

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT****24 CFR Part 28**

[Docket No. FR-5085-P-01]

RIN 2501-AD25

**Revisions to the Regulations
Implementing the Program Fraud Civil
Remedies Act of 1986****AGENCY:** Office of the Secretary, HUD.**ACTION:** Proposed rule.

SUMMARY: This proposed rule would amend HUD's regulations implementing the Program Fraud Civil Remedies Act of 1986 (PFCRA), which were codified in 1996 and were amended in 2003 to include inflation adjustments. The purpose of this proposed rule is to more closely conform the PFCRA regulations with the PFCRA statutory language, to incorporate additional definitions into the PFCRA regulations, and to add an additional item to the list of factors the Secretary shall consider in determining the amount of penalties and assessments to be imposed.

DATES: *Comment Due Date:* November 7, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the

instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Dane Narode, Acting Associate General Counsel, Office of Program Enforcement, Department of Housing and Urban Development, 1250 Maryland Avenue, Suite 200, Washington, DC 20024-0500; telephone number 202-708-2350 (this is not a toll-free number); e-mail address Dane.M.Narode@hud.gov. Hearing- or speech-impaired individuals may access the voice telephone number listed above by calling the toll-free Federal Information Relay Service during working hours at 800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

On June 24, 1988 (53 FR 24000), HUD published its regulations implementing the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801) (PFCRA). PFCRA established administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to HUD or its agents. HUD's regulations implementing PFCRA are located at 24 CFR part 28. On September 24, 1996 (61 FR 50208), HUD issued a final rule further streamlining the PFCRA regulations at part 28.

II. This Proposed Rule

This proposed rule would more closely conform both § 28.5

("Definitions") and § 28.10 ("Basis for civil penalties and assessments") to the PFCRA statutory provisions. A definition of "reasonable prospect" would be included in § 28.5 to explain that the Reviewing Official will use limited information available in HUD's Report of Investigation to determine whether allocating HUD's resources to a particular action is appropriate. Also, a definition of "Ability to pay" would be included in § 28.5 to clarify that a factor in determining amounts of penalties and assessments will be based on an assessment of the respondent's resources available presently and prospectively, from which the Department could ultimately recover the total award. The definition would also allow for the consideration of respondent's resources to be based on historical evidence. The proposed rule would also modify § 28.25 ("Complaint") so that the provisions for methods of complaint transmittal more closely conform to PFCRA and to give the same meaning to the term "deliver" that it has in PFCRA. This section would require both parties to preserve documents upon issuance of the complaint for the Department, and receipt of the complaint for the respondent. Additionally, this section and § 28.30 would be revised to provide for the filing of the complaint and answer directly with the Office of Administrative Law Judges, in accordance with the specified provisions of § 26.30 of this title.

Furthermore, the proposed rule would revise § 28.35 to remove the disclosure of documents regulation from part 28. The disclosure of documents regulation would, under a separate proposed rule regarding HUD's hearing procedures, be moved to part 26 ("Hearing Procedures"). Under this proposed rule, § 28.35 would incorporate the substance of the regulation on the statute of limitations for PFCRA hearings, which would be moved from part 26 under the separate proposed rule.

Finally, the proposed rule would add "ability to pay" to § 28.40 ("Hearings") as an additional factor to be considered in determining the amount of penalties and assessments; the factor has been added to the definitions at § 28.5, as discussed above.

III. Small Business Concerns Related to Board Enforcement Actions

With respect to enforcement actions undertaken pursuant to this proposed rule, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (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 federal agencies include the following language on agency publications and notices that are provided to small business 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], you will find the necessary comment forms at www.sba.gov/ombudsman or call 1-888-REG-FAIR (1-888-734-3247).

In accordance with its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD will include the language cited above on notices implementing enforcement actions, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

IV. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would revise definitions and usages of terms to conform more closely with those of the governing statute, and would add “ability to pay” as a factor to be considered in determining penalty and assessment amounts. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect 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.

Environmental Impact

This proposed 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 proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. 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.

Unfunded Mandates Reform Act

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

List of Subjects for 24 CFR Part 28

Administrative practice and procedure, Claims, Fraud, Penalties.

Accordingly, for the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 28 as follows:

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

1. The authority citation for 24 CFR part 28 is revised to read as follows:

Authority: 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812; 42 U.S.C. 3535(d).

2. Revise § 28.1(b) to read as follows:

§ 28.1 Purpose.

* * * * *

(b) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted in accordance with the Administrative Procedure Act pursuant to part 26, subpart B, of this chapter.

3. Revise § 28.5 to read as follows:

§ 28.5 Definitions.

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

(b) The terms *Claim*, *Knows or has reason to know*, *Person*, *Reviewing Official*, and *Statement* have the same meanings as defined in 31 U.S.C. § 3801.

(c) *Ability to pay* is determined based on an assessment of the respondent's resources available both presently and prospectively from which the Department could ultimately recover the total award, which may be predicted based on historical evidence.

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

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

(f) *The reasonable prospect of collecting an appropriate amount of penalties and assessments* is determined based on a generalized assessment made by a Reviewing Official based on the limited information available in the Report of Investigation for purposes of determining whether the allocation of HUD's resources to any particular action is appropriate. This assessment is not the same as the assessment made when determining ability to pay, nor is the reasonable prospect of collecting a factor to be considered in determining the amount of any penalty or assessment in any particular case.

(g) *Report of Investigation* means a report containing the findings and conclusions of a Program Fraud Civil Remedies Act investigation by the Inspector General or his or her designee as described in § 28.15.

4. Revise § 28.10(a)(1) and (b)(1) to read as follows:

§ 28.10 Basis for civil penalties and assessments.

(a) *Claims.* (1) A civil penalty of up to \$7,500 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know:

(i) Is false, fictitious, or fraudulent;
(ii) Includes or is supported by a written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that:

(A) Omits a material fact;
(B) Is false, fictitious, or fraudulent as a result of the omission; and
(C) Is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or

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

* * * * *

(b) *Statements.* (1) A civil penalty of up to \$7,500 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or
(B) (1) Omits a material fact; and
(2) Is false, fictitious, or fraudulent as a result of such omission;

(ii) In the case of a statement described in paragraph (b)(1)(i)(B) of this section, is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and

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

* * * * *

5. Revise § 28.20 to read as follows:

§ 28.20 Request for approval by the Department of Justice.

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

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

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

6. Revise § 28.25 to read as follows:

§ 28.25 Complaint.

(a) *General.* Upon obtaining approval from the Department of Justice, the General Counsel or designee may issue a complaint to the respondent. The complaint shall be mailed, by registered or certified mail, or shall be delivered through such other means by which delivery may be confirmed. The complaint shall also be filed simultaneously with the Office of Administrative Law Judges in accordance with § 26.30(a) of this chapter.

(b) *Complaint.* The complaint shall include:

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

(2) A statement that the required approval to issue the complaint was received from the Department of Justice as required by 24 CFR 28.20;

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

(4) A statement that the respondent may request a hearing by submitting a written response to the complaint;

(5) The addresses to which a response must be sent in accordance with § 26.38 of this title; and

(6) A statement that failure to submit an answer within 30 days of receipt of the complaint may result in the imposition of the maximum amount of penalties and assessments sought without right of appeal.

(c) *Parts 26 and 28.* A copy of this part 28 and part 26, subpart B of this chapter shall be included with the complaint.

(d) *Obligation to preserve documents.* Upon receipt of the complaint, the respondent is required to preserve and maintain all documents and data, including electronically stored data, within their possession or control that may relate to the allegations in the complaint. The Department shall also preserve such documents or data upon the issuance of the complaint.

7. Revise § 28.30 to read as follows:

§ 28.30 Response.

(a) The respondent may file a written response to the complaint in accordance with § 26.30 of this title within 30 days of service of the complaint. The response shall be deemed to be a request

for a hearing. The response must include the admission or denial of each allegation of liability made in the complaint; any defense on which the respondent intends to rely; any reasons why the penalties and assessments should be less than the amount set forth in the complaint; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) *Failure to respond.* If no response is submitted, HUD may file a motion for default judgment in accordance with § 26.41 of this chapter.

8. Revise § 28.35 to read as follows:

§ 28.35 Statute of limitations.

The statute of limitations for commencing hearings under this part shall be tolled:

(a) If the hearing is commenced in accordance with 31 U.S.C. 3803(d)(2)(B) within 6 years after the date on which the claim or statement is made; or

(b) If the parties agree to such tolling.

9. Amend § 28.40 as follows:

a. Revise paragraphs (a) and (b);

b. Redesignate paragraph (b)(17) as (b)(18);

c. Add a new paragraph (b)(17); and

d. Revise newly designated paragraph (b)(18).

§ 28.40 Hearings.

(a) *General.* Hearings under this part shall be conducted in accordance with the procedures in part 26, subpart B, of this chapter, governing actions in accordance with the Administrative Procedure Act.

(b) *Factors to consider in determining amount of penalties and assessments.* In determining an appropriate amount of civil penalties and assessments, the ALJ and, upon appeal, the Secretary or designee, shall consider and state in his or her opinion any mitigating or aggravating circumstances. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed. The amount of penalties and assessments imposed shall be based on the ALJ's and the Secretary's or designee's consideration of evidence in support of one or more of the following factors:

(17) The respondent's ability to pay, and

(18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

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Dated: July 28, 2008.

Roy A. Bernardi,

Deputy Secretary.

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