

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Parts 21 and 24

[Docket No. FR-4692-P-01]

RIN 2502-AC81

### Adoption of Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** On January 23, 2002, a proposed common rule was published that announced substantive changes and amendments to the governmentwide nonprocurement common rule for debarment and suspension and the governmentwide rule implementing the Drug-Free Workplace Act of 1988. This rule would adopt those amendments.

**DATES:** *Comment Due Date:* September 20, 2002.

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Dane Narode, Deputy Chief Counsel for Administrative Proceedings, Departmental Enforcement Center, 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); e-mail: [Dane\\_M\\_Narode@HUD.gov](mailto:Dane_M_Narode@HUD.gov). Hearing-impaired or speech-impaired individuals may access the voice telephone number listed above by calling the Federal information relay service during working hours at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** On January 23, 2002 (67 FR 3266), a governmentwide common rule was published that proposed substantive changes and amendments to the governmentwide nonprocurement common rule for debarment and suspension and the governmentwide rule implementing the Drug-Free Workplace Act of 1988. The publication is available at [http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

Through this proposed rule, HUD would adopt the changes and amendments made in the common rule. In addition, HUD is proposing in this rule to adopt specific requirements that, along with the provisions in the common rule, would best serve HUD's programs.

HUD's proposed rule inserts an additional paragraph regarding employment contracts to the definition of "covered transaction" found at § 24.200. HUD's addition makes clear that each payment under an employment contract constitutes a new "covered transaction." HUD has also enhanced the exclusion review that takes place in § 24.300. Under HUD's proposed rule, a participant must ensure it is not entering into a covered transaction with an excluded or disqualified person. In reviewing for an exclusion, however, HUD, at section § 24.300(d), exempts participants from checking on the exemption status of their principals while making salary payments pursuant to an employment contract.

Additionally, § 24.440 proposes to use terms or conditions to the award transaction as a means to enforce exclusions under HUD transactions rather than written certifications.

HUD proposes to provide examples for the debarment and suspension common rule definition of "principal" found at § 24.995. The expansion contains minor modifications consistent with HUD's present practice regarding the definition of "principal" for the purpose of debarments and suspensions. HUD is retaining its definitions of "Hearing Officer" at § 24.947 and "Ultimate Beneficiary" at § 24.1017 as found in the current common rule. The proposed rule makes clear in § 24.750 and § 24.845 that all fact finding referrals for HUD suspensions and debarments will be made to hearing officers.

Subpart J of part 24, which addresses limited denial of participation, has been revised stylistically so that the rule conforms to the question and answer format of the proposed rule. HUD has removed the term "contractor" from § 24.1105 because the proposed rule has deleted the definition of the term. The revised definition of "participant" in the proposed rule covers individuals previously defined as "contractors" in the current rule. Section 24.1145, which addresses imputing the conduct of one person to another in a limited denial of participation, has been revised to be consistent with the provisions of § 24.630.

Finally, the requirements for maintaining a drug-free workplace are

being enacted as a new part 21, codifying HUD's drug-free workplace requirements.

## List of Subjects

### 24 CFR Part 21

Administrative practice and procedure, Grant programs, Drug-free workplace, Reporting and recordkeeping requirements.

### 24 CFR Part 24

Administrative practice and procedure, Government contracts, Grant programs, Loan programs, Technical assistance, Reporting and recordkeeping requirements.

For the reasons stated in the common preamble, the Department of Housing and Urban Development amends 24 CFR Chapter I, as follows:

1. A new part 21 is added to read as follows:

## PART 21—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

### Subpart A—Purpose and Coverage

Sec.

21.100 What does this part do?

21.105 Does this part apply to me?

21.110 Are any of my Federal assistance awards exempt from this part?

21.115 Does this part affect the Federal contracts that I receive?

### Subpart B—Requirements for Recipients Other Than Individuals

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### Subpart D—Responsibilities of HUD Awarding Officials

21.400 What are my responsibilities as an HUD awarding official?

### Subpart E—Violations of this Part and Consequences

21.500 How are violations of this part determined for recipients other than individuals?

- 21.505 How are violations of this part determined for recipients who are individuals?
- 21.510 What actions will the Federal Government take against a recipient determined to have violated this part?
- 21.515 Are there any exceptions to those actions?

#### Subpart F—Definitions

- 21.605 Award.
- 21.610 Controlled substance.
- 21.615 Conviction.
- 21.620 Cooperative agreement.
- 21.625 Criminal drug statute.
- 21.630 Debarment.
- 21.635 Drug-free workplace.
- 21.640 Employee.
- 21.645 Federal agency or agency.
- 21.650 Grant.
- 21.655 Individual.
- 21.660 Recipient.
- 21.665 State.
- 21.670 Suspension.

Authority: 41 U.S.C. 701; 42 U.S.C. 3535.

#### Subpart A—Purpose and Coverage

##### § 21.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

##### § 21.105 Does this part apply to me?

- (a) Portions of this part apply to you if you are either:
- (1) A recipient of an assistance award from the Department of Housing and Urban Development; or
- (2) An HUD awarding official. (See definitions of award and recipient in §§ 21.605 and 21.660, respectively.)
- (b) The following table shows the subparts that apply to you:

If you are . . .	see sections . . .
(1) a recipient who is <i>not</i> an individual .....	24.2110–24.2230 24.2500–24.2515
(2) a recipient who is an individual .....	24.2110–24.2115 24.2300–24.2301 24.2500–24.2515
(3) a HUD awarding official .....	24.2100–24.2115 24.2400–24.2500 24.2515

##### § 21.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Secretary determines the application of which would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

##### § 21.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 21.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

#### Subpart B—Requirements for Recipients Other Than Individuals

##### § 21.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

- (a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in the subsequent sections of this subpart. Briefly, those measures are to:

- (1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 21.205 through 21.220); and
- (2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 21.225).

- (b) Second, you must identify all known workplaces under your Federal awards (see § 21.230).

##### § 21.205 What must I include in my drug-free workplace statement?

You must publish a statement that:

- (a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

- (b) Specifies the actions that you will take against employees for violating that prohibition; and

- (c) Lets each employee know that, as a condition of employment under any award, he or she:

- (1) Will abide by the terms of the statement; and

- (2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

##### § 21.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 21.205 be given to each employee who will be engaged in the performance of any Federal award.

##### § 21.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about:

- (a) The dangers of drug abuse in the workplace;
- (b) Your policy of maintaining a drug-free workplace;
- (c) Any available drug counseling, rehabilitation, and employee assistance programs; and
- (d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

##### § 21.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 24.2205 and an ongoing awareness program as described in § 24.2215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) the performance period of the award is less than 30 days .....	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) the performance period of the award is 30 days or more .....	must have the policy statement and program in place within 30 days after award.

If . . .	then you . . .
(c) you believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the HUD awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

**§ 21.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?**

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 21.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must:

- (1) Be in writing;
- (2) Include the employee's position title;
- (3) Include the identification number(s) of each affected award;
- (4) Be sent within ten calendar days after you learn of the conviction; and
- (5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either:

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

**§ 21.230 How and when must I identify workplaces?**

(a) You must identify all known workplaces under each HUD award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces:

(1) To the HUD official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by HUD officials or their designated representatives.

(b) Your workplace identification for an award must include the actual

address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the HUD awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the HUD awarding official.

**Subpart C—Requirements for Recipients Who Are Individuals**

**§ 21.300 What must I do to comply with this part if I am an individual recipient?**

As a condition of receiving an HUD award, if you are an individual recipient, you must agree that:

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

- (1) In writing;
- (2) Within 10 calendar days of the conviction;
- (3) To the HUD awarding official or other designee for each award that you currently have, unless § 21.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

**§ 21.301 [Reserved]**

**Subpart D—Responsibilities of HUD Awarding Officials**

**§ 21.400 What are my responsibilities as an HUD awarding official?**

As an HUD awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in:

- (a) Subpart B of this part, if the recipient is not an individual; or
- (b) Subpart C of this part, if the recipient is an individual.

**Subpart E—Violations of this Part and Consequences**

**§ 21.500 How are violations of this part determined for recipients other than individuals?**

A recipient other than an individual is in violation of the requirements of this part if the Secretary determines, in writing, that:

(a) The recipient has violated the requirements of Subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

**§ 21.505 How are violations of this part determined for recipients who are individuals?**

An individual recipient is in violation of the requirements of this part if the Secretary determines, in writing, that:

(a) The recipient has violated the requirements of Subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

**§ 21.510 What actions will the Federal Government take against a recipient determined to have violated this part?**

If a recipient is determined to have violated this part, as described in § 21.500 or 21.505, the Department of Housing and Urban Development may take one or more of the following actions:

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 24 CFR part 24, for a period not to exceed five years.

**§ 21.515 Are there any provisions for exceptions to those actions?**

The Secretary may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Secretary determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

**Subpart F—Definitions****§ 21.605 Award.**

Award means an award of financial assistance by the Department of Housing and Urban Development or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule (codified in HUD's regulations at 24 CFR part 85) that implements OMB Circular A-102 and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veteran's benefits to individuals (i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

**§ 21.610 Controlled substance.**

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

**§ 21.615 Conviction.**

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

**§ 21.620 Cooperative agreement.**

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 21.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

**§ 21.625 Criminal drug statute.**

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution,

dispensing, use, or possession of any controlled substance.

**§ 21.630 Debarment.**

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Governmentwide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

**§ 21.635 Drug-free workplace.**

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

**§ 21.640 Employee.**

(a) Employee means the employee of a recipient directly engaged in the performance of work under the award, including:

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers), even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces.

**§ 21.645 Federal agency or agency.**

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

**§ 21.650 Grant.**

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

**§ 21.655 Individual.**

Individual means a natural person.

**§ 21.660 Recipient.**

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency), or legal entity, however organized, that receives an award directly from a Federal agency.

**§ 21.665 State.**

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

**§ 21.670 Suspension.**

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Governmentwide Debarment and Suspension (Nonprocurement) that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

2. Part 24 is revised to read as set forth at 67 FR 3273, January 23, 2002:

**PART 24—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)**

Sec.

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24.50 How is this part written?

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**Subpart A—General**

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- 24.120 May we grant an exception to let an excluded person participate in a covered transaction?
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#### **Disclosing information—Lower Tier Participants**

- 24.350 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?
- 24.355 What happens if I fail to disclose the information required under § 24.350?
- 24.360 What must I do if I learn of information required under § 24.350 after entering into a covered transaction with a higher tier participant?

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- 24.410 May I approve a participant's use of the services of an excluded person?
- 24.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?
- 24.420 May I approve a transaction with an excluded or disqualified person at a lower tier?
- 24.425 When do I check to see if a person is excluded or disqualified?
- 24.430 How do I check to see if a person is excluded or disqualified?
- 24.435 What must I require of a primary tier participant?
- 24.440 What method do I use to communicate those requirements to participants?
- 24.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?
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- 24.730 What information must I provide to the suspending official if I contest a suspension?
- 24.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?
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- 24.745 Is a record made of fact-finding proceedings?
- 24.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?
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- 24.810 When does a debarment take effect?
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- 24.830 Under what conditions do I get an additional opportunity to challenge the facts on which the proposed debarment is based?
- 24.835 Are debarment proceedings formal?
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- 24.845 What does the debarring official consider in deciding whether to debar me?
- 24.850 What is the standard of proof in a debarment action?

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- 24.860 What factors may influence the debarring official's decision?
- 24.865 How long may my debarment last?
- 24.870 When do I know if the debarring official debars me?
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- 24.905 Affiliate.
- 24.910 Agency.
- 24.915 Agent or representative.
- 24.920 Civil judgment.
- 24.925 Conviction.
- 24.930 Debarment.
- 24.935 Debarring official.
- 24.940 Disqualified.
- 24.945 Excluded or exclusion.
- 24.947 Hearing officer.
- 24.950 Indictment.
- 24.955 Ineligible or ineligibility.
- 24.960 Legal proceedings.
- 24.965 List of parties excluded or disqualified from federal procurement and nonprocurement programs.
- 24.970 Nonprocurement transaction.
- 24.975 Notice.
- 24.980 Participant.
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- 24.990 Preponderance of the evidence.
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- 24.1010 Suspending official.
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- 24.1020 Voluntary exclusion or voluntarily excluded.

Appendix to part 24—Covered Transactions.

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- 24.1165 How is a limited denial of participation reported?

**Authority:** 41 U.S.C. 701 *et seq.*; 42 U.S.C. 3535(d); Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235).

3. Part 24 is further amended as set forth below.

a. “[Agency noun]” is removed and “the Department of Housing and Urban Development” is added in its place wherever it occurs.

b. “[Agency adjective]” is removed and “HUD” is added in its place wherever it occurs.

c. “[Agency head or designee]” is removed and “HUD Debarring Official or designee” is added in its place wherever it occurs.

4. Section 24.200 is further amended by adding a paragraph (c) to read as follows:

#### § 24.200 What is a covered transaction?

\* \* \* \* \*

(c) In the case of employment contracts that are covered transactions, each salary payment under the contract is a separate covered transaction.

5. Section 24.300 is further amended by adding paragraphs (c) and (d) to read as follows:

#### § 24.300 May I enter into a covered transaction with an excluded or disqualified person?

\* \* \* \* \*

(c) You as a participant are responsible for determining whether you are entering into a covered transaction with an excluded or disqualified person. You may decide the method by which you do so. You may, but are not required to, check the *List*.

(d) In the case of an employment contract, HUD does not require employers to check the *List* prior to making salary payments pursuant to that contract.

6. Section 24.440 is added to read as follows:

#### § 24.440 What method do I use to communicate those requirements to participants?

To communicate the requirements to participants, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower tier covered transactions.

7. Section 24.750 is further amended by adding a paragraph (c) to read as follows:

#### § 24.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

\* \* \* \* \*

(c) The official receiving the referral for findings of fact regarding disputed material facts must be a hearing officer in all HUD suspensions.

8. Section 24.845 is further amended by adding a paragraph (d) to read as follows:

#### § 24.845 What does the debarring official consider in deciding whether to debar me?

\* \* \* \* \*

(d) The official receiving the referral for findings of fact regarding disputed material facts must be a hearing officer in all HUD debarments.

9. Section 24.947 is added to read as follows:

#### § 24.947 Hearing officer.

*Hearing officer* means an Administrative Law Judge or Board of Contract Appeals Judge authorized by HUD's Secretary or by the Secretary's designee, to conduct proceedings under this part.

10. Section 24.995 is further amended by adding a paragraph (c) to read as follows:

#### § 24.995 Principal.

\* \* \* \* \*

(c) A person who has a critical influence on, or substantive control over, a covered transaction, whether or not employed by the participant. Persons who have a critical influence on, or substantive control over, a covered transaction may include, but are not limited to:

- (1) Loan officers;
- (2) Staff appraisers and inspectors;
- (3) Underwriters;
- (4) Bonding companies;
- (5) Borrowers under programs financed by HUD or with loans guaranteed, insured, or subsidized through HUD programs;
- (6) Purchasers of properties with HUD-insured or Secretary-held mortgages;
- (7) Recipients under HUD assistance agreements;
- (8) Ultimate beneficiaries of HUD programs;
- (9) Fee appraisers and inspectors;
- (10) Real estate agents and brokers;
- (11) Management and marketing agents;
- (12) Accountants, consultants, investment bankers, architects, engineers, and attorneys who are in a business relationship with participants in connection with a covered transaction under a HUD program;
- (13) Contractors involved in the construction or rehabilitation of

properties financed by HUD, with HUD insured loans, or acquired properties, including properties held by HUD as mortgagee-in-possession;

(14) Closing agents;

(15) Turnkey developers of projects financed by or with financing insured by HUD;

(16) Title companies;

(17) Escrow agents;

(18) Project owners;

(19) Administrators of nursing homes and projects for the elderly financed or insured by HUD; and,

(20) Developers, sellers or owners of property financed with loans insured under title I or title II of the National Housing Act.

11. Subpart J is added to Part 24 to read as follows:

#### **Subpart J—Limited Denial of Participation**

##### **§ 24.1100 What is a limited denial of participation?**

A limited denial of participation excludes a specific person from participating in a specific program, or programs, within a HUD Field Office's geographic jurisdiction, for a specific period of time. A limited denial of participation is normally issued by a HUD Field Office but may be issued by a Headquarters office. The decision to impose a limited denial of participation is discretionary and in the best interests of the Government.

##### **§ 24.1105 Who may issue a limited denial of participation?**

The Secretary designates HUD Officials who are authorized to impose a limited denial of participation, affecting any participant and/or their affiliates, except FHA approved mortgagees.

##### **§ 24.1110 When may a HUD official issue a limited denial of participation?**

(a) An authorized HUD official may issue a limited denial of participation against a person based upon adequate evidence of any of the following causes:

(1) Approval of an applicant for insurance would constitute an unsatisfactory risk;

(2) Irregularities in a person's past performance in a HUD program;

(3) Failure of a person to maintain the prerequisites of eligibility to participate in a HUD program;

(4) Failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations;

(5) Failure to satisfy, upon completion, the requirements of an assistance agreement or contract;

(6) Deficiencies in ongoing construction projects;

(7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;

(8) Commission of an offense listed in § 24.800;

(9) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee;

(10) Making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department;

(11) Imposition of a limited denial of participation by any other HUD office; or

(12) Debarment or suspension by another federal agency for any cause substantially the same as provided in § 24.800.

(b) Filing of a criminal Indictment or Information shall constitute adequate evidence for the purpose of limited denial of participation actions. The Indictment or Information need not be based on offenses against HUD.

(c) Imposition of a limited denial of participation by any other HUD office shall constitute adequate evidence for a concurrent limited denial of participation. Where such a concurrent limited denial of participation is imposed, participation may be restricted on the same basis without the need for additional conference or further hearing.

(d) An affiliate or organizational element may be included in a limited denial of participation solely on the basis of its affiliation, and regardless of its knowledge of or participation in the acts providing cause for the sanction. The burden of proving that a particular affiliate or organizational element is currently responsible and not controlled by the primary sanctioned party (or by an entity that itself is controlled by the primary sanctioned party) is on the affiliate or organizational element.

##### **§ 24.1115 When does a limited denial of participation take effect?**

A limited denial of participation is effective immediately upon issuance of the notice.

##### **§ 24.1120 How long may a limited denial of participation last?**

A limited denial of participation may remain effective up to 12 months.

##### **§ 24.1125 How does a limited denial of participation start?**

A limited denial of participation is made effective by providing the person,

and any specifically named affiliate, with notice:

(a) That the limited denial of participation is being imposed;

(b) Of the cause(s) under § 24.1110 for the sanction;

(c) Of the potential effect of the sanction, including the length of the sanction and the HUD program(s) and geographic area affected by the sanction;

(d) Of the right to request, in writing, within 30 days of receipt of the notice, a conference under § 24.1130; and

(e) Of the right to contest the limited denial of participation under § 24.1130.

##### **§ 24.1130 How may I contest my limited denial of participation?**

(a) Within 30 days after receiving a notice of limited denial of participation, you may request a conference with the official who issued such notice. The conference shall be held within 15 days after the Department's receipt of the request for a conference, unless you waive this time limit. The official who imposed the sanction, or designee, shall preside. At the conference, you may appear with a representative and may present all relevant information and materials to the official or designee. Within 20 days after the conference, or within 20 days after any agreed upon extension of time for submission of additional materials, the official or designee shall, in writing, advise you of the decision to terminate, modify, or affirm the limited denial of participation. If all or a portion of the remaining period of exclusion is affirmed, the notice of affirmation shall advise you of the opportunity to contest the notice and request a hearing before a Departmental Hearing Officer. You have 30 days after receipt of the notice of affirmation to request this hearing. If the official or designee does not issue a decision within the 20-day period, you may contest the sanction before a Departmental Hearing Officer. Again, you have 30 days from the expiration of the 20-day period to request this hearing. If you request a hearing before the Departmental Hearing Officer, you must submit your request to the Debarment Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW., B 133 Portals 200, Washington, DC 20410.

(b) You may skip the conference with the official and you may request a hearing before a Departmental Hearing Officer. This must also be done within 30 days after receiving a notice of limited denial of participation. If you opt to have a hearing before a Departmental Hearing Officer, you must submit your request to the Debarment Docket Clerk, Department of Housing



and Urban Development, 451 Seventh Street, SW., B 133 Portals 200, Washington, DC 20410. The hearing before the Departmental Hearing Officer is more formal than the conference before the sanctioning official described above. The hearing before the Departmental Hearing Officer will be conducted in accordance with 24 CFR part 26, subpart A. The Departmental Hearing Officer will issue findings of fact and make a recommended decision. The sanctioning official will then make a final decision as promptly as possible after the Departmental Hearing Officer recommended decision is issued. The sanctioning official may reject the recommended decision or any findings of fact, only after specifically determining the decision or any of the facts to be arbitrary or capricious or clearly erroneous.

**§ 24.1135 Do Federal Agencies coordinate limited denial of participation actions?**

Federal agencies do not coordinate limited denial of participation actions. As stated in § 24.1100, a limited denial of participation is a HUD specific action and applies only to HUD activities.

**§ 24.1140 What is the scope of a limited denial of participation?**

The scope of a limited denial of participation is as follows:

(a) A limited denial of participation generally extends only to participation in the program under which the cause arose. Program may, in the discretion of the authorized official, include any or all of the functions within the jurisdiction of an Assistant Secretary. The authorized official, however, may determine that the sanction shall apply to all programs throughout HUD where the sanction is based on an indictment or conviction.

(b) For purposes of this subpart, participation includes receipt of any benefit or financial assistance through grants or contractual arrangements; benefits or assistance in the form of loan guarantees or insurance; and awards of procurement contracts.

(c) The sanction may be imposed for a period not to exceed 12 months, and shall be effective within the geographic jurisdiction of the office imposing it, unless the sanction is imposed by an Assistant Secretary or Deputy Assistant Secretary in which case the sanction may be imposed on either a nationwide or a more restricted basis.

**§ 24.1145 May HUD impute the conduct of one person to another in a limited denial of participation?**

For purposes of determining a limited denial of participation, HUD may impute conduct as follows:

(a) *Conduct imputed to participant.* HUD may impute the fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval or acquiescence. The participant's acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

(b) *Conduct imputed to individuals associated with participant.* HUD may impute the fraudulent, criminal, or other seriously improper conduct of a participant to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(c) *Conduct of one participant imputed to other participants in a joint venture.* HUD may impute the fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application or similar arrangement, or with the knowledge, approval, or acquiescence of those participants. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

**§ 24.1150 What is the effect of a suspension or debarment on a limited denial of participation?**

If you have submitted a request for a hearing pursuant to § 24.1130 of this section, and you also receive, pursuant to subpart G or H of this part, a notice of proposed debarment or suspension that is based on the same transaction(s) or conduct as the limited denial of participation, as determined by the debarring or suspending official, the following rules shall apply:

(a) During the 30-day period after you receive a proposed debarment or suspension, during which you may elect to contest the debarment under § 24.815, or the suspension pursuant to § 24.720, all proceedings in the limited denial of participation, including discovery, are automatically stayed.

(b) If you do not contest the proposed debarment pursuant to § 24.815, or the suspension pursuant to § 24.720, the final imposition of the debarment or suspension shall also constitute a final decision with respect to the limited

denial of participation to the extent that the debarment or suspension is based on the same transaction(s) or conduct as the limited denial of participation.

(c) If you contest the proposed debarment pursuant to § 24.815, or the suspension pursuant to § 24.720, then:

(1) Those parts of the limited denial of participation and the debarment or suspension based on the same transaction(s) or conduct, as the determined by the debarring or suspending official, shall be immediately consolidated before the debarring or suspending official;

(2) Jurisdiction of the hearing officer under 24 CFR part 24, subpart J, to hear those parts of the limited denial of participation based on the same transaction(s) or conduct as the debarment or suspension, as determined by the debarring or suspending official, shall be divested, and the hearing officer responsible for hearing the limited denial of participation shall transfer the administrative record to the debarring or suspending official; and

(3) The debarring or suspending official shall hear the entire consolidated case under the procedures governing debarments and suspensions, and shall issue a final decision as to both the limited denial of participation and the debarment or suspension.

**§ 24.1155 What is the effect of a limited denial of participation on a suspension or a debarment?**

The imposition of a limited denial of participation does not affect the right of the Department to suspend or debar any person under this part.

**§ 24.1160 May a limited denial of participation be terminated before the term of the limited denial of participation expires?**

If the cause for the limited denial of participation is resolved before the expiration of the 12-month period, the official who imposed the sanction may terminate it.

**§ 24.1165 How is a limited denial of participation reported?**

When a limited denial of participation has been made final, or the period for requesting a conference pursuant to § 24.1130 has expired without receipt of such a request, the official imposing the limited denial of participation shall notify the Director of the Compliance Division in the Departmental Enforcement Center of the scope of the limited denial of participation.



Dated: June 5, 2002.

**Mel Martinez,**

*Secretary.*

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