561 of the Multifamily Reform Act amended section 537 of the National Housing Act, which authorizes HUD to impose a civil money penalty on a multifamily mortgagor for certain listed violations. Section 561 amended section 537 by expanding the list of parties and violations that may be subject to a civil money penalty, among other changes.

Prior to the passage of the Multifamily Reform Act, section 537 only permitted HUD to impose a civil money penalty on a mortgagor of a multifamily property (defined in section 537 as a property that includes 5 or more units and has a mortgage insured, coinsured, or held under the National Housing Act). Section 561 expanded this list to allow HUD to impose a civil money penalty on a general partner of a partnership mortgagor and an officer or director of a corporate mortgagor. For certain violations, section 561 expanded this list further to allow HUD to impose a civil money penalty on certain agents of mortgagors and certain members of a limited liability company.

Section 561 also expanded the list of violations that are subject to a civil money penalty. These additional violations include the failure to maintain the premises, to provide

acceptable management, and to provide access to the accounting records of a property.

Currently, section 537 is implemented in HUD's regulations at 24 CFR 30.45. This proposed rule would amend § 30.45 to incorporate the amendments made by section 561. Section 30.45 also implements section 202a of the Housing Act of 1959 (captioned "Civil Money Penalties Against Section 202 Mortgagors") (12 U.S.C. 1701q-1). Though this proposed rule would significantly revise the structure of § 30.45 to accommodate the amendments made by section 561, it would not make any substantive changes to the implementation of section 202a other than as described in sections V. (clarifying the coverage of Section 811 properties) and VI. (adjusting the amount of the civil money penalty) of this preamble. These changes are not related to the amendments made by the Multifamily Reform Act and are included in this rulemaking for convenience only.

#### III. Section 562 of the Multifamily Reform Act

Section 562 of the Multifamily Reform Act added a new section 29 to the 1937 Act. New section 29 of the 1937 Act authorizes HUD to impose a civil money penalty on an owner, general partner, and certain agents of an owner of a property receiving project-based Section 8 assistance.

Section 29 authorizes a civil money penalty against these parties for a "knowing and material breach of a housing assistance payments contract \* \* \*", which under new section 29 includes the:

(a) Failure to provide decent, safe, and sanitary housing; and

(b) Knowing or wilful submission of false, fictitious, or fraudulent statements or requests for housing assistance.

New section 29 also directs HUD to issue regulations that establish standards and procedures governing the imposition of civil money penalties under the new section. This proposed rule would implement section 29 in a new § 30.68. This new section would be incorporated into HUD's current structure of standards and procedures for civil money penalties in part 30, including the provisions for hearing procedures in part 26, subpart B. HUD's current regulations in part 30 and part 26, subpart B satisfy the requirement of new section 29 to establish standards and procedures governing the imposition of civil money penalties.

#### IV. Definitions of "Ownership Interest in," "Effective Control," and "Entity"

Both sections 561 and 562 of the Multifamily Reform Act direct HUD to specifically seek public comment on the definitions of the terms "ownership interest in" and "effective control" as those terms are used in the definition of the terms "agent employed to manage the property that has an identity of interest" and "identity of interest agent". These terms are defined in §§ 30.45(a) and 30.68(a) of the regulations contained in this proposed rule. In addition, in order to clarify the definition of "identity of interest agent," the rule defines "entity," a term used in the definition, in §§ 30.45(a) and 30.68(a).

While HUD encourages public comment on all aspects of this proposed rule, HUD is asking members of the public who wish to comment on this proposed rule to pay particular attention to the definition of these terms as they are used in the proposed regulations.

#### V. Clarification Regarding Section 811 Properties

In addition to implementing sections 561 and 562 of the Multifamily Reform Act, this proposed rule would clarify one aspect of the section of HUD's regulations that concern civil money penalties for Section 202 properties. This provision is currently implemented in the same section in HUD's regulations as the civil money penalty provision for multifamily properties (§ 30.45).

The proposed rule would clarify that § 30.45 applies to section 811 and section 202 capital advance projects as well as section 202 direct loan projects. The proposed rule would accomplish this by changing all references to section 202 to include section 811 and by defining the term "Section 202 or 811 property" to mean a property with a mortgage held pursuant to either a direct loan or a capital advance under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q) or a property with a mortgage held pursuant to section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013).

This clarification is necessary because section 202 of the Housing Act of 1959 was amended in 1990 by the Cranston-Gonzalez National Affordable Housing Act (Public Law 101-625, 104 Stat. 4079) (Affordable Housing Act). Prior to the passage of this Act, the Section 202 direct loan program concerned housing for the elderly and persons with disabilities. After the amendment, section 202 continued to concern

housing for the elderly, but housing for persons with disabilities was separated from section 202 and moved to section 811 of the Affordable Housing Act.

The civil money penalty provision relating to section 202 properties, implemented by § 30.45, was authorized by section 109 of the Department of Housing and Urban Development Reform Act of 1989 (Public Law 101-235, 103 Stat. 1987) (HUD Reform Act). The HUD Reform Act was passed prior to the revision of the Section 202 program and the creation of the Section 811 program. As a result, prior to the passage of the Affordable Housing Act, section 109 of the HUD Reform Act applied to both housing for the elderly and housing for persons with disabilities.

After the passage of the Affordable Housing Act, it appeared that section 109 would not apply to section 811 properties. We do not believe, however, that Congress intended to remove section 811 properties from the coverage of section 109 when it passed the Affordable Housing Act. Therefore, this proposed rule would clarify that § 30.45 applies to both section 811 properties and section 202 properties.

#### VI. Increase in Amount of Penalty

Under the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101-410, 104 Stat. 890, as amended by Public Law 104-134, title III, Sec. 31001(s)(1), 110 Stat. 1321-373, codified at 28 U.S.C. 2461 note) (the Inflation Adjustment Act), HUD is required to adjust for inflation the maximum amounts of its civil money penalties at least once every four years. This adjustment, as described in section 5 of the Inflation Adjustment Act, requires HUD to increase maximum civil money penalty amounts by the percentage change in the Consumer Price Index for all-urban consumers published by the Department of Labor. The Inflation Adjustment Act requires that any increase in the maximum civil money penalty amount for penalties in the range of \$10,000 to \$100,000 be rounded to the nearest multiple of \$5,000.

Accordingly, this proposed rule would increase the maximum amount of civil money penalties for multifamily and section 202 or 811 properties from \$27,500 to \$30,000. The maximum amount of civil money penalties for Section 8 properties would not be changed because the current increase is not large enough to cause the amount to be rounded up.

#### VII. 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 21, 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.

With respect to the imposition of civil money penalties, 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 **Federal Register** 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.

## VIII. Findings and Certifications

### *Environmental Impact*

In accordance with 40 CFR 1508.4 of the Council on Environmental Quality regulations and 24 CFR 50.19(c)(1) of the HUD regulations, the policies and procedures contained in this proposed rule are determined not to have the potential of having a significant impact on the human environment and are therefore exempt from further environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

### *Federalism Impact*

This proposed 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").

### *Regulatory Flexibility Act*

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this proposed rule. In so doing, the Secretary certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule implements sections 561 and 562 of the Multifamily Reform Act. The rule makes conforming changes to HUD's regulations at 24 CFR part 30 to reflect statutory changes made to the National Housing Act and the United States Housing Act of 1937. These changes were mandated by the Multifamily Reform Act and are not discretionary on the part of HUD.

The purpose of these amendments is to grant HUD additional enforcement tools to use against those who violate agreements and program requirements. The Multifamily Reform Act expanded the list of persons and the types of violations subject to civil money penalties under HUD's insured housing and Section 8 programs. To the extent that these statutory changes impact small entities, it will be as a result of actions taken by the small entities themselves—that is, by violating multifamily and Section 8 program regulations and requirements.

Notwithstanding HUD's determination that this rule will not

have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

### *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 proposed rule does not, within the meaning of the UMRA, impose any Federal mandates on any State, local, or tribal governments nor on the private sector.

### **List of Subjects in 24 CFR Part 30**

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

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR part 30 as follows:

### **PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT**

1. The authority citation for 24 CFR part 30 is revised to read as follows:

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

2. Add paragraph (f) to § 30.5 to read as follows:

#### **§ 30.5 Effective dates.**

\* \* \* \* \*

(f) Under § 30.68, a civil money penalty may be imposed for violations, or for those parts of continuing violations, occurring on or after [INSERT DATE 30 DAYS AFTER PUBLICATION OF FINAL RULE IN *Federal Register*].

3. Revise § 30.45 to read as follows:

#### **§ 30.45 Multifamily and section 202 or 811 mortgages.**

(a) *Definitions.* The following definitions apply to this section only:

*Agent employed to manage the property that has an identity of interest and identity of interest agent.* An entity:

- (1) That has management responsibility for a project;
- (2) In which the ownership entity, including its general partner or partners (if applicable) and its officers or directors (if applicable), has an ownership interest; and
- (3) Over which the ownership entity exerts effective control.

*Effective control.* The ability to direct, alter, supervise, or otherwise influence the actions, policies, decisions, duties, employment, or personnel of the management agent.

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

*Multifamily property.* Property that includes 5 or more living units and that has a mortgage insured, co-insured, or held pursuant to the National Housing Act (12 U.S.C. 1702 *et seq.*).

*Ownership interest.* Any financial, legal, beneficial, or equitable interest in the management agent.

*Section 202 or 811 property.* Property that includes 5 or more living units and that has a mortgage held pursuant to a direct loan or capital advances under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q) or capital advances under section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013).

(b) *Violation of agreement.* (1) *General.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against a mortgagor of a section 202 or 811 property or a mortgagor, general partner of a partnership mortgagor, or any officer or director of a corporate mortgagor of a multifamily property who:

(i) Has agreed in writing, as a condition of a transfer of physical assets, a flexible subsidy loan, a capital improvement loan, a modification of the mortgage terms, or a workout agreement, to use nonproject income to make cash contributions for payments due under the note and mortgage, for payments to the reserve for replacements, to restore the project to good physical condition, or to pay other project liabilities; and

(ii) Knowingly and materially fails to comply with any of the commitments listed in paragraph (b)(1)(i) of this section.

(2) *Maximum penalty.* The maximum penalty for each violation under paragraph (b) of this section is the amount of loss that the Secretary would experience at a foreclosure sale, or a sale after foreclosure, of the property involved.

(c) *Other violations.* (1) *Multifamily projects.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against any of the following who knowingly and materially take any of the actions listed in 12 U.S.C. 1735f–15(c)(1)(B):

(i) Any mortgagor of a multifamily property;

(ii) Any general partner of a partnership mortgagor of such property;

(iii) Any officer or director of a corporate mortgagor;

(iv) Any agent employed to manage the property that has an identity of interest with the mortgagor, with the general partner of a partnership mortgagor, or with any officer or director of a corporate mortgagor of such property; or

(v) Any member of a limited liability company that is the mortgagor of such property or is the general partner of a limited partnership mortgagor or is a partner of a general partnership mortgagor.

(2) *Section 202 or 811 projects.* The Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, may initiate a civil money penalty action against any mortgagor of a section 202 or 811 property who knowingly and materially takes any of the actions listed in 12 U.S.C. 1701q-1(c)(1).

(3) *Maximum penalty.* The maximum penalty for each violation under paragraph (c) of this section is \$30,000.

(d) *Payment of penalty.* No payment of a civil money penalty levied under this section shall be payable out of project income.

4. Add § 30.68 to read as follows:

**§ 30.68 Section 8 owners.**

(a) *Definitions.* The following definitions apply to this section only:

*Agent employed to manage the property that has an identity of interest and identity of interest agent.* An entity:

(1) That has management responsibility for a project;

(2) In which the ownership entity, including its general partner or partners (if applicable), has an ownership interest; and

(3) Over which the ownership entity exerts effective control.

*Effective control.* The ability to direct, alter, supervise, or otherwise influence the actions, policies, decisions, duties, employment, or personnel of the management agent.

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

*Ownership interest.* Any financial, legal, beneficial, or equitable interest in the management agent.

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

(1) Failure to provide decent, safe, and sanitary housing pursuant to section 8 of the United States Housing Act of 1937 and 24 CFR 5.703; or

(2) Knowing or willful submission of false, fictitious, or fraudulent statements or requests for housing assistance payments to the Secretary or to any department or agency of the United States.

(c) *Maximum penalty.* The maximum penalty for each violation under this section is \$25,000.

(d) *Payment of penalty.* No payment of a civil money penalty levied under this section shall be payable out of project income.

(e) *Exceptions.* The Secretary may not impose penalties under this section for a violation, if a material cause of the violation is the failure of the Secretary, an agent of the Secretary, or a public housing agency to comply with an existing agreement.

5. Revise § 30.80(k) introductory text to read as follows:

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

\* \* \* \* \*

(k) In addition to the above factors, with respect to violations under §§ 30.45, 30.55, 30.60, and 30.68, the Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, or the Assistant Secretary for Public and Indian Housing, or his or her designee, shall also consider:

\* \* \* \* \*

Dated: May 25, 2000.

**Andrew Cuomo,**

*Secretary.*

[FR Doc. 00-16024 Filed 6-23-00; 8:45 am]

**BILLING CODE 4210-32-P**