DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 30

[Docket No. FR–4399–F–02]

RIN 2501–AC56

Amendments to HUD's Civil Money Penalty Regulations

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule implements 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.

DATES: Effective Date: January 7, 2002.

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 June 26, 2000 Proposed Rule

The proposed rule proposed to implement section 561 and 562 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Pub. L. 105–65, Title V, 111 Stat. 1384) (the MAHRA), the purpose of which is to enhance enforcement against multifamily mortgagors and Section 8 owners who violate program requirements. Section 561 of the MAHRA amended the National Housing Act at 12 U.S.C. 1735f–15, ''Civil Money Penalties Against Multifamily Mortgagors,'' to expand the parties against whom HUD may seek a civil money penalty, as well as the violations potentially subject to a civil money penalty. Under the law, civil money penalty liability can extend to mortgagors, general partners of mortgagors, officers or directors of corporate mortgagors, identity of interest agents, and members of limited liability companies that are mortgagors or partners of partnership mortgagors. Additional violations for which HUD may seek a civil money penalty under section 561 include failure to maintain the mortgaged property, failure to provide acceptable management, and failure to properly maintain the books and accounts of the mortgaged property in accordance with HUD requirements.

Section 562 of the MAHRA added a new section to the U.S. Housing Act of 1937, codified at 42 U.S.C. 1437z–1, entitled ''Civil Money Penalties Against Section 8 Owners.'' Under this section, potentially liable parties include owners, their general partners in the case of a partnership owner, and identity of interest agents. A penalty may be imposed for any knowing and material breach of a housing assistance payments contract, including failure to provide decent, safe and sanitary housing, and knowing submission of false or fraudulent statements or requests for housing assistance payments to HUD or any other government agency.

The final rule implements these sections by amending the existing civil money penalty regulations at 24 CFR part 30. Section 561 of the MAHRA is implemented at § 30.45. Amendments to that section include new definitions, including definitions of ''identity of interest agent'' and further definitions of terms used within that definition. The section also incorporates the amended statutory list of violations for which HUD may seek a civil money penalty. Section 562 of the MAHRA is implemented in a new 24 CFR 30.68.

II. This Final Rule

The public comment period on the proposed rule closed on August 25, 2000. HUD received 11 comments. Five were from trade associations representing housing owners or managers, four were from groups representing tenants, one was from a management corporation on its own behalf, and one was from an individual owner.

III. Public Comments

A. Comments Arguing That the Rule Unfairly Burdens Mortgagors/Owners

Comment: The potential maximum penalty will cause financial hardship to small owners. Many of the owners subject to the rule are single asset entities with only the one property and the related assistance as their sole source of income. Many of these are small businesses or non-profits with limited outside revenue, individuals, elderly, and other like entities. These owners cannot afford the maximum $30,000 penalty being proposed. The reason such owners often fail to maintain properties or submit audited financial statements are income shortages, and the proposed penalty will only exacerbate the problem.

Response: While the maximum amount of civil money penalty is set as a statutory matter, the rule does not require HUD to assess the maximum civil penalty in any given case of a violation subject to such penalty. Rather, in assessing a penalty, HUD, by statute, must assess a variety of factors, including an entity's ability to pay. (See 12 U.S.C. 1735f–15(d)(3); 12 U.S.C. 1701q–1((d)(3); and 42 U.S.C. 1437z–1(c)(3)(C).) HUD's civil money penalty regulations implement this statutory requirement at 24 CFR 30.80(c). Thus, there is already sufficient statutory and regulatory protection of small owners. HUD has made no change to the rule as a result of this comment.

Comment: The cash flow from assisted projects can be too low for owners to fully comply with all HUD standards. It is unfair to require owners to maintain projects at a higher level than the project income allows. There needs to be balance in the system so that owners who are doing a good job of managing the project within the constraints of the rent they can charge are not subject to penalties. It is not fair to require owners to reach into their own pockets to supplement the rent. HUD field officials should be trained in this standard.

Response: HUD is required to consider ''the gravity of the offense'' and ''the degree of the violator's culpability'' when determining whether to seek a civil money penalty and, if so, how much to seek. (See 24 CFR 30.80(a) and (h).) These mandatory considerations should provide sufficient protection to the owner in the scenario described, where an owner is generally doing a good job but is found to have committed a violation. In addition, HUD expects owners with income shortfalls to seek relief that may be available, including budget-based rents or other permitted rent increases, or mortgage restructuring, if applicable. If such relief is available and an owner fails to seek it, HUD will consider that failure as part of its analysis of the gravity of the offense and the degree of culpability. Nonetheless, lack of income is not *per se* an excuse for an owner's failure to comply with legal obligations. Civil money penalties are always a potential result of failure to comply.

As to the commenter's request that HUD provide training, the Departmental Enforcement Center currently provides employees engaged in the civil penalty process with adequate training in applying HUD's regulations on such

penalties, including the standards discussed above. For these reasons, HUD makes no change to the rule as a result of this comment.

Comment: Since owners generally rely on HAP payments to correct violations, and since the owners face civil money penalties if they apply for HAP payments knowing that violations exist, there would never be funds available to correct the violations and return the property to compliance. Therefore, the procedures should allow for an evaluation of the cause of a property's financial distress before imposing monetary penalties.

Response: HUD existing procedures allow sufficient flexibility to consider a variety of circumstances. These procedures include a general requirement that HUD consider ''such matters as justice may require,'' 24 CFR 30.80(j). However, HUD believes that it is important that the agency retain maximum flexibility regarding civil penalties, within the general standards and procedures stated in the regulations. Therefore, after consideration, HUD has decided not to change the rule to address the specific situation raised by the comment. Rather, as to that situation and other individual situations that may arise, owners can consult with legal counsel and/or HUD field office staff, as appropriate.

Comment: Civil money penalties will be ''detrimental'' to housing managers and hinder the operation of their properties.

Response: While HUD considers the ability to pay in assessing a civil money penalty under 24 CFR 30.80(c), it is also true that the purpose of civil money penalties is to provide a disincentive for a manager, or any party statutorily subject to civil money penalties, to violate its legal obligations regarding HUD-assisted housing developments. Thus, the fact that civil money penalties might be detrimental does not argue against their imposition in appropriate cases. HUD makes no change to the rule as a result of this comment.

B. Comments on the Proposed Amount of Penalties

Comment: HUD should seek penalties appropriate to the violations, and not excessive penalties. A number of commenters stated that the amount of penalties should not be excessive and should relate to the severity of the violation, the financial condition of the violator, and whether there was good faith in attempting to comply with HUD regulations. Some commenters specifically cited the Small Business Regulatory Flexibility Act (''SBRFA''), 5 U.S.C. 612(b), and one commenter stated that some of the SBRFA policies should be incorporated into the final rule so that owners and managers will have a basic understanding of them.

Response: HUD's existing regulations governing civil penalties within which the new rule will be codified already provide for consideration of these factors. The regulations require consideration of, among other things, the gravity of the offense (24 CFR 30.80(a)); the violator's ability to pay (which of necessity includes the financial condition)(24 CFR 30.80(c)); and whether there was good faith (24 CFR 30.80(h)). Furthermore, in order to assess a civil penalty, HUD must show that there was a ''knowing and material'' violation. (*See*, *e.g.,* 24 CFR 30.45(b)(1)(ii) and (c).) Lack of knowledge would be a form of good-faith defense that a respondent could raise. Regarding SBRFA-related matters, HUD has fully complied with SBRFA requirements, and has published material on its SBRFA policies, so that it is not necessary to repeat this material in each individual rule. For more information, please see below the section entitled ''Small Entities and HUD Enforcement Actions.'' In addition, information on HUD's SBRFA policies can be found on the World Wide Web by choosing the ''Small Business'' link from HUD's home page, *http://www.hud.gov,* and clicking on the link to ''1996 Law (SBREFA).''

Comment: Civil money penalties could be crippling in many circumstances, and owners and managers need a clear understanding of their exposure to deter potential wrongdoing.

Response: Under its current statutory authority to assess civil money penalties for multifamily housing, section 202 and section 811 developments, as adjusted under the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, HUD may assess a civil money penalty of up to $30,000. For section 8 properties, the Inflation Adjustment Act currently does not result in an increase above the original $25,000 statutory amount (*See* 42 U.S.C. 1437z–1(b)(3)). Owners and managers should consider these amounts their maximum potential civil money penalty exposure. (For the pre-adjustment penalty for multifamily housing, see 12 U.S.C. 1715f–15(c)(2).) See the preamble to the proposed rule for an explanation as to the section 202 and 811 programs, 65 FR 39502–39504 (June 26, 2000).)

Comment: Four commenters supported increased civil money penalties. One also supported the expansion of parties potentially subject to civil money penalties. Others stated that aggressive enforcement of civil money penalties is the best remedy to insure that tenants get decent homes and HUD funds are spent wisely.

Response: These comments do not seek any change in the regulation. Therefore, no change is necessary as a result.

C. Comments Raising Fairness Concerns

Five commenters raised concerns regarding the fairness of civil money penalties. These comments concerned hypothetical situations where HUD contributes to a violation; false statement provisions; due process concerns; and a concern that potential civil money penalties will encourage owners to opt out of assisted housing programs.

Comment: A provision prohibiting HUD from assessing penalties in the case of misconduct by HUD should be more fully implemented in the rule. Three commenters stated that, as to Section 8 owners, the rule implements the statutory provision that HUD may not impose penalties if a material cause of the violation is the failure of HUD or a PHA to comply with an existing agreement at 24 CFR 30.68(e) (*see* 42 U.S.C. 1437z–1(a)(2). However, the rule does not implement a similar provision in 12 U.S.C. 1735f–15(a) relating to HUD-assisted mortgagors. In addition, the rule should provide examples of HUD actions to which this provision would apply. One of the three commenters cited, as an example, HUD denials of requests for rent increases, which the commenter argued made it unfair for HUD to impose penalties for non-compliance. Another commenter similarly argued that the rule should not allow HUD to take any enforcement action until the agency has ''fully complied'' with its obligations under the regulatory agreement between the owner and HUD.

Response: The commenters correctly observe that the provision in question regarding failure to comply with existing agreements is found in both authorizing statutes that this rule implements. Therefore, HUD sees no reason why HUD should not implement the parallel provision in § 30.45. Indeed, failure to do so could be misunderstood to indicate that HUD intended to implement this provision for the Section 8 program only. Therefore, in accordance with this comment, HUD revises the proposed rule to implement this provision in § 30.45.

However, HUD disagrees with the commenters' assertion that HUD should provide examples of conduct to which this provision would apply, or address

the specific issue of the regulatory agreement. In particular, HUD disagrees with the commenter's example, citing a denial of a rent increase as cause for excuse from civil money penalties for noncompliance with HUD regulations. In most circumstances, the ordinary denial of a requested rent increase would not be an example of a failure to comply with an existing agreement, and would not insulate the owner from civil money penalties. Rather, such requests would be assessed in accordance with the regulatory requirements governing them, and approved or denied based on those requirements. As to the comment regarding theoretical future failures of HUD to ''fully comply'' with the regulatory agreement, HUD believes that the issue of whether a failure to comply with an agreement has occurred, and amounts to a violation of the agreement that constitutes a material cause of the owner's malfeasance, is of necessity controlled by the facts of particular cases, and is best examined on a case by case basis in the hearing process. Therefore, HUD makes no change other than to add the parallel provision.

Comment: The provision allowing for civil money penalties to be imposed on Section 8 owners in the case of false statements or false requests to HUD for housing assistance payments is unfair. Two commenters stated that, since it is impossible to determine that each unit is ''decent, safe and sanitary'' each day, the certification on the HAP voucher exposes the owner to a penalty with each submission. It would be an impossible administrative burden for owners to inspect each unit prior to submission on the voucher. In addition, minor technical violations could unfairly lead to large civil money penalties. Therefore, standards need to be set so that *de minimis* inaccuracies in vouchers, which can always be found, do not lead to civil penalties.

Response: In order to be liable for civil penalties, an owner must make a ''knowing or willful'' false submission or statement. While it is impossible to comment on future situations that may or may not arise, in the type of hypothetical scenario described by the comment, the submission might not be ''knowing'' or ''willful,'' and so might not meet the standard for assessing a civil penalty. Of course, this response does not relieve each owner of the responsibility to make reasonable and timely efforts to ascertain the condition of the project and take appropriate corrective action when necessary. In close cases, HUD is still obligated to consider the gravity of the offense and the degree of culpability (see 24 CFR 30.80(a) and (h)). Of course, HUD will consider each case on its merits. In questionable cases, potential respondents are advised to consult with the HUD field office as well as their own counsel. However, the rule as currently written is flexible enough to deal with the commenter's concern, and so no further modification of the rule is necessary.

Comment: Owners will opt out of HUD programs. The proposed rule provides another incentive for owners to opt out at the earliest opportunity. There should be reasonable procedures whereby good owners will not be fined for minor and technical violations. It should be HUD's goal to create incentives for owners who want to stay in HUD's programs.

Response: Reasonable procedures regarding minor and technical violations are already in place. For example HUD is required to consider the gravity of the offense when determining the amount of a civil money penalty. 12 U.S.C. 1735f-15(d)(3); 12 U.S.C. 1701q–1(d)(3); 42 U.S.C. 1437z–1(c)(3)(A), implemented at 24 CFR 30.80(a). In addition, HUD has provided incentives for owners to remain in multifamily assisted housing programs, including mark-to-market and mark-up-to market. Whether or not particular owners will choose to opt out rather than pay civil money penalties is purely hypothetical. In any case, HUD must enforce its program rules, which are for the benefit of tenants and the taxpaying public.

D. Due Process Concerns

Comment: One commenter stated that since the rule does not include a detailed appeals procedure, it violates due process.

Response: The commenter is incorrect. Although these particular revisions to 24 CFR part 30 do not include a separate appeals procedure, the general procedures incorporated into part 30, where these sections will be codified, applies. Under 24 CFR 30.95, hearings regarding part 30 civil money penalties are to be conducted under the procedures in 24 CFR part 26, subpart B. This subpart contains complete hearing procedures that comply with due process, including higher-level administrative appeal and judicial review provisions. Furthermore, judicial review is authorized by the underlying statutes. (*See* 12 U.S.C. 1735f–15(e) and 42 U.S.C. 1437z–1(d)). Therefore, no change is necessary as a result of this comment.

Comment: One commenter stated that the rule should provide that civil penalties cannot be imposed until the appeals process is completed.

Response: Generally, the authorizing statutes provide that a civil penalty may be imposed only after the respondent ''has received notice and an opportunity for a hearing on the record.'' (*See* 12 U.S.C. 1735f–15(d)(1)(B) and 42 U.S.C. 1437z–1(c)(1)(B)). Thus, HUD has authority to impose the penalty at that point, and sees no reason to refrain from imposing a penalty at the time of the initial decision if the respondent is found liable. While respondents have the right to seek a stay of the penalty during the appeals process, HUD does not believe an automatic stay for all cases would be in the public interest, since some cases may involve egregious acts of noncompliance for which a stay would not be appropriate.

E. Use of Funds Collected Through Civil Penalties

Three commenters suggested uses of the funds collected through the civil penalty process to benefit the specific project found liable.

Comment: Since the ultimate goal is to provide decent, safe and sanitary housing, HUD should permit the penalty or a payment in lieu of the penalty to be paid to the project to fix the underlying problems.

Response: The law does not permit the suggested payment of penalties. Penalties collected from multifamily and Section 202 owners may only be deposited in the Flexible Subsidy fund established by Section 201(j) of the Housing and Community Development Amendments of 1978. 12 U.S.C. 1735f–15(j); 12 U.S.C. 1701q–1(j). For FHA-insured or formerly FHA-insured projects, penalties collected against Section 8 owners and agents must either be deposited in the appropriate insurance fund or in another fund established under 42 U.S.C. 1437 (*see* 42 U.S.C. 1437z–1(g)(1)). For projects that are not FHA-insured, penalties collected against Section 8 owners and agents must be applied to the administrative costs incurred in enforcing HUD programs (see 42 U.S.C. 1437z-1(g)(2)). Since HUD cannot promulgate rules that violate Federal law, HUD makes no change as a result of this comment.

Comment: The fines should be directed to be used by the property solely to address any ''damage'' which was caused to the property for failure to meet the defined level of expectation.

Response: As in the comment above, the law does not permit the suggested application of penalties. Penalties collected from multifamily and section 202 owners may only be deposited in the Flexible Subsidy fund established by section 201(j) of the Housing and Community Development Amendments

of 1978. 12 U.S.C. 1735f–15(j); 12 U.S.C. 1701q–1(j). Penalties collected against Section 8 owners and agents must either be deposited in the appropriate insurance fund or another fund established by 42 U.S.C. 1437, or applied to the administrative costs incurred in enforcing HUD programs. 42 U.S.C. 1437z–1(g). Since HUD cannot promulgate rules that violate Federal law, HUD makes no change as a result of this comment.

F. Accessibility Issues

Comment: Failure to provide accessibility features required by law should be a basis for liability for civil penalties. One commenter stated that under § 561, failure to maintain the premises should include failure to have accessibility features required by law. Failure to have acceptable management should include failure to grant reasonable accommodations and other fair housing compliance as required by law. A commenter stated that under § 562, decent, safe and sanitary housing should be changed to ''decent, safe, accessible, and sanitary housing.''

Response: The proposed rulemaking for this rule did not put the public on notice that violations of civil rights laws could lead to the assessment of civil money penalties under sections 561 and 562 of the MAHRA. HUD does not believe it can add entirely new categories of penalties at this stage of the rulemaking, but rather would have to do so through a new proposed rule. Therefore, HUD makes no change to this rule as a result of these comments.

G. Additional Factors in Assessing Penalties

Two commenters argued for the inclusion of additional factors when assessing civil money penalties.

Comment: A past pattern of violation, prior to the publication of the final rule, and/or evidence of continuing violation should be given ''material weight'' in whether or not to establish penalties and in establishing their amount.

Response: 24 CFR 30.80(b) requires HUD to consider any history of past violations in determining whether to assess a civil penalty and the amount of such penalty. Therefore, no further revision to part 30 is necessary as a result of this comment.

Comment: The rule should clarify that mortgagors/owners who are in noncompliance with HUD procedures and management standards, particularly those affecting tenant living conditions and security of tenure, will be subject to penalties. For example, failure by the owner to comply with the notice requirements for Section 8 opt-outs and/or mortgage prepayments should be subject to penalties. Similarly, common violations of HUD management standards stated in handbooks, such as failure to maintain proper waiting lists for vacancies or transfers, improper charges to tenants, violations of local and State landlord/tenant laws and tenants' rights under leases, should be subject to penalties.

Response: HUD agrees that the violation of programatic procedures and standards, including the examples given by the commenter, are indicators of unsatisfactory management. The rule has been clarified to include this interpretation. However, the rule also makes clear that HUD does not believe that a single programmatic violation, unless extraordinarily serious, constitutes unacceptable management for which a civil money penalty may be imposed.

Comment: The rule should clarify that failure to respect the right of tenants to organize, should be subject to civil penalties. One commenter states that rule on tenant organization did not include civil penalties as an enforcement mechanism, and that HUD advised tenant representatives that this was an oversight that could be corrected by a subsequent rulemaking.

Response: HUD agrees with the comment, and the final rule has been revised accordingly.

H. Opt-Out Projects

One commenter stated that the rule should be extended to cover project-based Section 8 developments that opt out and convert to preservation vouchers.

Comment: HUD has authority to apply the civil penalty rule to projects that opt out because the MAHRAA statute which extended ''civil monetary authority'' over Section 8 units has been amended to provide for preservation vouchers in the event of an opt out. Doing so would eliminate the different standards used for units receiving preservation vouchers as opposed to project-based assistance. Ultimately, the commenter would prefer that oversight of units receiving preservation vouchers be transferred from PIH to the Office of Multifamily Housing. In the meantime, HUD should seek to equalize the standards. If further research suggests that MAHRAA, as amended, does not give HUD the authority to do this, HUD should propose legislation to accomplish this objective.

Response: HUD does not believe that it has the authority under the statute being implemented by this rule to take the steps suggested by the commenter under the MAHRAA, which states that a penalty may be imposed for a knowing and material breach of a HAP contract. (See 42 U.S.C. 1437z–1(b)(2).) This provision applies to owners, general partners, and identity-of-interest management agents of projects receiving project-based Section 8, 42 U.S.C. 1437z–1(b)(1). However, the enhanced vouchers granted to opt-out projects are generally tenant-based, and projects receiving project-based vouchers are generally not projects that have opted out. Thus, the statute being implemented by this rule does not appear to grant HUD the authority over projects that opt out as the commenter claims. Furthermore, HUD is reluctant to seek an expansion of its civil money penalty authority until it has gained sufficient experience to determine the effectiveness of its existing authority. Therefore, HUD makes no change to the rule as a result of this comment.

I. Tenant Participation in Civil Penalty Proceedings

Comment: Tenants and tenant organizations should be able to have a voice in HUD's process for assessing civil money penalties. Specifically, tenants should get notice of any proposed civil penalties; access to information regarding the administrative record of such proceedings, including all correspondence between HUD and owners on proposed penalties; and the right to comment before HUD's final decision. This should be done because tenants have the greatest stake in the maintenance of HUD standards, and they aspire to be major partners with HUD in the oversight of their homes. Allowing tenants to participate will allow tenants to be HUD's ''eyes and ears'' and enhance HUD's ability to gather evidence.

Response: The civil penalty process, by statute, is conducted by the government. HUD does not believe that involvement by tenants in the actual conduct of civil penalty cases is authorized, and therefore declines to adopt this suggestion.

As to the portion of the comment seeking information regarding ongoing civil penalty proceedings, the Freedom of Information Act would apply to those requests.

J. Clarification of Terms

Five commenters requested that the meaning of various terms used in the rule be clarified.

Comment: The definition of ''ownership interest in'' is too broad and should be clarified to mean persons holding legal title to interests in the subject entity.

Response: HUD believes that the suggested revision is too restrictive, as there are a variety of legal and equitable forms of ownership interest. Furthermore, for purposes of determining whether there is an identity of interest between ownership and the managing agent, the commenter's suggested definition is inadequate. HUD therefore declines to adopt the suggested change.

Comment: The definition of ''effective control'' is too broad and should be clarified to mean actual or apparent legal authority to bind the subject entity.

Response: HUD believes that effective control means much more than the authority to bind, and includes various forms of influence over others in the organization. Such influence is often based on financial or family considerations. HUD has thus adopted a functional definition of ''effective control.'' The suggested clarification would prevent HUD from taking relevant factors into consideration when determining whether an identity of interest relationship exists between an owner and a management agent. Therefore, HUD declines to adopt the suggested change.

Comment: HUD should amend ''agent employed to manage the property that has an identity of interest'' so it is the same as for ''identity of interest agent'' in Handbook 4381.5 REV–2, Chapter 1.

Response: The definition for identity of interest agent used in the rule is statutory, and HUD does not believe it has the authority to alter it. (*See* 12 U.S.C. 1735f–15–1(k), 42 U.S.C. 1437z–1(h).)

Comment: The rule should contain more precise cross-references to new Section 29 of the U.S. Housing Act of 1937 and the corresponding provisions of 24 CFR parts 26 and 30.

Response: The ''Authority'' statement at the beginning of the rule and the discussion in the preamble provide appropriate cross-references to the underlying statutory authority.

Comment: The definition of ''entity'' is too broad. In the case of a public corporation, a low-level staff member such as a ''low ranking Vice President'' can be the owner of a small number of shares in an employee stock ownership plan, and could be included in the definition. Similarly, the definition of ''entity'' in 30.45(a)(3) as ''any other organization or group of people'' is overly broad. The same problem occurs in section 30.68. The definition should be narrowed to limit the scope of liability to those with actual responsibility for violations.

Response: Although the commenter seems to take the position that one can become liable for civil penalties simply by meeting the definition of ''entity,'' in fact the definition of ''entity'' does not control who is potentially liable for civil penalties; rather, the only potentially liable parties are those listed under 12 U.S.C. 1735f–15(c)(1)(A) and 42 U.S.C. 1437z–1(b)(1). HUD does not believe, as the commenter fears, that the relevant statutory sections and rule would allow HUD to hold a person liable for a civil money penalty for the sole reason that he or she is a ''low-level staff member'' of, or holds a few shares in, the management agent. The proposed definition of ''entity'' properly takes account of the various legal and business entities that can be involved in housing transactions.

Comment: Entities subject to fines in §§ 30.45(b)(1) and (c)(1) and 30.68(b) should include the officers or directors of a corporate general partner in a partnership entity. This is necessary to prevent bad landlords from avoiding liability by using complex corporate structures to shield themselves.

Response: Applicable statutes do not give HUD authority to impose civil money penalties directly against the parties mentioned in the comment. 12 U.S.C. 1735f–15(c)(1)(A); 12 U.S.C. 1701q–1(b)(1) and (c)(1); 42 U.S.C. 1437z–1(b)(1). Of course, ''any'' general partners, including corporate ones, are covered under 12 U.S.C. 1735f–15(c)(1)(A) and 42 U.S.C. 1437z–1(b)(1).

K. Effective Date

Comment: The rule should be effective retroactively. The effective date should be amended to include past patterns of violation or continuing violations that have not been corrected as of the date of publication of the rule. This is essential to prevent bad landlords who have escaped effective enforcement action for years from getting away with impunity by claiming that only violations going forward from the date of rule publication are subject to fines. HUD should be able to take into account a previous administrative record of non-compliance with HUD standards in assessing fines quickly and firmly after the date of publication.(#8)

Response: HUD currently has the authority to impose civil money penalties for violations listed in the original civil penalty statutes which occurred after December 15, 1989, the effective date of those statutes. Sections 108(b) and 109(b) of the Department of Housing and Urban Development Reform Act of 1989, Public Law 101–235, 103 Stat. 2007, 2011. With respect to violations which were added by Section 561 of MAHRAA, HUD has statutory authority to impose civil money penalties only for violations which take place after the effective date of the final rule implementing section 561. (See Public Law 105–65 at section 561(c)(1). Section 562 has a similar provision. (See Public Law 105–65 at section 562(b).

Although HUD cannot make violators liable under the new laws for conduct occurring prior to the effective date of final regulations, HUD does consider a history of past violations in determining whether to assess a civil penalty and how much. 24 CFR 30.80(b).

L. Section 811 and 202 Properties

Comment: Four commenters support the application of the rule to 811 and 202 properties.

Response: Since these comments seek no change in the proposed rule, no response is necessary.

IV. 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.

V. 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) and (c)(6) of the HUD regulations, the policies and procedures contained in this final 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 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'').

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule. In so doing, the Secretary certifies that this final rule would not have a significant economic impact on a substantial number of small entities. This 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.

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, within the meaning of the UMRA, impose any Federal mandates on any State, local, or tribal governments nor on the private sector.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled ''Regulatory Planning and Review''). OMB determined that this proposed rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the proposed rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, 20410–0500.

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 amends 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 January 7, 2002.

3. Revise § 30.45 to read as follows:

§ 30.45 Multifamily and section 202 or 811 mortgagors.

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

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

(i) That has management responsibility for a project;

(ii) 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

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

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

(3) *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.

(4) *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.*).

(5) *Ownership interest.* Any direct or indirect interest in the stock, partnership interests, beneficial interests (for a trust) or other medium of equity participation. An indirect interest includes equity participation in any entity that holds a management interest (e.g. general partner, managing member of an LLC, majority stockholder, trustee) or minimum equity interest (e.g., a 25% or more limited partner, 10% or more stockholder) in the ownership entity of the management agent.

(6) *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.* 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):

(1) Any mortgagor of a multifamily property;

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

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

(4) 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

(5) 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.

(d) *Acceptable management.* For purposes of this rule, ''management acceptable to the Secretary'' under 12 U.S.C. 1735f–15(c)(1)(B)(xiv) shall include:

(1) Proper fiscal management;

(2) Proper handling of vacancies and tenanting in accordance with HUD regulations;

(3) Appropriate handling of rent collection;

(4) Proper maintenance;

(5) Compliance with HUD regulations on tenant organization; and

(6) Any other matters that pertain to proper management.

(e) *Civil money penalty.* A consistent pattern of violations of HUD program requirements, or a single violation that causes serious injury to the public or tenants, can be a basis for an action to assess a civil money penalty.

(f) *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).

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

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

(i) *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.

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 direct or indirect interest in the stock, partnership interests, beneficial interests (for a trust) or other medium of equity participation. An indirect interest includes equity participation in any entity that holds a management interest (*e.g.* general partner, managing member of an LLC, majority stockholder, trustee) or minimum equity interest (*e.g.,* a 25% or more limited partner, 10% or more stockholder) in the ownership entity of 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.

4. 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: November 26, 2001.

Mel Martinez,

Secretary.

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