

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 291

[Docket No. FR-4871-P-01; HUD 2004-0006]

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: Proposed rule.

SUMMARY: The purpose of this proposed rule is to address real estate broker participation in predatory lending practices targeted at Federal Housing Administration (FHA) borrowers. This rule includes measures to prevent property “flipping,” inflated appraisals, falsified gift letters, and fraudulent underwriting. This rule is similar to existing removal rules for 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.

DATES: *Comment Due Date:* November 16, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Interested persons may also submit comments electronically through either:

- The Federal eRulemaking Portal at: <http://www.regulations.gov>; or
- The HUD electronic Web site at: <http://www.epa.gov/feddocket>. Follow the link entitled “View Open HUD Dockets”. Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available, without revision, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and downloading at <http://www.epa.gov/feddocket>.

FOR FURTHER INFORMATION CONTACT: Wanda L. Sampedro, Deputy Director, Asset Management Division, Office of Housing, Room 9176, Department of

Housing and Urban Development, 451 Seventh Street, SW., 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: This rule proposes to establish the bases and procedures for removing real estate brokers from HUD’s qualified selling broker list and prohibiting removed brokers from using HUD’s systems to participate in the sale of HUD-owned, single family properties. Currently, HUD’s qualified selling broker list is maintained in the Single Family Acquired Asset Management System (SAMS). In SAMS, a real estate broker’s name and address identifier (NAID) enables a real estate broker to be compensated for services rendered. Deactivation of the NAID removes the real estate broker’s ability to participate in the sale of HUD-owned single family properties.

This rule would add a new paragraph (i) to § 291.100, which would provide 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 NAID. The rule provides 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.

Once HUD makes an initial finding that there is good cause to remove a broker, HUD will provide the broker with written notice of the proposed removal. The notice will state the reasons that HUD is taking action, identify the violations or deficiencies involved, and provide a citation to the relevant regulation, statute, or policy. The notice will also state the effective date and duration of the proposed removal. The effective date of the broker’s removal will be the 30th day after the date of the notice. HUD’s determination of the duration of removal will reflect the number, extent, and seriousness of the broker’s improper actions.

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 the real estate broker does not respond within the time provided, the removal takes effect in accordance with the notice. If a conference is requested, it will occur within 15 days after the date of HUD’s receipt of the request. Within 20 days after the date of completion of the conference, HUD will advise the real estate broker in writing of HUD’s decision to rescind, modify, or affirm the broker’s removal from HUD’s qualified selling broker list. If the real estate broker did not request a conference when submitting the written response, HUD will respond in writing within 20 days after the date of receipt of the broker’s response.

If HUD’s decision affirms the removal, the broker has the right to a hearing before an administrative law judge (ALJ) to appeal the removal. The removal, however, would remain effective pending the hearing before the ALJ. All bids submitted and commissions earned by the real estate broker prior to removal will be honored, unless they are determined to have been made under fraudulent circumstances.

HUD is particularly interested in obtaining public comment on whether the procedures proposed in this rule for removing real estate brokers from HUD’s qualified selling broker list may be made less burdensome, while still providing real estate brokers the opportunity to respond adequately to a notice of removal and to participate in the resolution of problems.

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 proposed 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

In accordance with HUD’s regulations at 24 CFR 50.19(c)(6), this rule sets forth administrative requirements which do not constitute a development decision that affects the physical condition of specific project areas or building sites, and therefore is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and related federal laws and authorities.

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 proposed 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. Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's program responsibilities.

With respect to removing a real estate broker or taking other appropriate enforcement action against a real estate broker, HUD is cognizant that Section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 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 agencies include the following language on agency publications and notices that 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 an agency, including HUD, you will find the necessary comment forms at URL: <http://www.sba.gov/ombudsman>, or call 1-888-REG-FAIR (1-888-734-3247).

As HUD stated in its notice describing HUD's actions on the implementation of SBREFA, published on May 21, 1998 (63 FR 28214), 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.

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 the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., 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 proposes to amend 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 blocked 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 of a broker under 18 U.S.C. 1010;

(ii) Any of the following actions by a broker:

(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) Violating the terms of the *Selling Broker Certification*, form SAMS-1111-A;

(E) Failing to maintain a current state license;

(F) Violating Section 8(a) of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2607(a)), particularly when the real estate broker has acted in concert with a particular settlement service provider by accepting a "thing of value" for the referral of the settlement service business; and

(G) 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.

(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;

(A) The effective date of the broker's removal will be the 30th day after the date of the notice;

(B) 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.

(4) *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.

(5) *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. 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. If HUD's decision affirms the removal, the broker has the right to a hearing before an administrative law judge (ALJ). The removal remains in effect pending the proceeding before the ALJ. Participation in the appeal process before the ALJ is not a prerequisite to filing an action for judicial review under the Administrative Procedure Act.

(6) *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: August 24, 2004.

Sean Cassidy,

General Deputy Assistant Secretary for Housing.

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