

Recommendations by the Administrative Conference of the United States (ACUS)

Comment: Four of the five commenters refer to recommendations recently issued by ACUS (Recommendation 95-2, "Debarment and Suspension from Federal Programs," adopted January 19, 1995) and urge that HUD conform its regulations to the ACUS Recommendations. In particular, the commenters urge compliance with item II of the Recommendations. This item recommends that cases involving disputed issues of material fact be referred to administrative law judges, military judges, administrative judges of boards of contract appeals or similarly independent hearing officers for hearings and preparation of (1) findings of fact certified to the debarring official, or (2) a recommended decision to the debarring official, or (3) an initial decision, subject to agency appeal. Item II of the ACUS Recommendations also recommends that debarring officials be senior agency officials who are guaranteed sufficient independence to provide due process, and that such officials ensure that information used as the basis for a sanction appear in the administrative record of the decision.

The commenters expressed concern that the use of "hearing officials" who are not administrative judges would result in the deprivation of due process. They criticized these officials as being neither trained in the law nor versed in HUD's programs.

One commenter also urged HUD to adopt item III of the ACUS Recommendation. Item III lists various recommendations for future rulemaking: (1) that entities coordinating the FAR and the common rule, and individual agencies, provide for a list of mitigating and aggravating factors; (2) establishment of a process for determining a lead agency when a person deals with more than one agency; (3) minimum evidentiary thresholds for procurement debarment; (4) notice to affected persons of the impact of sanctions; and (5) use of "show cause" warning letters.

Response: The rule satisfies the ACUS recommendation that debarring officials be senior, independent agency officials. Notices of suspension and proposed debarment are, under delegations by the Secretary of HUD, issued by Assistant Secretaries, the Inspector General, and the President of the Government National Mortgage Association. These officials are the highest responsible officials for major components of the Department. They report directly to the

Secretary. These officials are not subject to the supervision of, nor do they directly supervise, agency personnel who carry out investigative or prosecutive activities. Their ability to make independent debarment decisions is thus evident from their position.

The Department has revised the rule to address the comments concerning referral of disputes of material fact. The revision deletes the references to "hearing official." The specific HUD-only additions to the common rule, at §§ 24.314(b)(2)(i) and 24.413(b)(3), clarify that disputes of material fact may be referred to "hearing officers" who are defined as administrative law judges or members of the HUD Board of Contract Appeals. In accordance with the first option listed in ACUS Recommendation item II, the hearing officers will provide findings of fact to the suspending or debarring official. In addition, the final rule provides that the suspending or debarring official may, in his or her discretion, refer cases based upon indictment, conviction or civil judgment, or cases in which there is no dispute of material fact, to the hearing officer for appropriate findings.

The final rule is in conformity with the other elements of ACUS Recommendation 95-2 to the extent possible in the context of a coordinated governmentwide system. Recommendation item IV urges that all federal agencies adopt the common rule. By conforming its hearing procedures to those of the common rule, HUD has followed the ACUS suggestion. By coordinating procurement and non-procurement suspension and debarment, HUD has followed the suggestion of ACUS in Recommendation item I.

HUD has agreed to consider ACUS Recommendation item III, along with other proposed changes to the common rule, before the end of this year. Certain of the item III suggestions, such as appropriate notice to respondents and the use of "show cause" letters, will in any event be considered by HUD as new procedures are adopted under the regulatory revision.

Finally, ACUS Recommendation item V addresses Congress rather than the executive branch agencies.

Consideration of Mitigating Factors in Debarment Proceedings

Comment: Two commenters asserted that the proposed rule had eliminated all references to mitigating factors as an element of the suspension and debarment process.

Response: These comments may be based on the elimination of paragraph (d) in 24 C.F.R. § 24.115, which refers to

consideration of mitigating factors in the debarment of contractors. This deletion is the result of coordination of procurement and non-procurement debarment.

Mitigation will, necessarily, continue to be an element in HUD's suspension and debarment process. Most importantly, 24 C.F.R. § 24.300 will continue to require consideration of the seriousness of the "person's" acts and "any mitigating factors." In addition, the provisions of 24 C.F.R. § 24.314, referring to the inclusion of "any evidence of mitigating circumstances," are expanded under the proposed rule and this final rule by requiring consideration of "any information and argument" submitted by the respondent. (See §§ 24.313(a) and 24.314(a) and (b)(1).) The opportunity to submit, for review, evidence of mitigation as well as any other information is thus well preserved.

Limits on Discovery and Use of Alternative Dispute Resolution

Comment: Two commenters proposed that the Department impose limits on discovery as a means of streamlining the hearing process. One commenter further recommended that the rule provide for the use of alternative dispute resolution. The commenters stated that these changes would reduce costs to the Department and to participants while increasing efficiency.

Response: The Department's current rule allows the use of discovery pursuant to the provisions of 24 CFR Part 26. In the final rule, cases that the suspending or debarring official does not refer to hearing officers shall not be subject to formal discovery, but instead shall be limited to information in the administrative record, including any submissions by the respondent. (See §§ 24.314(a) and (b) and 24.413(a) and (b).)

The discovery provisions of Part 26 shall continue to apply to those cases that are referred to a hearing officer for findings of fact. (See §§ 24.314(b)(2)(i) and 24.413(b)(3).) However, 24 CFR § 26.17 provides that "discovery shall not be permitted where it will unduly delay the hearing, thereby resulting in prejudice to the public interest or the rights of the parties." In addition, the final rule procedures at §§ 24.314(b)(2)(ii) and 24.413(b)(4) will require that the hearing in a case referred to the hearing officer commence within 45 days of referral, unless both parties agree to an extension of time. The Department is also required to compile an administrative record prior to hearing, and to provide a copy to the respondent. This record will contain all