

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 291**

[Docket No. FR-4871-F-02]

RIN 2502-A108

Disposition of HUD-Acquired Single Family Property; Disciplinary Actions Against HUD-Qualified Real Estate Brokers

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule establishes the basis and procedures for removing real estate brokers from HUD's qualified selling broker list and for prohibiting removed brokers from using HUD's systems to participate in the sale of HUD-owned, single family properties. This rule is similar to existing removal rules for Federal Housing Administration (FHA) appraisers, consultants, and nonprofit organizations, and provides HUD a more expeditious disciplinary procedure for real estate brokers than the suspension and debarment procedures that would otherwise be applicable. This final rule follows publication of a September 17, 2004, proposed rule, and takes into consideration the public comments received on the proposed rule.

DATES: *Effective Date:* December 7, 2006.

FOR FURTHER INFORMATION CONTACT:

Ivery W. Himes, Division Director, Asset Management and Disposition Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9176, Washington, DC 20410-8000; telephone (202) 708-1672 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Background—The September 17, 2004, Proposed Rule**

HUD published the proposed rule on September 17, 2004 (68 FR 56118), to add a new paragraph (i) to § 291.100 for the purpose of addressing real estate broker participation in predatory lending practices, such as property “flipping,” inflated appraisals, falsified loan documents, and/or fraudulent underwriting targeted at FHA borrowers, and violating the terms of the Selling Broker Certification (form SAMS-1111-A). The proposed rule provided for the removal by HUD, for

good cause, of a real estate broker from HUD's qualified selling broker list and the deactivation of the broker's name and address identifier (NAID). A NAID provides a broker with access to HUD systems and enables a broker to participate in the sale of HUD-owned property and be compensated for services rendered. The proposed rule provided several examples of activities that would constitute good cause, such as fraudulent activities, the use of false and misleading statements, the loss of a state license, or acting in concert with an appraiser to arrive at an artificial appraised value, and laid out the procedure that would be followed in removing a broker from the list and deactivating the broker's NAID.

II. Discussion of the Public Comments Received on the September 17, 2004, Proposed Rule

The public comment period for the September 17, 2004, proposed rule closed on November 16, 2004. HUD received eight comments: three from businesses, two from local associations, one from a national association, one from an individual, and one from a state agency. The issues and questions raised by the commenters on the September 17, 2004, proposed rule, along with HUD's responses, are grouped below according to the relevant section or subject of the proposed rule.

Section 291.100(i)(1)—In General

Comment: HUD already has procedures in place to remove participants such as appraisers and nonprofit entities from its programs, and those procedures should apply to brokers as well. These procedures entail HUD initiating an internal inquiry based on its own observations, based on program controls that indicate a problem, or in response to an external complaint. Before HUD arrives at a decision, the results of the inquiry are reviewed by senior area office personnel. If it is deemed appropriate, the case is referred to the Inspector General's office.

HUD response: It is HUD's goal with this rule to establish a procedure that is tailored to instances where removal from the roster is sufficient protection of HUD's interests, and to provide the affected brokers with an expeditious process for contesting removal. Consistent with HUD's goal, this rule gives a broker the opportunity to respond fully, both in writing and by requesting a conference, to HUD's initial findings before any disciplinary action is taken. In addition, the time frames within which a broker and HUD must act under the rule are intended to

quickly resolve issues or remove a broker from participation in the sale of HUD-owned, single family properties without undue delay. A fair and expeditious disciplinary procedure will serve to promote the integrity of, and the public's confidence in, the process for disposition of HUD-owned single family properties.

Section 291.100(i)(2)(ii)(F)—Violation of Section 8(a)

Comment: With regard to using a violation of section 8(a) of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2607(a)) as a basis for removal, the Federal circuit courts have split as to what constitutes a violation under section 8 of RESPA. This provision should be eliminated as a ground for removal until there is national uniformity in the interpretation of section 8.

HUD response: HUD has determined that it is not appropriate to exclude entirely any basis for disciplinary action that is intended to protect the public interest and maintain the integrity of HUD's single family disposition program. HUD will consider aggravating and mitigating factors, including those relating to RESPA, when deciding whether to initiate an action and when disposing of an action. However, HUD is also revising § 291.100(i)(2)(ii)(F) to replace the narrow focus on section 8(a) with a statement more broadly referring to “Violating the Real Estate Settlement Procedures Act” as a basis for removal.

Section 291.100(i)(2)(ii)(G)—Any Other Offense

Comment: The rule does not specify sufficiently what “any other offense that reflects on the broker's character and integrity” means as a basis for removal. The phrase is overly broad, can be open to misinterpretation, and may include inconsequential or minor offenses that HUD does not intend to address. The phrase should be clarified or it should be deleted. Several examples of suggested clarifying language were submitted.

HUD response: The proposed rule stated at § 291.100(i)(2)(ii)(G) that good cause for removal includes, but is not limited to, committing any other offense that reflects on the broker's character and integrity, including non-compliance with civil rights requirements regarding the sale of HUD-owned single family properties. In general, the rule makes clear that the list at § 291.100(i)(2)(ii) is not exhaustive, but only provides examples of broker acts or omissions that constitute good cause for purposes of proceeding with a disciplinary action. However, following consideration of

these comments and suggested revisions, HUD will clarify the proposed language of § 291.100(i)(2)(ii)(G) in this final rule by listing “non-compliance with civil rights requirements regarding the sale of HUD-owned single family properties” as an individual example of good cause in paragraph (G), and by adding a separate paragraph (I), which is more focused on factors that are housing-related than the language that was in the proposed rule. Paragraph (I) reads, “Any other actions or omissions that evidence a lack of business integrity or non-compliance with the laws, regulations, and rules applicable to housing, lending, or real estate sales.” To provide more guidance as to what constitutes “good cause,” an additional example is added as paragraph (H) to read, “Involvement in, or knowledge of, any fraudulent activity by any person involved in the REO sales transaction.”

Comment: While convictions under 18 U.S.C. 1010 should serve as grounds for disciplinary action, so should state criminal convictions, state or federal civil judgments, or state regulatory actions taken as a result of conduct described in § 291.100(i)(2)(ii)(A)–(E).

HUD response: The change by this rule discussed in the previous response, which describes additional examples of good cause for removal provided in §§ 291.100(i)(2)(ii)(H) and (I), will permit HUD to take action as described in the comment. To provide additional clarity, HUD is including a specific reference to a conviction under 18 U.S.C. 371, which would apply to conspiring to defraud a federal agency, along with the existing reference 18 U.S.C. 1010.

Section 291.100(i)(4)—Response and Conference

Comment: HUD should provide a longer period, such as 30 days, rather than the proposed 20 days for a broker to respond or request a conference. HUD should consider granting extensions to the response times for reasonable cause. The 15-day deadline for the conference should be extended to 30 days to provide more time for the broker to prepare.

HUD response: As noted in the proposed rule and above in this preamble, the rule is intended to provide a more expeditious disciplinary procedure for real estate brokers, and the time periods stated in the rule are consistent with this intent. The rule does permit the written notice from HUD to provide a longer period of time to submit a written response and/or request a conference, such as when the complexity of the issues involved requires additional time. Following

consideration of the public comments, HUD has decided that it would be appropriate for the rule to also allow HUD to extend the 15-day period, upon notification to the broker, and to request additional information at or following a conference, and to provide a broker additional time to submit such information. These changes accommodate the concern that complex issues be given the consideration they deserve, while still preserving the more expeditious nature of the procedure. HUD has also changed the rule to reflect that the conference is not considered closed until the broker has had an opportunity to submit additional information requested by HUD and until HUD has reviewed the additional information. As discussed below, § 291.100(i)(4) is redesignated as § 291.100(i)(5).

Section 291.100(i)(5)(ii)—Disposition/ HUD Response

Comment: The various time limits imposed on HUD seem burdensome. HUD should provide itself additional time before it must hold a conference with the real estate broker or before it must respond to a broker's response.

HUD response: As noted above in the response to the comments on § 291.100(i)(4), this final rule permits HUD to request additional information following a conference and to provide a broker additional time to submit such information. This change should also adequately address the concern in this comment on § 291.100(i)(5)(ii). As discussed below, § 291.100(i)(5) is redesignated as § 291.100(i)(6).

Comment: Brokers should not be suspended until they have exhausted their due process rights to a hearing before an Administrative Law Judge (ALJ). At the least, brokers should be allowed to request that the ALJ issue an order requiring HUD to allow them to continue to participate in the program until the case is finally resolved. Because so many small brokers rely on their participation in SAMS for their livelihood, deactivation from that system should take place only upon a finding of wrongdoing by a neutral third party.

HUD response: HUD has adopted this rule to provide an expeditious disciplinary procedure while still providing a broker a fair opportunity to present for consideration any exculpatory or mitigating information. A finding by HUD in these circumstances is significant enough to properly require action to protect the interests of the public and HUD, and those interests must be HUD's paramount, though not sole, consideration.

Additional Sanctions

Comment: For violations of § 291.100(i), HUD may also wish to sanction real estate agents who work with HUD-qualified brokers. While such agents may not be on a HUD list, HUD may wish to prevent the future addition of such agents to the qualified broker list unless they can provide just cause for qualifying at that time. HUD needs to take legal action against all who create or aid and abet mortgage fraud.

HUD response: The suggested actions are beyond the scope of this rule, which focuses on HUD-qualified brokers; however, this comment, as other comments also did, recognized the connection between an agent's actions and a broker's responsibility. Although agents are not themselves listed individually, agents must work through a listed broker, who is the point of contact and enforcement with HUD. As discussed below in HUD's response under the heading “Individual agent NAIDS,” §§ 291.100(i)(2)(i) and 291.100(i)(2)(ii) are revised in this final rule to clarify this point and refer specifically to actions by a broker or an agent.

Comment: The names and license numbers of brokers removed from HUD's qualified selling broker list should be referred to the appropriate state licensing authority. This will assist the public, and state agencies may be permitted by their statutes to assess more stringent penalties.

HUD response: This is HUD's current practice following disciplinary action, and this practice will continue.

Individual Agent NAIDS

Comment: Even though brokers are responsible for monitoring the activities of their agents, HUD should consider assigning NAIDS to individual agents as well. When HUD suspends a broker from the program, it affects all the agents in a firm even if a single agent caused the problem.

HUD response: Approved brokers act as gatekeepers for the competitive sales Real Estate-Owned (REO) program. HUD regulations at 24 CFR 291.100(h) and 291.205(a)(1) require that all bids placed in the competitive sales program go through approved brokers, unless the bid is submitted by a government or nonprofit entity. Individual agents must work through an approved broker in the competitive sales REO program. As such, brokers are the logical enforcement point for HUD.

To make explicit the connection between the actions of an agent and the responsibilities of a broker that was recognized in this and in other

comments, §§ 291.100(i)(2)(i) and 291.100(i)(2)(ii) are revised in this final rule to refer to actions by a broker or an agent supervised by that broker and acting within the scope of the agent's duties.

Comment: If HUD cannot assign NAIDS to individual agents, and a problem is the result of an individual agent whom the broker subsequently fired and the broker has implemented management controls to prevent a reoccurrence, HUD's remedy should not entail removal from the program.

HUD response: HUD will consider the sufficiency of corrective actions taken by a broker in reaching its decision under § 291.100(i)(6)(ii), which has been revised to specifically provide for HUD's consideration of such corrective action.

III. Changes to the Proposed Rule in This Final Rule

The following changes to the September 17, 2004, proposed rule are made by this final rule, consistent with the discussion of public comments in this preamble, and as further explained below:

1. Section 291.100(i)(2)(i) is revised to read, "Conviction under 18 U.S.C. 371 or 1010 of a broker or an agent supervised by that broker and acting within the scope of the agent's duties."

2. Section 291.100(i)(2)(ii) is revised to read, "Any of the following actions by a broker or an agent supervised by that broker and acting within the scope of the agent's duties."

3. Because form numbers are subject to change, the reference to form SAMS-1111-A in § 291.100(i)(2)(ii)(D) is removed and is replaced with language cross-referencing HUD's earnest money deposit requirements found elsewhere in part 291.

4. Section 291.100(i)(2)(ii)(F) is revised to read, "Violating the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601 *et seq.*)"

5. The proposed language of § 291.100(i)(2)(ii)(G) is divided into two separate paragraphs in this final rule by listing, "Non-compliance with civil rights requirements regarding the sale of HUD-owned single family properties" as an individual example of good cause in paragraph (G), and by clarifying the remaining language originally in paragraph (G) by adding a separate paragraph (I) to read, "Any other actions or omissions that evidence a lack of business integrity or non-compliance with the laws, regulations, and rules applicable to housing, lending, or real estate sales." To provide more guidance as to what constitutes "good cause," an additional example is added at

paragraph (H) to read, "Involvement in, or knowledge of, any fraudulent activity by any person involved in the REO sales transaction."

6. To better organize the final rule and improve its internal consistency, paragraphs (A) and (B) of § 291.100(i)(3)(iv) in the proposed rule are redesignated as § 291.100(i)(4)(i) and (ii), and the clause "unless the broker submits a written response or requests a conference in accordance with paragraph (i)(5) of this section" is added to redesignated § 291.100(i)(4)(i). The succeeding paragraphs of § 291.100(i) are renumbered accordingly.

7. Provisions are added to the proposed language of § 291.100(i)(4) (redesignated in this final rule as § 291.100(i)(5)) to allow HUD to extend the 15-day period for holding a conference by providing written notice to the broker and to allow HUD to request additional information and to provide a broker additional time to submit the information. Also added is clarification that the conference is not considered completed until the date set for submission if the information requested by HUD is not submitted, or until after HUD considers the information that was timely submitted.

8. To resolve an inconsistency that appeared in § 291.100(i)(5)(ii) of the proposed rule, which stated, "Participation in the appeal process before the ALJ is not a prerequisite to filing an action for judicial review under the Administrative Procedure Act," the final rule removes the references to a hearing before an ALJ and provides (in redesignated § 291.100(i)(6)(ii)) that, "The written decision by HUD shall constitute final agency action." Final agency action is a prerequisite to filing an action for judicial review, and the language of the proposed rule left the point of final agency action open to question.

IV. Findings and Certifications

Unfunded Mandates Reform Act

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

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or

regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Secretary has reviewed this rule before publication and, by approving it, certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this rule would not have a significant economic impact on a substantial number of small entities. The rule would establish uniform and expeditious requirements and procedures to remove real estate brokers from HUD's qualified selling broker list. As such, the rule would benefit both the industry and the government in that it clarifies the terms of the relationship between HUD and its listed real estate brokers.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on state and local governments and is not required by statute or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the executive order. This 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 the executive order.

Executive Order 12866, Regulatory Planning and Review

OMB reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the executive order (although not economically significant, as provided in section 3(f)(1) of the executive order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500.

List of Subjects in 24 CFR Part 291

Community facilities, Conflict of interests, Homeless, Lead poisoning, Low and moderate income housing, Mortgages, Reporting and recordkeeping requirements, Surplus government property.

■ Accordingly, HUD amends 24 CFR part 291 as follows:

PART 291—DISPOSITION OF HUD-ACQUIRED SINGLE FAMILY PROPERTY

■ 1. The authority citation for 24 CFR part 291 continues to read as follows:

Authority: 12 U.S.C. 1701 *et seq.*; 42 U.S.C. 1441, 1441a, and 3535(d).

■ 2. In § 291.100, add paragraph (i) to read as follows:

§ 291.100 General policy.

* * * * *

(i) *Disciplinary actions against HUD-qualified real estate brokers.*

(1) *In general.* Real estate brokers that are involved in Real Estate Owned (REO) sales will be removed from HUD's qualified selling broker list and will be prohibited from using HUD systems to participate in the sale of HUD-owned single family properties for good cause in accordance with the procedures of this paragraph. Nothing in this section prohibits HUD from taking such other action against a broker as provided in 24 CFR part 24 or from seeking any other available remedy.

(2) *Good cause.* Good cause includes, but is not limited to:

(i) Conviction under 18 U.S.C. 371 or 1010 of a broker or an agent supervised by that broker and acting within the scope of the agent's duties;

(ii) Any of the following actions by a broker or an agent supervised by that broker and acting within the scope of the agent's duties:

(A) Falsifying loan documents or aiding or abetting persons in the use of false or misleading information including, but not limited to, forged or fraudulent gift letters and owner occupant certifications;

(B) Acting in concert with an appraiser to arrive at an artificial appraised value;

(C) Engaging in fraudulent activities (with or without the assistance of an

appraiser) that have led to default and payment of an insurance claim;

(D) Failing to comply with earnest money collection, management, and disbursement procedures as set forth in this part;

(E) Failing to maintain a current state license;

(F) Violating the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601 *et seq.*);

(G) Non-compliance with civil rights requirements regarding the sale of HUD-owned single family properties;

(H) Involvement in, or knowledge of, any fraudulent activity by any person involved in the REO sales transaction; and

(I) Any other actions or omissions that evidence a lack of business integrity or non-compliance with the laws, regulations, and rules applicable to housing, lending, or real estate sales.

(3) *Written notice.* Once HUD makes an initial finding that there is good cause to remove a broker, HUD will provide the broker with written notice of proposed removal from HUD's qualified selling broker list and deactivation of the broker's access to HUD systems to participate in the sale of HUD-owned properties. The notice will:

(i) State the reasons that HUD is taking the action;

(ii) Identify the violations or deficiencies involved;

(iii) Provide a citation to the relevant regulation, statute, or policy; and

(iv) State the effective date and duration of the removal and deactivation.

(4) *Effective date and duration of removal.* (i) The effective date of the broker's removal will be the 30th day after the date of the notice, unless the broker submits a written response or requests a conference in accordance with paragraph (i)(5) of this section;

(ii) HUD's determination of the duration of removal and deactivation will be based upon HUD's consideration of the number and seriousness of the broker's violations and deficiencies.

(5) *Response and conference.* Real estate brokers will be given 20 days after the date of the notice (or longer, if provided in the notice) to submit a written response to HUD opposing the proposed removal and to request a conference. A request for a conference

must be in writing and must be submitted along with the written response. If a conference is requested, it will occur within 15 days after the date of receipt of the request. HUD may extend the 15-day period by providing written notice to the broker. HUD may request additional information at or following a conference and provide additional time to submit such information. If the information is not submitted by the time set by HUD, the conference is completed. If the information is timely submitted, the conference is not completed until HUD has considered the additional information.

(6) *Disposition.* (i) *No response from real estate broker.* If the real estate broker does not submit a written response within the time provided, the removal and deactivation take effect in accordance with the notice.

(ii) *Response from real estate broker.* If the real estate broker submits a written response within the time provided, the removal and deactivation are delayed until HUD considers the response and makes a final determination. HUD will consider the sufficiency of any corrective actions taken by a broker with respect to its procedures and, if relevant, its agents, in reaching its decision. Within 20 days after the date of receipt of the written response, or if a conference is requested, within 20 days after the date of completion of the conference, HUD will advise the real estate broker in writing of the decision to rescind, modify, or affirm the removal from HUD's qualified selling broker list and the deactivation of the broker's access to HUD systems to participate in the sale of HUD-owned properties. The written decision by HUD shall constitute final agency action.

(7) *Effect of removal proceeding on bids.* All bids submitted and commissions earned by the real estate broker prior to removal will be honored, unless HUD determines they were made under fraudulent circumstances.

Dated: October 27, 2006.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

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