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Part III

Housing and Urban Development

24 CFR Part 200

Single Family Mortgage Insurance; Appraiser Roster Removal Procedures; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR–4429–F–03]

RIN 2502–AH29

Single Family Mortgage Insurance; Appraiser Roster Removal Procedures

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

ACTION: Final rule.

SUMMARY: This final rule adopts provisions concerning the functioning of HUD's Appraiser Roster that were published for public comment in a proposed rule on July 2, 1999. The Appraiser Roster lists appraisers who are eligible to perform Federal Housing Administration single family appraisals. The provisions adopted by this final rule provide procedures for addressing unsatisfactory appraisers, including removing an appraiser from the Roster.

DATES: *Effective Date:* May 5, 2000.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Home Mortgage Insurance Division, Office of Insured Single Family Housing, Room 9266, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–8000; telephone (202) 708–2700 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. The July 2, 1999 Proposed Rule

On July 2, 1999, HUD published a rule (64 FR 36216) for public comment that proposed to codify the current placement procedures for HUD's Appraiser Roster and proposed procedures for removing an appraiser from the Appraiser Roster. The Appraiser Roster lists appraisers who are eligible to perform Federal Housing Administration (FHA) single family appraisals. HUD maintains the Appraiser Roster to provide a means by which HUD can monitor the quality of appraisals performed on single family homes financed through FHA single family programs and to ensure that appraisers performing FHA appraisals meet high competency standards.

The Appraiser Roster is an important part of the FHA Single Family Mortgage Insurance program because accurate appraisals are vital to the success of the Program and HUD's ability to protect the FHA insurance funds. A more complete description of these procedures is presented in the preamble to the July 2, 1999 proposed rule.

The public comment period for the proposed rule closed on August 2, 1999. HUD received 2 comments, one from a banking institution and the other from a trade association. One of the commenters wrote in favor of the proposed rule. The other commenter raised a number of concerns about the proposed removal procedure. This comment is discussed below, in section III.B. of this preamble.

II. The December 28, 1999 Final Rule

On December 28, 1999, HUD published a final rule (64 FR 72868) that adopted certain of the provisions concerning HUD's Appraiser Roster published in the July 2, 1999 proposed rule. Specifically, that final rule adopted the provisions that codify the current Appraiser Roster placement procedure, but did not adopt the independent removal procedure nor certain other related provisions of the July 2, 1999 proposed rule. The structure of the proposed rule was also revised in the December 28, 1999 final rule to comply with President Clinton's Memorandum of June 1, 1998, entitled ''Plain Language in Government'' (63 FR 31885). In particular, the section numbering of the proposed rule was expanded to cover additional headings and the language was revised to present the rule in question-and-answer format.

III. This Final Rule

This final rule adopts the provisions concerning an independent procedure for removing an appraiser from HUD's Appraiser Roster published in the July 2, 1999 proposed rule and also follows the plain language structure of the December 28, 1999 final rule. HUD proposed this independent removal procedure, separate and apart from HUD's existing debarment, suspension, and limited denial of participation administrative remedies, in order to better safeguard the FHA insurance funds and to better protect homebuyers. A summary of the provisions adopted by this final rule is presented in section IV. of this preamble. This section of the preamble provides some additional background on this rulemaking and presents a discussion of the significant issues raised by the public comments.

A. Background

At the outset, it is important to note that HUD proposed § 200.200 to fill a regulatory void created by the removal in 1996 of part 267 HUD's regulations. HUD removed part 267 as part of a page-by-page review of HUD's regulations initiated in response to President Clinton's March 4, 1995, memorandum requiring all Federal departments and agencies to conduct a page-by-page review of their regulations and to eliminate or revise those regulations that were outdated or unnecessary. HUD removed part 267 in a final rule published in the **Federal Register** on April 1, 1996 (61 FR 14395).

Part 267 (previously entitled ''Appraisal and Property Valuation'') was originally implemented in a final rule published in the **Federal Register** on October 3, 1994 (59 FR 50456). The part established the Appraiser Roster in lieu of fee appraisers and contained standards for placement on, and removal from, the Roster. HUD removed the part because, as noted in the preamble to the April 1, 1996 final rule, ''[t]he standards and requirements [for appraisal and property valuation] that are applicable to HUD insured single family and multifamily properties are set forth in contracts or handbooks, and need not be repeated in the CFR.'' The removal of part 267 by the April 1, 1996 final rule did not change any part of HUD's appraisal and property valuation policy.

This rulemaking was instituted because rulemaking is an appropriate means of implementing a procedure having the binding effect of the removal procedure adopted by this final rule and, as noted in the preamble to the July 2, 1999 proposed rule, because HUD had intended to retain the predecessor procedure as part of its regulations despite ''streamlining'' the rest of part 267. HUD inadvertently failed to retain the predecessor removal procedure, and this final rulemaking is intended, in part, to correct this omission.

The original removal procedure, contained in § 267.8(d)(3), read as follows:

> (3) Removal from the Roster. HUD may at any time remove the appraiser from the Roster for cause. Cause includes, but is not limited to, significant deficiencies in appraisals, failure to maintain standing as a State certified or State licensed appraiser and prosecution for committing or attempting to commit fraud, misrepresentation or other offence that may reflect on the appraiser's character and integrity. Such removal shall not be governed by the procedures of part 24 of this title. The appraiser shall, however, be subject to other sanctions in accordance with part 24 of this title.

B. Discussion of Significant Issues Raised by Public Comments

Comment—The proposed rule fails to provide appraisers with even minimally sufficient due process protections. The commenter wrote that the proposed rule

falls short of the minimal due process safeguards to which appraisers are entitled. In particular, the commenter was concerned that the removal procedure does not provide for a judicial-type procedure, as is the case with HUD's existing debarment, suspension and limited denial of participation administrative remedies. The commenter was also concerned that no due process protections were provided for under § 200.200(f) (entitled, ''Education sanctions'').

HUD Response. As noted previously, the Appraiser Roster was created by HUD to replace the previous system of appraiser fee panels. HUD created the Roster to provide a means by which HUD could ensure that appraisers performing FHA appraisals met high competency standards and that their appraisals met high quality standards. Because the purpose of the Roster is to ensure that certain requirements and standards are met, placement on the Roster is similar to the granting of a license to perform FHA appraisals.

Under section 9(c) of the Administrative Procedure Act, now 5 U.S.C. 558(c) (the APA), a license may be withdrawn, suspended, or revoked if the licensee has been given (a) notice by the agency in writing of the facts or conduct that may warrant the action; and (b) opportunity to demonstrate or achieve compliance with all lawful requirements for the license.

The removal procedure adopted in this final rule provides an appraiser with written notice of a proposed removal (which must include the reasons for the action and the duration of the action), a right to submit a written response challenging the proposed removal and to request a conference, and a review by an official who was neither involved in HUD's initial decision nor who reports to a person involved in the initial decision. These procedures clearly meet, and even exceed, the APA requirements.

These procedures also meet the due process standards enunciated by the Supreme Court in *Matthews* v. *Eldridge,* 424 U.S. 319 (1976), in which the Court created a three-pronged test to determine the adequacy of procedural safeguards in an administrative process. This test calls for the balancing of three factors: the private interest affected by the agency; the risk of error; and the Government's interest.

Regarding the first factor, appraisers do not have privity of contract with HUD because they are engaged by lenders and by HUD property management contractors. Therefore, appraisers have no property interest in retention on the Appraiser Roster. This position is supported by *Sutton* v. *United States Department of Housing and Urban Development, et al.,* 885 F. 2d 471 (8th Cir., 1989), cert. den. 493 U.S. 1075 (1990), reh. den. 494 U.S. 1092 (1990), affirming a decision of the U.S. District Court, E.D. MO., that a fee appraiser was not entitled to relief after the Department refused to recertify him. The District Court held that the appraiser's interest in recertification was not within the range of property and liberty interests protected by the due process clause and that his due process rights were not violated by HUD's refusal to recertify him without notice and hearing when he had been given a right to meet with a HUD Official to discuss his nonrecertification and his right to appeal the decision. Although *Sutton* involved a fee panel appraiser (a predecessor to the Appraiser Roster), the similarities between that method for lenders to obtain appraisers and the present method of selection are far greater than the differences. The same is true of the methods for removing appraisers from fee panels and the method for removal from the Appraisal Roster in the proposed rule.

With regard to the second factor, the risk of error is minimal because an appraiser's performance that would lead to removal from the Appraiser Roster will be checked against performance standards. See HUD's response to the next comment.

Insofar as the third factor is concerned, HUD needs a method to remove poorly performing appraisers from the Appraiser Roster as expeditiously as possible to protect its insurance funds from risks resulting from deficient appraisals.

Furthermore, removing unsatisfactory appraisers in an expeditious manner is vital to the continued well-being of the FHA insurance funds because an accurate appraisal is fundamental to making informed financing decisions. HUD's existing debarment, suspension, and limited denial of participation administrative remedies are not always effective as an initial remedy in the case of the Appraiser Roster because of the time required to utilize these procedures.

It is clear that this final rule implements a removal procedure that provides an appropriate level of due process protection for appraisers placed on the Appraiser Roster. It should also be noted that the removal procedures contained in this final rule significantly exceed the due process protections provided for in the original Appraiser Roster removal procedure contained in part 267 (see § 267.8(d)(3) contained in the April 1, 1995 edition of 24 CFR and repeated in section III.(A) of this preamble).

With regard to the commenter's concern about § 200.200(f) of the proposed rule, there is no need for due process protections for this provision because the provision is intended to benefit appraisers placed on the Roster. If HUD determines that an appraiser is not meeting the standards required for continued placement on the Roster, § 200.200(f) gives HUD the option of remedying the situation by requiring the appraiser to attend further professional training. This provision appears at § 200.204(c) of this final rule, and is re-named ''education requirements'' to clarify that it is non-punitive.

The appraiser may, of course, choose not to seek the additional training. In this case, HUD may then choose to remove the appraiser from the Roster. At this point, the appraiser has available to him or her the full range of due process protections provided for by the removal procedure. Section 200.200(f) of the proposed rule allows HUD to provide an alternative and less rigorous response to an appraiser who is not meeting the Appraiser Roster standards. Deletion of the requirements of § 200.200(f) would leave HUD with fewer choices with regard to non-performing appraisers. With § 200.200(f), an appraiser may have the option to rehabilitate his or her performance, making removal unnecessary.

Comment—Causes for removal are broader than those for debarment, suspension, and limited denial of participation. The commenter wrote that the causes for removal listed in the removal procedure are broader, and in some cases, less specific than the causes listed for debarment, suspension, or limited denial of participation. In particular, the commenter was concerned about HUD's interpretation of the term ''significant deficiencies in appraisals'' as a cause for removal.

HUD Response. The removal procedure for the Appraiser Roster is not related to HUD's existing debarment, suspension, and limited denial of participation administrative remedies. The removal procedure and the causes for removal are targeted to the Appraiser Roster. HUD developed these causes for removal with the Appraiser Roster specifically in mind. Any comparison with causes for action under any of HUD's other administrative remedies is misplaced. It may be the case that Appraiser Roster causes for removal are similar, in some cases, to the causes for action under HUD's other remedies. Where the causes differ, however, it is because HUD has

determined that it is necessary to have an expansive list of causes for removal for the Appraisal Roster to ensure effective compliance with the Appraiser Roster requirements and standards.

Regarding the commenter's concern about how HUD will interpret the term ''significant deficiencies,'' the HUD Appraiser Handbook provides important guidance on how the Appraiser Roster is managed. In particular, the Handbook lists a number of violations in chapter 7–4 that provide a more complete picture of what HUD considers significant deficiencies. While this list is not exhaustive, it does provide a substantial guide as to how HUD will enforce HUD's appraisal standards. HUD's Appraiser Handbook may be obtained from HUD's web page at http://www.hud.gov/reac/reasfappr.html or http://www.hudclips.org.

Comment—HUD has offered no evidence that indicates that an independent removal procedure is necessary. The commenter was concerned that HUD had not provided any evidence that indicated that an independent removal procedure, separate from HUD's existing debarment and suspension procedures, was necessary.

HUD Response. In many cases, HUD's existing remedies involve a formal administrative-type procedure. This type of procedure requires a significant investment in time and other resources. Because of the importance of maintaining the high quality of FHA appraisals, HUD has determined that an expeditious means of removing an appraiser from the roster is necessary.

Comment—HUD's stated purpose for ''streamlining'' the disciplinary process contradicts its earlier actions. The commenter was concerned that HUD had failed to discuss in the preamble to the July 2, 1999 proposed rule the reasons why HUD removed predecessor appraiser removal procedure in 1996 during our ''streamlining'' review of all of HUD's regulations. The commenter wrote that ''[i]t is baffling why just three years ago the Department believed that repealing the less formal removal procedure was considered streamlining and now the Department considers recodifying a similar less formal removal provision to be streamlining.

HUD Response. As noted in the preamble to the July 2, 1999 proposed rule and the preamble to this final rule, the removal of the Appraiser Roster removal procedure was inadvertent, and this final rulemaking is intended, in part, to correct this mistake.

IV. Summary of Provisions Adopted by this Final Rule and the December 28, 1999, Final Rule

The following table presents a summary of the provisions adopted by this final rule and the final rule published on December 28, 1999. Both of these final rules are taken from the July 2, 1999, proposed rule. The first column of the table lists the provisions of the proposed rule. The second column lists where the proposed provision appears under the new section numbering of the rule that was initiated by the December 28, 1999 final rule, and which final rule adopted the provision.

Provision in proposed rule . . .	adopted by final rule at . . .
§ 200.200(a)	§ 200.200(a) (December 22, 1999).
§ 200.200(b)	§ 200.200(b) (December 22, 1999).
§ 200.200(c)	§ 200.202 (December 22, 1999).
§ 200.200(d)	§ 202.204(a) of this final rule.
§ 200.200(e)	§ 200.206 (December 22, 1999).
§ 200.200(f)	§ 202.204(b) of this final rule.
§ 200.200(g)	§ 202.204(a) of this final rule.
§ 200.200(h)	§ 202.204(c) of this final rule.

V. Findings and Certifications

Paperwork Reduction Act Statement

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and assigned OMB control number 2502–0538. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Environmental Impact

This final 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 final rule before publication, and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule would not have a significant economic impact on a substantial number of small entities. Generally, HUD expects that the number of removal proceedings initiated under this proposed rule would be relatively low. For example, in fiscal year 1998, of the over 30,000 appraisers listed on the Appraiser Roster, HUD initiated enforcement proceedings against only 36 appraisers (most of these enforcement proceedings were Limited Denial of Participation proceedings).

Further, the proposed rule would provide several procedural safeguards designed to minimize any potential impact on small entities. For example, the rule grants appraisers, selected for removal from the Appraiser Roster, with the opportunity to provide a written response and to request a conference regarding a proposed removal. The rule also specifies that the official designated by HUD to review an appeal may not be the same HUD official involved in the initial removal decision.

With respect to removing an appraiser from the Appraiser Roster, or taking other appropriate enforcement action against an appraiser, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 847) (''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 [insert agency name], call 1–888–REG–FAIR (1–888–734–3247).

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 impose, within the meaning of the UMRA, any Federal mandates on any State, local, or, tribal governments or on the private sector.

Federalism Impact

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 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 the Executive Order.

VI. List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

For the reasons discussed in the preamble, HUD amends 24 CFR part 200 as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

1. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1701–1715z-18; 42 U.S.C. 3535(d).

2. Section 200.204 is revised to read as follows:

§ 200.204 What actions may HUD take against unsatisfactory appraisers on the Appraiser Roster?

An unsatisfactory appraiser may be subject to removal, education requirements, or other actions, as follows:

(a) *Removal from the Appraiser Roster.* HUD officials, as designated by the Secretary, may at any time remove a listed appraiser from the Appraiser Roster for cause in accordance with paragraphs (a)(1) through (a)(3) of this section. The provisions of paragraphs (a)(1) through (a)(3) of this section do not apply to removal actions taken under any section in 24 CFR part 24 nor to any other remedy against an appraiser available to HUD by statute or otherwise.

(1) *Cause for removal.* Cause for removal includes, but is not limited to:

(i) Significant deficiencies in appraisals, including non-compliance with Civil Rights requirements regarding appraisals;

(ii) Failure to maintain standing as a state-certified or state-licensed appraiser;

(iii) Prosecution for committing, attempting to commit, or conspiring to commit fraud, misrepresentation, or any other offense that may reflect on the appraiser's character or integrity;

(iv) Failure to perform appraisal functions in accordance with instructions and standards issued by HUD;

(v) Failure to comply with any agreement made between the appraiser and HUD or with any certification made by the appraiser;

(vi) Being issued a final debarment, suspension, or limited denial of participation;

(vii) Failure to maintain eligibility requirements for placement on the Appraiser Roster as set forth under this subpart or any other instructions or standards issued by HUD; or

(viii) Failure to comply with HUD-imposed education requirements under paragraph (c) of this section within the specified period for complying with such education requirements.

(2) *Procedure for removal.* If you are a listed appraiser and HUD decides to remove you for cause from the Appraiser Roster, the following procedure applies to you unless you have been issued a final debarment, suspension, or limited denial of participation, in which case you are subject to paragraph (a)(3) of this section:

(i) You will be given written notice of your proposed removal. The notice will include the reasons for your proposed removal and the duration of your proposed removal.

(ii) You will have 20 days from the date of your notice of proposed removal to submit a written response appealing the proposed removal and to request a conference. A request for a conference must be in writing and must be submitted along with a written response.

(iii) Within 30 days of receiving your written response, or if you have requested a conference, within 30 days after the completion of your conference, a HUD official, designated by the Secretary, will review your appeal and will send you a final decision either affirming, modifying, or canceling your removal from the Appraiser Roster. HUD may extend this time upon giving you notice. The HUD official designated by the Secretary to review your appeal will not be someone involved in HUD's initial removal decision nor will it be someone who reports to a person involved in that initial decision.

(iv) If you do not submit a written response, your removal will be effective 20 days after the date of HUD's initial removal notice. If you submit a written response, and the removal decision is affirmed or modified, your removal or modification will be effective on the date of HUD's notice affirming or modifying the initial removal decision.

(3) *Automatic removal for issuance of final debarment, suspension, or limited denial of participation.* If you are a listed appraiser and you have been issued a final debarment, a suspension, or a limited denial of participation, the provisions of paragraph (a)(2) of this section do not apply to you, and you will be automatically removed from the Appraiser Roster.

(b) *Reinstatement.* If an appraiser who has been removed from the Roster wants to be reinstated on the Roster, the appraiser must follow the procedures and requirements contained in this subpart for placement on the Roster. Before an appraiser is eligible to reapply for placement on the Roster, the appraiser shall comply with the terms of any applicable remedial training education requirements, and the time

period for the appraiser's removal from the Roster shall have expired.

(c) *Education requirements.* Where there is evidence that an appraiser is deficient in FHA appraisal requirements, HUD may require an appraiser to undergo professional training and retake the HUD test on FHA appraisal methods and reporting.

(d) *Other action.* Nothing in this section prohibits HUD from taking such other action, against an appraiser, as provided under 24 CFR part 24, or from seeking any other remedy against an appraiser available to HUD by statute or otherwise.

Dated: March 29, 2000.

William C. Apgar,

Assistant Secretary for Housing—Federal Housing Commissioner.

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