

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 2004

[Docket No. FR-4942-P-01; HUD-2004-0018]]

RIN 2508-AA14

### Office of Inspector General (OIG) Subpoenas and Production in Response to Subpoenas or Demands of Courts or Other Authorities

**AGENCY:** Office of Inspector General, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend HUD's Office of Inspector General's (OIG's) regulations to provide an appellate review procedure regarding the OIG's responses to subpoenas issued to OIG employees requesting documents or testimony in legal proceedings where the OIG is not a party. The establishment of an appellate proceeding is designed to ensure both a thorough review process by the OIG and a complete opportunity for a party or person to take formal exception to the OIG's determination.

**DATES:** *Comment Due Date:* February 7, 2005.

**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. Electronic comments may be submitted through either:

- The Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov); or
- The HUD electronic Web site at [www.epa.gov/feddocket](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 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 [www.epa.gov/feddocket](http://www.epa.gov/feddocket).

### FOR FURTHER INFORMATION CONTACT:

Bryan Saddler, Counsel to the Inspector General, Room 8260, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-4500; telephone (202) 708-1613 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. Background

The regulations regarding requests of HUD's Office of Inspector General (OIG) employees for testimony and production of documents are located at 24 CFR part 2004. Under § 2004.20, no OIG employee may produce official records or provide any testimony relating to official information in response to a demand or request without the prior written approval of the Inspector General (IG) or the Counsel for Inspector General (Counsel). The IG has delegated the authority to respond to requests and demands for production of OIG records and testimony of OIG employees to the Counsel.

Section 2004.21 identifies the factors that the OIG will consider in making determinations in response to requests for OIG documents or testimony, and § 2004.25 provides that the Counsel's decision is the final determination on demands and requests of OIG employees for the production of official records and information or testimony.

After request or demand of documents or testimony, the Counsel will review the demand and determine whether the OIG employee is authorized to release documents or testify. The Counsel will notify the requester of the final determination and the reasons for the grant or denial of the request.

#### II. This Proposed Rule

As the current regulations are written, no review process exists for unfavorable decisions made by the Counsel. Once the Counsel makes a determination denying a request for documents or testimony, or restricting the release of documents or testimony, the decision is final. This proposed rule addresses the need for a review process by amending 24 CFR part 2004 to provide for an appellate review process regarding the Counsel's responses to subpoenas

issued to OIG employees in legal proceedings where the OIG is not a party.

When a party or any person is aggrieved by the Counsel's decision denying a request for documents or testimony, that party or person may seek review of the decision by filing a written Notice of Intention to Petition for Review (Notice). After filing this Notice, the party or person must also file a Petition for Review (Petition) detailing the issues and reasons why a review of the Counsel's decision is appropriate. All filings must be served on the Counsel in accordance with § 2004.23. Either the Counsel or the IG will review the Petition, and the decision on the Petition will become the final decision of the OIG.

If the party or person is not satisfied with the OIG's decision, the party or person may seek judicial review. However, as noted in the current regulations, if the Counsel declines to approve a demand for records or testimony, and a court or other authority rules that the demand must be complied with regardless of OIG instructions not to release the material or information sought, the OIG employee or former OIG employee upon whom the demand has been made shall respectfully decline to comply with the demand.

This rule amendment sets forth a review process where Counsel can thoroughly and timely consider the party's or person's petition prior to issuing a final decision on the release of documents or testimony.

#### III. Findings and Certifications

##### *Information Collection Requirements*

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, 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 currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

## REPORTING AND RECORDKEEPING BURDEN

| Section reference  | Number of parties | Number of responses per respondent | Estimated average time for requirement (in hours) | Estimated annual burden (in hours) |
|--------------------|-------------------|------------------------------------|---|------------------------------------|
| § 2004.28(c) ..... | 8                 | 2                                  | 5   | 80                                 |

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposal by name and docket number (FR-4942-P-01) and must be sent to:

Mark Menchik, HUD Desk Officer,  
Office of Management and Budget,  
New Executive Office Building,  
Washington, DC 20503, Fax number:  
(202) 395-6947, E-mail: *Mark\_D.\_Menchik@omb.eop.gov*;

and

Reports Liaison Officer, Office of  
Inspector General, Department of  
Housing and Urban Development, 451  
Seventh Street, SW, Room 8170,  
Washington, DC 20410-4500.

#### *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 rule would provide those persons aggrieved by an OIG decision denying a request for production of documents or testimony the opportunity to seek review of the decision. This rule would impose no additional economic or other burdens. Rather, this rule provides small entities with the benefit of a review process for unfavorable OIG decisions. Accordingly, this proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required. Notwithstanding HUD's determination that this rule will not have a significant economic 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 by this preamble.

#### *Environmental Impact*

In accordance with 24 CFR 50.19(c)(1) of the Department's regulations, 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. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

#### *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.

#### *Executive Order 13132, Federalism*

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from publishing any rule that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or 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.

#### **List of Subjects in 24 CFR Part 2004**

Administrative practice and procedure, Courts.

For the reasons stated in the preamble, HUD proposes to amend 24 CFR part 2004 as follows:

#### **PART 2004—SUBPOENAS AND PRODUCTION IN RESPONSE TO SUBPOENAS OR DEMANDS OF COURTS OR OTHER AUTHORITIES**

1. The authority citation for 24 CFR part 2004 continues to read as follows:

**Authority:** Inspector General Act of 1978, as amended (5 U.S.C. app.) and 42 U.S.C. 3535(d).

2. Revise § 2004.28 to read as follows:

#### **§ 2004.28 Procedure in the event of an adverse ruling.**

(a) *Opportunity to review adverse ruling.* Any person aggrieved by a decision made by the Counsel under this part denying a request for documents or testimony, or restricting the release of documents or testimony, may seek review of that decision pursuant to paragraph (c) of this section.

(b) *Procedure in the event of conflicting court order.* If the Inspector General or Counsel declines to approve a demand for records or testimony and a court or other authority rules that the

demand must be complied with irrespective of the instructions from the OIG not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(c) *Procedure.* (1) *Notice of intention to petition for review.* A party or any person aggrieved by the decision made pursuant to this part denying or restricting the release of documents or testimony may seek review of the decision by filing a written Notice of Intention to Petition for Review (Notice) within five business days of the date of this decision. The Notice shall identify

the petitioner, the adverse decision, and any dates (such as deposition, hearing, or court dates) that are significant to the party. The Notice shall be served in accordance with § 2004.23.

(2) *Petition for review.* Within five business days of the filing of a Notice, the person or party seeking review shall file a Petition for Review (Petition) containing a clear and concise statement of the issues to be reviewed and the reasons why the review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons and arguments for such exceptions based on appropriate citations to such record or law as may exist. These reasons may be stated in

summary form. Decisions on the Petition may be made by either the Inspector General or the Counsel and shall become the final decisions of the OIG. The Petition will be served in accordance with § 2004.23.

(d) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the agency for review of a decision made under the authority of this part is a prerequisite to the seeking of judicial review of the final decision.

Dated: November 3, 2004.

**Kenneth M. Donohue, Sr.,**

*Inspector General.*

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**BILLING CODE 4210-78-P**