1987, following the 2:30 p.m. open meeting, will be:

Post oral argument discussion.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Nancy Morris at (202) 272-3085.

Jonathan G. Katz,
Secretary.
July 15, 1987.

[FR Doc. 87-16388 Filed 7-15-87; 2:45 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 52, No. 137
Friday, July 17, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

[Docket No. 86N-0438]

Animal Drugs, Feeds, and Related Products; Dimetridazole

Correction

In rule document 87-15201 beginning on page 25212 in the issue of Monday, July 6, 1987, make the following correction:

On page 25213, in the second column, in amendatory instruction 4, "520.580b" should read "520.680b".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Eight in One Pet Products, Inc.; Withdrawal of Approval of NADA

Correction

In notice document 87-12438 appearing on page 20642 in the issue of Tuesday, June 2, 1987, make the following correction:

In the second column, in the first complete paragraph, in the third line, "21 U.S.C. 360(e)" should read "21 U.S.C. 360b(e)".

BILLING CODE 1505-01-D

federal register

Friday
July 17, 1987

Part II

Department of Housing and Urban Development

Office of the Secretary

24 CFR Part 0

Standards of Conduct; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 0

[Docket No. R-87-1303; FR 2146]

Standards of Conduct

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule comprehensively amends the Department's Standards of Conduct regulations. It clarifies certain provisions of the former regulations and eliminates redundant and outdated material. It also conforms the former regulations to subsequently enacted statutes.

The rule operates prospectively. Therefore, in the absence of an actual conflict of interest, any financial interest properly held or acquired under the prior regulation will not have to be divested even if its holding or acquisition is prohibited under this regulation.

On September 25, 1986 the President signed Executive Order 12565 (51 FR 34437) which amended Executive Order 11222 to establish a comprehensive system of financial reporting for federal employees. The Office of Government Ethics (OGE) has published a proposed rule (51 FR 43359) implementing Executive Order 12565. This rule would significantly revamp the confidential reporting system and would require every agency to issue regulations in accordance with OGE's rule. Therefore, once OGE publishes a final rule concerning the confidential financial disclosure system, the Department will amend Subpart C of these regulations to bring it into conformity with OGE regulations.

EFFECTIVE DATE: September 18, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. David D. White, Assistant General Counsel for Administrative Law, Office of General Counsel, Room 10254, 451 7th Street, SW., Washington, DC 20410, (202) 755-7137 (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

HUD published a proposed rule on August 22, 1986 (51 FR 30178) entitled "Standards of Conduct." The rule was intended to amend the Standards of Conduct regulations by specifically defining permissible financial interests and outside activities for Department employees, as well as interests which are prohibited by the Ethics in Government Act of 1978 and Office of Personnel Management regulations.

The Department received three comments in response to the proposed rule. Two of these comments were from HUD employees who suggested various technical amendments. One of these commenters also suggested that the Department retain the rule in the former regulation that permitted an employee to obtain FHA insurance on his immediate past residence, vacation or retirement home. The Department decided not to adopt this suggestion because the thrust of the new regulation is to restrict employee involvement in HUD-related real estate investments, and to relax restrictions on real estate investments unrelated to the programs of the Department. However, the rule was modified somewhat in this regard after negotiations with the American Federation of Government Employees (AFGE), as discussed below.

The third commenter was an official of the AFGE. He made a number of preliminary observations in anticipation of negotiations concerning the Standards of Conduct. Some of these comments were suggested technical changes. He also suggested eliminating rules based upon the Government-wide Standards of Conduct regulations promulgated by the Office of Personnel Management. The Department does not have the discretion to modify or eliminate those rules.

However, the rule was also submitted in a draft final version to the AFGE for review pursuant to Article 5 of the Department's Agreement with the AFGE. The AFGE requested negotiations concerning certain provisions of the rule. As a result of those negotiations this rule deletes the provision which required an employee to obtain the prior approval of a Deputy Counselor before maintaining a publicly listed place of business (§ 0.735-203(d)). That rule has been superceded by a new § 0.735-203(d)(1) which requires an employee to obtain prior approval before using his title or reference to Government experience in connection with a commercial enterprise.

After discussion with the AFGE we also added a new § 0.735-204(a)(3) which explicitly permits an employee to obtain FHA insurance on one single family dwelling in addition to the employee's current principal residence. This change pemits an employee for example, to retain FHA insured financing on any one past residence or other investment property. Under the prior regulation, an employee could properly obtain FHA insurance on his immediate past residence, vacation or retirement home. We agreed to reinstate a somewhat modified version of this rule because of concerns raised during the clearance process and the AFGE negotiations concerning the possible hardship on employees who may have to refinance in connection with a job relocation.

The rule was also submitted for review to the Office of Government Ethics (OGE) pursuant to 5 CFR 735-104. In accordance with OGE suggestions, we made a number of changes in § 0.735-202 of the rules concerning the acceptance of gifts. First, we reinstated at § 0.735-202(b)(2) the rule that an employee may accept food and refreshments of nominal value on infrequent occasions at a business meeting. We deleted proposed § 0.735-202(b)(2)(i) which would have permitted acceptance of food and refreshments at conferences and similar meetings where payment by the employee would not be practicable.

Second, as OGE suggested we deleted § 0.735-202(b)(2)(ii) which would have permitted acceptance of food and refreshments at "meetings which do not include the inspection, monitoring, or selection of grantees, contractors, or others who do business, or are seeking to do business, with the Department."

Third, we revised § 0.735-202(b)(5) which generally addressed the subject of attendance at conferences and social functions. As OGE recommended, we revised the regulation to provide for case-by-case handling of attendance at these functions. The rule now permits an employee to participate in a "widely attended luncheon, dinner, conference or similar gathering sponsored by a trade, technical, professional or other association or similar group for a discussion of matters related to the work of the Department." Participation must be in the Department's interest and approved in advance by the employee's supervisor. However, acceptance of food and refreshments from a private company in connection with an association's activities will be impermissible.

Fourth, we revised § 0.735-202(b)(6) to include a reference to HUD's gift acceptance authority at 42 U.S.C. 3535(k). We also added a new § 0.735-202(e) to state that employees may accept certain gifts of travel from charitable organizations defined in 26 U.S.C. 501(c)((3).

Finally, in § 0.735-202(c) we restored language which would permit an employee to accept gifts of only nominal value (not "modest" value) on special occasions from persons receiving less pay than himself.

OGE also suggested a number of changes to provisions concerning the misuse of Government position and official title. In response to these suggestions, we revised § 0.735–202(d)(2) to require an employee to obtain the prior approval of a Deputy Counselor before using his official title or reference to government employment "in connection with" a commercial enterprise, rather than to "promote" a commercial enterprise as the proposed rule stated. OGE objected to the implication that an employee's title or employment could ever be used to promote a commercial enterprise.

We declined to adopt OGE's recommendation that a Deputy Counselor approve every proposed use of an employee's title in connection with a writing. An employee's use of title in connection with a commercial writing must be approved by a Deputy Counselor under § 0.735–203(d)(2). For other writings, an employee must add a disclaimer or obtain the prior approval of the appropriate Assistant Secretary or equivalent, or his or her designee pursuant to § 0.735–203(e)(3).

OGE also recommended several other technical and editorial changes in the proposed rule to clarify meaning and correct errors. We have made those changes where appropriate.

In preparing this rule for publication in final form, the Department reconsidered all changes set forth in the proposed rule. One of the proposed revisions would have barred employees from acquiring notes or bonds issued by a State or local agency if the proceeds were to be used for HUD-related housing. After reevaluating the effects of this restriction, the Department decided the proposed revision was unnecessary to prevent a real or apparent conflict of interest in most cases, and this final rule eliminates the restriction. However, acquisition of such bonds or notes based upon any inside information acquired during the course of HUD employment would be prohibited by § 0.735–201(a) and § 0.735–206. Other than this change and those discussed above, the rule is essentially unchanged from that which was published in proposed form. Major changes from the former regulations are as follows:

Subpart A

1. The statement of purpose in § 0.735–101 has been shortened and simplified. In addition, a similar statement now set forth in § 0.735–201 has been deleted entirely.

2. The provisions of § 0.735–104 have been modified to clarify the role and responsibilities of the Department Counselor and to identify the Department's Deputy Counselors. In addition, the Inspector General has been designated a Deputy Standards of Conduct Counselor for employees in the Office of Inspector General.

3. A new provision has been added in § 0.735–106 authorizing waiver of one or more of the regulations' restrictions by the Department Counselor when their application is not necessary to prevent an actual or apparent conflict of interest in a particular case.

4. Section 0.735–201 of the former regulations has been eliminated because it was superfluous and unnecessary. Section 0.735–202 of the former regulations has been renumbered § 0.735–201 and all following sections are renumbered accordingly. (Unless otherwise indicated, all subsequent section references in Subpart B of this preamble are to the renumbered sections.)

5. The prohibition in § 0.735–202(a)(3) on accepting gifts from a person or organization whose interests may be substantially affected by the performance of an employee's official duties has been changed to prohibit acceptance when these interests may be substantially affected by "the actions of the Department."

6. A new subparagraph (b)(5) has been added to § 0.735–202 permitting participation by a Department employee at a widely-attended luncheon, dinner, seminar or other similar gathering sponsored by a trade, technical or other association. Participation must be approved in advance by the employee's supervisor as being in the Department's interest. The rule does not permit an employee to accept payment of food and refreshments from a private company in connection with this type of activity.

7. A new subparagraph (b)(6) has been added to § 0.735–202 permitting acceptance by Department employees of in-kind contributions toward official travel (for example, donated transportation tickets and meals) made by a non-Federal entity, if consistent with the Department's official travel policies. These policies are intended to permit such acceptance only in circumstances where no actual or apparent conflict of interest would result. The policies are available for public inspection.

8. A new paragraph (e) has been added to § 0.735–202 permitting acceptance of travel expenses from a charitable organization defined in 26 U.S.C. 501(c)(3).

9. In § 0.735–203(b)(4), the prohibition against engaging in outside employment or activities related to the substantive programs of the Department has been clarified so that the prohibition is against "active participation in, or conduct of, a business dealing with, or related to, real estate or manufactured housing including, but not limited to, real estate brokerage, management and sales, architecture, engineering, mortgage lending, property insurance, appraisal services, construction, construction financing, land planning and real estate development." The new standard permits employees to engage in isolated transactions in areas that are generally similar to programs of HUD when there is no actual conflict of interest, but it does not permit employees to engage in any outside employment involving a HUD program, such as the sale of real estate financed with FHA insurance.

10. In § 0.735–203(b)(5) a provision has been added prohibiting an employee from "serving as an officer or director of any organization which engages in lobbying activities concerning HUD's programs." This provision codifies existing Department policy on this issue.

11. A provision has been added at § 0.735–203(d)(1) requiring an employee to obtain the approval of a Deputy Counselor before using his or her title or government experience in connection with a commercial enterprise. The former provision requiring prior approval before maintaining a publicly listed place of business has been deleted.

12. Current provisions concerning honoraria in § 0.735–203(e)(4) have been revised to reflect the statutory limitation (2 U.S.C. 441i) on receipt of honoraria. The limit, with certain exceptions, is $2000 per appearance, speech or article.

13. A new provision has been added in § 0.735–203 (f) to reflect the statutory limitation on outside earned income that may be received by Presidential appointees at or above GS–16. That limitation is 15% of annual salary.

14. In § 0.735–203 (g) and (h), new provisions have been added incorporating the restrictions on outside activities set forth in 18 U.S.C. 203 and 205. In general, these restrictions pertain to off-duty employee involvement in outside claims, requests for rulings, contracts and applications or other similar particular matters in which the United States is a party or has a direct and substantial interest and which are pending before a Federal or District of Columbia department or agency or, in some instances, court.

15. A new § 0.735–203(k) has been added permitting an employee to serve as a member of the Board of a federal credit union or a cooperative or condominium association for a housing project which is not subject to

Department regulation or, if so regulated, in which the employee resides. This provision codifies existing Department policy.

16. Section 0.725–204, which deals with permissible holdings, has been revised substantially. Most restrictions on employee investment in non-HUD related properties have been eliminated, but restrictions against employee investment in HUD-related interests or properties have been expanded. Thus, the restriction on the number of permissible investment units (the so-called "six unit rule") has been eliminated, but restrictions on FHA-financing of properties other than the employee's principal residence and one other single family unit have been expanded. Most of the new or revised provisions in this section reflect this change in emphasis, and also codify existing Department policy concerning HUD-related financial interests.

17. The primary purpose of § 0.735–204(a) of the new regulation is to regulate certain financial interests acquired after beginning employment with the Department. Prohibited interests acquired prior to HUD employment are governed by § 0.735–204(c).

18. The prohibition against the acquisition of GNMA securities has been eliminated. Accordingly, employees may now purchase GNMA securities and funds comprised of GNMA securities. The holding of GNMA-guaranteed securities does not create a potential conflict-of-interest on the part of a HUD employee, because actions that may be taken by GNMA vis-a-vis the issuer after default will not affect the security holder. GNMA's guarantee of timely payment of principal and interest on mortgage-backed securities is backed by the full faith and credit of the United States. From the perspective of the investor, therefore, GNMAs are essentially similar to Treasury securities, which are not prohibited investments. However, an employee who has access to information unavailable to the general public relevant to GNMA securities (such as prepayment trends) is still prohibited from acquiring, selling, or otherwise dealing in GNMA securities on the basis of this "inside information." GNMA transactions based on inside information violate § 0.735–201(a) of this regulation which prohibits using public office for private gain and § 0.735–206 which prohibits the use of inside information.

19. This regulation continues to prohibit the holding and acquisition of FNMA securities and also bars the holding of securities collateralized by FNMA securities. See § 0.735–204(a)(1). The obligations of FNMA are not backed by the full faith and credit of the United States, and the interests of holders of FNMA debt obligations (including guaranteed passthrough securities) or equity securities can be affected by actions taken by HUD under its oversight and regulatory responsibility.

20. A new provision has been added at § 0.735–204(a)(3) barring an employee from having any interest in a Department-owned, insured, or subsidized project or unit other than an employee's principal residence, subject to certain exceptions set forth in § 0.735–204(b). This is a departure from the former rule at § 0.735–204(a)(6) which permitted an employee, for example, to obtain a HUD-insured loan for an immediate past residence, vacation or retirement home.

21. In § 0.735–204(a)(4), a new provision has been added barring the receipt of HUD subsidies under section 8 of the United States Housing Act of 1937, as amended, except in certain limited situations. The provision codifies existing Department policy.

22. The prohibition against "speculation" in real estate, in the former rule at § 0.735–205(a)(8), has been deleted since it was ambiguous and unenforceable.

23. A new § 0.735–204(a)(5) has been added barring acquisition of a direct creditor interest in mortgages insured by HUD. This restriction is in addition to that set forth in § 0.735–204(a)(4) which prohibits an employee from acquiring an interest in a HUD-insured investment property. This provision does not bar the acquisition of an indirect interest in HUD-insured mortgages, such as through GNMA securities.

24. A new provision has been added in § 0.735–204(b)(1) permitting employee investments in widely held mutual or money market funds which have broadly diversified portfolios although these funds may have HUD-related assets. The provision codifies existing Department policy.

25. A new § 0.735–204(b)(2) has been added permitting investment as a limited partner in a large public partnership if less than 25% of the partnership assets are involved in HUD-related housing. This also codifies existing Department policy.

26. A new provision has been added at § 0.735–204(b)(3) which permits an employee to obtain FHA insurance on one single family residential unit, other than the employee's principal residence. Under the provision, for example, an employee is not required to refinance a single family investment property formerly occupied as a principal residence.

27. Section 0.735–204(c) adds a new provision setting forth a procedure to resolve conflicts which may arise because of prohibited interests acquired involuntarily or acquired before employment with the Department. Prohibited interests acquired involuntarily or prior to HUD employment must be reported to, and considered by, a Deputy Counselor. Generally, an employee may retain such interests in the absence of an actual conflict of interest. For example, an employee who owned a property with section 8 voucher or certificate holder tenants in place prior to HUD employment may normally retain the property and the tenants after beginning employment with the Department. However, the employee may not take on new section 8 tenants during HUD employment.

28. A portion of the former regulations implementing 18 U.S.C. 208 has been deleted. Formerly, § 0.735–205(b)(2) permitted an employee to act in a matter involving a corporation if the employee owned stock in the corporation worth less than $7500 (and which was less than 1% of the total stock in that corporation), and if the employee, his or her spouse, or minor child was not involved in managing the corporation. This provision has been deleted because the $7500 ceiling is arbitrary and is not "inconsequential" within the meaning of 18 U.S.C. 208. Further, retaining this provision would have been inconsistent with other portions of the new rule which prohibit the mere acquisition of certain HUD-related interests.

29. The provision of the former regulations at § 0.735–205(c) which attributed the financial interests of an employee's spouse and minor child to the employee has been deleted. The Department has determined that provision was unfair and unenforceable, particularly when an employee's spouse had independent means and the employee had no actual control over the spouse's investments. Of course, sham transactions will still be barred by § 0.735–204. For example, the acquisition of a prohibited interest in the name of a minor child will be barred as a sham transaction if the employee's funds are used to purchase the interest or if the employee directs purchase of the interest with other funds.

30. Section 0.735–205 has been expanded to include a prohibition against the use of Government

personnel for other than official purposes. In addition, the prohibition against the misuse of Government property set forth in this section is intended to include intangible property such as the Government's rights in data, patents, and copyrights, as well as products and services it has under grants, loans, subsidies, and insurance.

31. A new § 0.735-207 has been added prohibiting an employee from misusing his or her supervisory relationship or management position to obtain favors from, encourage a contribution from, or sell to, another HUD employee or someone who has business with the Department.

32. A number of miscellaneous employee conduct provisions contained in §§ 0.735-207 through 0.735-212 of the former regulations have been revised and streamlined.

Subpart C

33. Section 0.735-301 adds a new provision describing the categories of employees required to submit public financial disclosure statements.

34. A new § 0.735-302(a)(4) has been added requiring employees at GS-13 or above who are involved in conducting Departmental investigations to file confidential financial disclosure statements.

35. A new provision has been added at § 0.735-302(d) requiring all employees who serve on Source Evaluation Boards and Technical Evaluation Panels to file confidential disclosure statements.

36. Much of the technical information in the former regulations concerning time and place of filing confidential statements has been deleted. This information will be set forth in a Handbook detailing filing procedures.

Subpart D

37. All provisions relating to special Government employees have been consolidated in Subpart D, §§ 0.735-401 through 405.

38. Section 0.735-402 adds a new provision prohibiting special Government employees from having financial interests or engaging in outside employment or activities that constitute an actual conflict of interest. This section codifies existing Department policy.

Subpart E

39. Subpart E is new and implements the post employment restrictions set forth in the Ethics in Government Act of 1978.

40. Section 0.735-213 of the former regulations has been transferred to Subpart E, § 0.735-501, to consolidate provisions dealing with conduct and responsibilities of former employees. Section 0.735-501(f) incorporates the provisions of 25 U.S.C. 450i(f), permitting representation before any Federal Department, agency, court or commission by a former federal employee employed by an Indian tribe.

41. Sections 0.735-502 through 509 set forth provisions concerning disciplinary actions that may be initiated against former employees who violate post employment restrictions.

Determinations

HUD regulations published at 24 CFR Part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969, contain categorical exclusions for certain actions, activities and programs specified in § 50.20. Since the amendments made by this rule fall within the categorical exclusions for internal administrative procedures set forth in paragraph (k) of § 50.20, the preparation of an Environmental Impact Statement or a Finding of No Significant Impact is not required for this rule.

Pursuant to the provisions of 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule affects only present and former Government employees.

This rule does not constitute a "major rule" as the term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule was listed as item 885 in the Department's Semiannual Agenda of Regulations published on April 27, 1987 (52 FR 14362, 73) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 0

Conflict of interest.

Accordingly, 24 CFR Part 0 is revised to read as follows:

PART 0—STANDARDS OF CONDUCT

Subpart A—General Provisions

Subpart B—Conduct and Responsibilities of Employees

Subpart C—Statements of Employment and Financial Interests

Subpart D—Conduct and Responsibilities of Special Government Employees

Subpart E—Conduct and Responsibilities of Former Employees

Authority: 5 U.S.C. 301; 18 U.S.C. 201-212; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; 5 CFR 735.101-412.

Subpart A—General Provisions

§ 0.735-101 Purpose.

The maintenance of high standards of honesty, integrity and impartiality by Government employees is essential for the proper performance of the public business and the maintenance of confidence by citizens in their Government. To inform the public and Department staff as to the specific application of this general principle, this Part sets forth the Department's regulations prescribing standards of conduct for, and governing the submission of statements of employment and financial interests by its employees. All questions about, or requests for, interpretations should be directed to the Department Counselor or to a Deputy Counselor.

§ 0.735-102 Definitions.

(a) "Department" means the Department of Housing and Urban Development.

(b) "Employee" means an employee of the Department, other than a Special Government employee.

(c) "Special Government employee" means a person who is retained, designated, appointed or employed by the Department to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days, either on a full-time or intermittent basis, as defined in 18 U.S.C. 202.

(d) "Person" means an individual human being.

(e) "Business entity" means a corporation, company, firm, partnership, society, joint stock company, or any other organization or institution having a business purpose including, but not limited to:

(1) Non-profit organizations or institutions which own or operate housing units, and

(2) Educational and other institutions doing research and development or related work involving grants or other types of financial assistance from, or contracts with, the Government.

§ 0.735-103 Notification to employees.

The provisions of this Part shall be brought to the attention of, and made available to, each employee and special Government employee at the time of entrance on duty and at least annually thereafter. Each revision of this Part shall be brought promptly to the attention of all employees and special Government employees.

§ 0.735-104 Interpretation and advisory service.

(a) *Department Counselor.* The General Counsel is the Standards of Conduct Counselor for the Department and shall serve as the Department's designee to the Office of Personnel Management on matters covered by this Part. The Department Counselor shall be responsible for directing and coordinating the Department's activities under this Part and assuring that adequate counseling is provided to prospective, present and former employees of the Department.

(b) *Deputy Counselors.* The Department's Deputy Standards of Conduct Counselors are the Associate General Counsel for Equal Opportunity and Administrative Law, the Assistant General Counsel for Administrative Law, all Regional Counsel, and any other employees designated by the Department Counselor. The Department Counselor and the Deputy Counselors shall provide authoritative advice to former, current and prospective Department employees who seek guidance on questions of conflicts of interest and on other matters covered by this Part. In addition, the Inspector General is the Deputy Counselor for employees of the Office of Inspector General and will provide advice to former, current and prospective employees of that office.

§ 0.735-105 Disciplinary and other remedial actions.

(a) When an actual or apparent conflict of interest or other violation of this Part is not resolved to the satisfaction of a Deputy Counselor, the matter shall be reported by the Deputy Counselor to the employee's supervisor; copies of the report shall also be provided to the Office of Personnel and Training and other concerned offices, such as the Office of the Inspector General, and the Office of the appropriate Assistant Secretary, Regional Administrator or other field office head.

(b) The employee's supervisor must consider the report of the Deputy Counselor, initiate appropriate remedial action, and inform the Deputy Counselor of the action taken. Remedial action may inlcude, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee of the conflicting interest within a reasonable time, but normally not more than 60 days after notice that a conflict exists;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

§ 0.735-106 Waivers.

(a) The Department Counselor, in an individual case, may waive any requirement of this Part not required by law if the Department Counselor finds that application of the requirement is not necessary to prevent an actual or apparent conflict of interest in a particular case.

(b) Each such waiver shall be in writing and supported by a statement of the facts and conclusions on which it is based.

(c) The Department Counselor's authority under this Section may not be delegated.

Subpart B—Conduct and Responsibilities of Employees

§ 0.735-201 Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office or official title for private gain;

(b) Giving preferential treatment;

(c) Impeding Government efficiency or economy;

(d) Losing independence or impartiality;

(e) Making a Government decision outside official channels;

(f) Adversely affecting the confidence of the public in the integrity of the Government;

(g) Discriminating against any other employee, or applicant for employment, on the ground of race, color, religion, national origin, sex, age, or handicap;

(h) Excluding any person from participating in, or denying to any person the benefits of, any program or activity administered by the Department on the ground of race, color, religion, sex, national origin, age, or handicap; or

(i) Knowingly participating in, or attending while on official business, any segregated meetings, or meetings held in segregated facilities, from which persons are excluded because of race, color, religion, national origin, sex, age or handicap.

§ 0.735-202 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of value, from a person, State government, local government or business entity, or a group of persons, State governments, local governments or business entities, who or which:

(1) Has, or is seeking, and contractual or other business or financial relationship with the Department;

(2) Conducts operations or activities that are regulated by the Department; or

(3) Has interests, or whose members or clients have interests, that may be substantially affected by the actions of the Department.

(b) The prohibitions of paragraph (a) of this section do not apply:

(1) When the circumstances make it clear that family or personal relationships are the motivating factors for a gift, entertainment or favor;

(2) To acceptance of food and refreshments of nominal value on infrequent occasions in the course of a business meeting in which the employee is properly in attendance;

(3) To acceptance by an employee of loans from banks or other financial institutions on customary terms;

(4) To Acceptance by an employee of unsolicited advertising or promotional material, such as pens, pencils, plaques, note pads, calendars, and other items of nominal intrinsic value;

(5) To participation by an employee at a widely attended luncheon, dinner, conference, or similar gathering sponsored by a trade, technical, professional or other association or similar group for a discussion of matters related to the work of the Department. Participation must be approved in advance by the employee's supervisor as being in the interest of the Department. Acceptance of food and refreshments from a private company in connection with an association's activities is impermissible.

(6) To acceptance by the Department pursuant to 42 U.S.C. 3535(k) and under its policies governing official travel, of a donation of transportation, lodging or meals from a non-federal entity to permit an employee to attend a meeting or other event in an official duty status.

(c) An employee shall not solicit contributions for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself or herself (5 U.S.C. 7351). However, this paragraph does not prohibit voluntary gifts or donations of modest value made because of special circumstances such as marriage, illness or retirement.

(d) An employee shall not accept any gift, present, decoration or other item from a foreign government, except as authorized by the Foreign Gifts and Decorations Act (5 U.S.C. 7342).

(e) An employee may accept payment of travel, subsistence, and other expenses, incident to attendance at a meeting, from a charitable organization as defined in 26 U.S.C. 501(c)(3), if the donor is not a prohibited source described in subsection (1) of this section (5 U.S.C. 4111).

§ 0.735-203 Outside employment and other activities.

(a) Reference in this section to outside employment and outside activities is not intended to cover employee investments. That subject is covered in § 0.735-204.

(b) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the employee's official duties and responsibilities. Incompatible activities include, but are not limited to:

(1) Outside activities which tend to impair the employee's ability or capacity to perform official duties and responsibilities.

(2) Outside activities that may be construed by the public to be the official acts of the Department;

(3) Outside activities that establish relationships or property interests that may result in a conflict between private interests and official duties;

(4) Active participation in, or conduct of, a business dealing with, or related to, real estate or manufactured housing including, but not limited to, real estate brokerage, management and sales, architecture, engineering, mortgage lending, property insurance, appraisal services, construction, construction financing, land planning, and real estate development;

(5) Serving as an officer or director of any organization which engages in lobbying activities concerning Department programs;

(6) Serving as an officer or director of a Department-approved mortgagee, lending institution or organization which services mortgages or other securities for the Department;

(7) Accepting employment, with or without compensation, with any person or business entity doing business with the Department;

(c) An employee shall not receive any salary or any thing of monetary value from a private source as compensation for his or her services to the Government (18 U.S.C. 209).

(d) An employee must obtain the prior approval of the appropriate Deputy Counselor:

(1) Before using his or her title or reference to his or her government employment or experience in connection with a commercial enterprise, or

(2) Before accepting employment, with or without compensation

(i) With a State or local government, or

(ii) In the same professional field as that of the employee's official position.

(e) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, Office of Personnel Management regulations, or this Part, except that

(1) An employee may not receive compensation for any lecture, writing, or consultation, the subject matter of which is substantially related to the responsibilities, programs, or operations of the Department;

(2) An employee may not, either with or without compensation, engage in teaching, lecturing or writing that is dependent on information obtained as a result of his or her Government employment, except when that information has been made available to the general public, or will be made available on request, or when the appropriate Assistant Secretary or his or her designee gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(3) An employee may use his or her title in connection with writing for publication only if:

(i) The writing contains a statement indicating that the views contained therein are those of the employee as an individual and do not necessarily represent the views of the Department of Housing and Urban Development; or

(ii) Such use of the employee's title is approved in advance by the appropriate Assistant Secretary or equivalent, or his or her designee.

(4) An employee may not accept any honorarium of more than $2,000 for any appearance, speech or article (2 U.S.C. 441i), except if the honorarium is paid directly to a charitable organization at the request of the employee and selected by the payor from a list of 5 or more charitable organizations provided by the employee. In computing the $2,000 amount, the following may be excluded:

(i) Actual travel and subsistence expenses for the employee and the employee's spouse or aide; and

(iii) Amounts paid or incurred for any agent's fees or commissions.

(f) Any employee who is compensated at an amount equal to or above GS-16 in the General Schedule and who occupies a full-time position, appointment to which must be made by the President by and with the advice and consent of the Senate, may not have in any calendar year outside earned income attributable to such calendar year which is in excess of 15 per cent of the employee's salary (Pub. L. 95-521, section 210, 5 U.S.C. App.).

(g) An employee may not directly or indirectly seek or receive compensation for services, rendered by himself or others, in connection with any proceeding, application, request for ruling, contract, claim, or other particular matter in which the United States is a party or has a direct and substantial interest and which is before any Federal or District of Columbia department or agency (18 U.S.C. 203).

(h) An employee may not act, with or without compensation, as agent or attorney for another:

(1) In prosecuting a claim against the United States; or

(2) In connection with any proceeding, application, request for ruling, contract or other particular matter in which the United States is a party or has a direct and substantial interest and which is before any Federal or District of Columbia department, agency, or court (18 U.S.C. 205).

(i) Permissible exceptions to the prohibitions set forth in paragraphs (g) and (h) of this section include:

(1) Representation without compensation in connection with a disciplinary, loyalty, or personnel proceeding;

(2) Representation with or without compensation of parents, spouse, child, or those to whom the employee owes a fiduciary duty except in those matters in which the employee has participated personally and substantially as a Government employee or which are the subject of his official responsibility; and

(3) Statements required to be made under penalty for perjury or contempt.

An employee seeking to engage in one of these excepted activities is encouraged to consult in advance with a Deputy Counselor.

(j) The prohibitions set forth in paragraphs (g) and (h) of this section are in addition to, and not in lieu of, any other restrictions contained in this subpart.

(k) This section does not prohibit an employee from serving in an individual capacity as an officer or a member of the Board of Directors of:

(1) A Federal Credit Union, or

(2) A cooperative or condominium association for a housing project which is not subject to regulation by the Department or, if so regulated, in which the employee personally resides.

(l) When participating in any activity permitted by this section, an employee shall make certain that his or her official title or Department connection is not shown or used in a manner which implies that the employee is acting in an official capacity.

§ 0.735-204 Financial interests.

(a) An employee shall not have a direct or indirect financial interest that conflicts, or appears to conflict, with his or her official duties and responsibilities. Such interests include, but are not limited to, the voluntary acceptance, acquisition or holding of:

(1) Securities issued by the Federal National Mortgage Association and securities collateralized by FNMA securities.

(2) FHA debentures or certificates of claim.

(3) Stock or other interest in a Department-owned, insured or subsidized multifamily project or single family dwelling, cooperative unit, or condominium unit, except to the extent that the stock or other interest represents the employee's principal residence. Employees who wish to purchase a Department-held property as a principal residence must adhere to the procedures established by the Assistant Secretary for Housing for the administration of the property disposition program set forth in Handbook 4310.5.

(4) Any Department subsidy provided pursuant to Section 8 of the United States Housing Act of 1937, as amended, to or on behalf of a tenant of property owned by the employee. However, an employee may accept the benefit of such a subsidy when:

(i) The employee involuntarily acquires a property which at the time of acquisition has a tenant receiving such a subsidy but only as long as that tenant continues to reside in the property, or

(ii) An incumbent tenant who has not previously received such a subsidy becomes the beneficiary thereof but only if there is no increase in that tenant's rent upon the commencement of subsidy payments other than normal annual adjustments.

(5) Any direct creditor interest in a mortgage insured by the Department.

(b) Notwithstanding paragraph (a) of this section, an employee may accept, acquire or hold

(1) An interest in a mutual or money market fund which has holdings listed in paragraph (a) of this section, and which:

(i) Has a broadly diversified portfolio not specializing in any particular industry;

(ii) Is widely held; and

(iii) Is not under the employee's control.

(2) A limited partnership interest in a large public partnership (i.e. one which has at least 5,000 partnership interests) less than 25% of the assets of which are Department insured or subsidized projects;

(3) Mortgage insurance provided pursuant to section 203 of the National Housing Act on any one single family residence in addition to the employee's current principal residence.

(c) If an employee acquires an interest prior to the commencement of employment with the Department which is prohibited under paragraph (a) of this section, or involuntarily acquires such a prohibited interest after the commencement of employment with the Department, the matter must be reported promptly to a Deputy Counselor. The Deputy Counselor will then determine whether retention of the interest is permissible or whether divestment or other appropriate remedial action is required.

(d)(1) An employee must not participate in his or her capacity as a Government employee in any matter in which, to his or her knowledge, the employee, his or her spouse, minor child, any organization in which the employee is serving as an officer, director, trustee, partner, or staff member, or a partner of the employee has a financial interest. In addition, an employee must not participate in his or her capacity as a Government employee in any matter in which, to the employee's knowledge, a person, business, or nonprofit organization with whom the employee is negotiating, or has an arrangement for, employment has a financial interest. For purposes of this paragraph a "matter" includes an application, contract, claim, request for a ruling, controversy, charge, accusation, arrest, judicial or other proceeding, or other particular matter. (18 U.S.C. 208(a)).

(2) Paragraph (d)(1) of this section does not apply:

(i) If a Deputy Counselor first determines that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee; or

(ii) If the financial interest is within one of the following categories which are hereby exempted from the requirements of section 208(a) of Title 18, United States Code, as being too remote or too inconsequential to affect the integrity of an employee's service:

(A) Any holding in a widely held mutual or money market fund, or regulated investment company, which is not under the employee's control and which has a broadly diversified portfolio not specializing in any particular industry;

(B) Participation in a bona fide employee benefit plan, other than a profit-sharing or stock-bonus plan, that is maintained by a former employer to the extent that the employee's rights in the plan are vested and require no additional services by him or her or further payment to the plan by the former employer with respect to the services of the employee.

§ 0.735-205 Misuse of Government personnel and property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, or the services of any HUD employee, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment and supplies, entrusted to him or her.

§ 0.735-206 Misuse of official information.

For the purpose of furthering a private interest, an employee shall not, except as permitted by § 0.735-203(e)(2), directly or indirectly use, or allow the use of, official information which has not been made available to the general public.

§ 0.735-207 Misuse of official position.

Except as may be permitted in the course of official business, an employee shall not use his or her supervisory relationship or management position, directly or indirectly, to seek a favor from, encourage a contribution from, or attempt to sell to, another HUD employee or person who has business with HUD.

§ 0.735-208 General conduct and conduct prejudicial to the Government.

(a) Each employee shall be courteous, considerate, and prompt in dealing with the public and with persons or organizations having business with the Department;

(b) An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct predjudicial to the Government.

§ 0.735-209 Intermediaries and product recommendations.

In communicating with any person or organization doing, or seeking to do, business with the Department, an employee shall not recommend or suggest the use of any particular or identified nongovernmental intermediary to deal with the Department, except as required by the employee's official duties.

§ 0.735-210 Membership in organizations in an official capacity.

(a) An employee may not, in his or her official capacity, serve as a member of a non-Federal or private organization except where express statutory authority exists, or statutory language necessarily implies such authority, or where the Secretary has determined in writing that such service would be beneficial to the Department and consistent with the employee's service to the Department.

(b) An employee may be designated to serve as a liaison representative of the Department to a non-Federal or private organization when the Secretary, the Under Secretary, an Assistant Secretary, the General Counsel, or a Regional Administrator, as appropriate, has determined in writing that such service would be beneficial to the Department and provided that:

(1) The activity relates to the work of the Department.

(2) The employee does not participate by vote in the policy determinations of the organization.

(3) The Department is not bound by any vote or action taken by the organization.

§ 0.735-211 Political activities.

Employees are required to observe the prohibitions against partisan political activities in 5 U.S.C. 7321-7327 and 18 U.S.C. 602, 603 and 607. Regulations implementing these restrictions are set forth in 5 CFR Part 733.

§ 0.735-212 Miscellaneous statutory provisions.

The attention of each employee is directed to the following statutory provisions which relate to his or her conduct:

(a) Pub. L. 96-303, 5 U.S.C. 7301 note, the "Code of Ethics for Government Service."

(b) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibitions against—

(1) The disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783(b)); and

(2) The disclosure of confidential information (18 U.S.C. 1905).

(g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse or unauthorized use of Government vehicle (31 U.S.C. 1344, 18 U.S.C. 641).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against concealing, removing, mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against—

(1) Embezzlement and theft of Government money, property, or records (18 U.S.C. 641);

(2) Failing to account for public money (18 U.S.C. 643); and

(3) Embezzlement or wrongful conversion of the money or property of another which comes under the control, or into the possession, of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized taking or use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibitions against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act of 1938, as amended (18 U.S.C. 219).

(q) The prohibition against the employment of an individual convicted of felonious rioting or related offenses (5 U.S.C. 7313).

(r) The prohibition against a public official appointing or promoting a relative, or advocating such an appointment or promotion (5 U.S.C. 3110).

Subpart C—Statements of Employment and Financial Interests

§ 0.735-301 Employees required to file under the Ethics in Government Act of 1978.

(a) The following employees shall submit public financial disclosure reports in accordance with the provisions of Title II of the Ethics in Government Act of 1978, as amended:

(1) Officers and employees whose positions are classified at GS-16 or above of the General Schedule, or whose basic rate of pay (excluding "step" increases) under other pay schedules is equal to, or greater than, the rate for GS-16 (step 1);

(2) Officers and employees in any other positions determined by the Director of the Office of Government

Ethics to be of equal classification to GS–16;

(3) Administrative Law Judges;

(4) Employees in the excepted service in positions which are of a confidential or policy-making character, unless their positions have been excluded by the Director of the Office of Government Ethics;

(5) Designated agency ethics officials.

(b) Those employees required to file under paragraph (a) of this section are subject to the provisions of 5 CFR Part 734 regarding procedures for filing, contents of reports, and penalties for failure to file or for falsifying a report.

§ 0.735–302 Employees required to file confidential financial disclosure statements.

The following categories of employees, other than those required to file under § 0.735–301, shall submit confidential statements of employment and financial interests:

(a) Employees classified at GS–13 or above who are in positions which include responsibility for making a Government decision or taking a Government action in regard to:

(1) Contracting or procurement;

(2) Administering or monitoring grants or subsidies;

(3) Regulating or auditing private or other non-Federal enterprises;

(4) Conducting Departmental investigations; or

(5) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

(b) Employees classified at GS–13 or above who are in positions which the Department has determined have duties and responsibilities which require the incumbent to report employees and financial interests in order to avoid involvement in possible conflicts of interest.

(c) Employees classified below GS–13 who are in positions which otherwise meet the criteria in paragraphs (a) or (b) of this Section. These positions have been justified in writing to OPM as exceptions that are essential to protect the integrity of the Government and to avoid employee involvement in possible conflicts of interest.

(d) Employees, regardless of grade level, who have been selected to serve on a Technical Evaluation Panel or Source Evaluation Board.

§ 0.735–303 Employee's grievance regarding filing requirements.

If an employee believes that his or her position has been improperly designated as one requiring its incumbent to submit a confidential statement of employment and financial interest, the employee may obtain review of the designation through the Department's grievance procedures.

§ 0.735–304 Reporting and review requirements.

(a) Confidential statements of employment and financial interest and supplementary statements:

(1) Shall be submitted on forms prescribed by the Department Counselor;

(2) Shall contain information required by the Department Counselor regarding the employment background and financial interests of the employee, the employee's spouse and family members, and

(3) Shall be submitted at the times and places designated by the Department Counselor.

(b) Notwithstanding paragraph (a) of this section, the Department Counselor shall not require reporting of information relating to the interests of an employee, or his or her spouse and family members, in professional associations or charitable, religious, social, fraternal, recreational, public service, civic, or political organizations or similar organizations not conducted as business enterprises.

(c) The appropriate Deputy Counselor shall review and retain employees' statements and shall advise employees as to corrective action if necessary.

§ 0.735–305 Confidentiality of employees' statements.

To insure the confidentiality of statements filed under § 0.735–302, the appropriate Deputy Counselors shall not allow access to, or allow information to be disclosed from, statements except as the Office of Personnel Management or the Department Counselor may determine for good cause shown.

SUBPART D—CONDUCT AND RESPONSIBILITIES OF SPECIAL GOVERNMENT EMPLOYEES

§ 0.735–401 Applicable provisions.

(a) Every special Government employee is subject to the provisions of §§ 0.735–101 through 0.735–106, 0.735–201, 0.735–202, 0.735–204(d), 0.735–205 through 0.735–210.

(b) Every special Government employee should become familiar with the statutes listed at § 0.735.212.

§ 0.735–402 Outside employment, activities and financial interests.

(a) Special Government employees may not engage in outside employment and activities or have financial interests that conflict with the responsibilities and duties of Federal employment. However, because special Government employees usually are employed outside the Department, they may engage in employment or activities prohibited other Federal employees under § 0.735–203 when there is no actual conflict of interest. Special Government employees may also have financial interests prohibited other Federal employees under § 0.735–204(a)(1) through (a)(5) when there is no actual conflict of interest.

(b) Notwithstanding the provisions of paragraph (a) of this section, a special Government employee may not directly or indirectly seek or receive compensation for services rendered by himself, herself or others in connection with any proceeding, application, request for ruling, contract, claim or other particular matter in which the United States is a party or has a direct and substantial interest and:

(1) Which is before any Federal or District of Columbia department or agency and in which he or she participated personally and substantially for the Government, or

(2) Which is pending before the Department, provided that a special Government employee who has served in the Department no more than 60 days in the previous 365 days shall be bound only as to a matter in which he or she participated personally and substantially. 18 U.S.C. 203.

(c) Notwithstanding the provisions of paragraph (a) of this section, a special Government employee may not act, with or without compensation, as an agent or attorney for another in prosecuting a claim against the United States, or in connection with any proceeding, application, request for ruling, contract or other particular matter in which the United States is a party or has a direct and substantial interest, and

(1) Which is before any Federal or District of Columbia department, agency or court and in which he or she participated personally and substantially for the Government, or

(2) Which is pending before the Department, provided that this clause shall not apply in the case of a special Government employee who has served in the Department no more than 60 days in the previous 365 days. 18 U.S.C. 205.

(d) Permissible exceptions to the prohibitions set forth in paragraphs (b) and (c) of this section include:

(1) Representation without compensation in connection with a disciplinary, loyalty, or personnel proceeding;

(2) Representation with or without compensation of parents, spouse, child, and those to whom the employee owes a fiduciary duty except in those matters in which the employee has participated

personally and substantially as a Government employee or which are the subject of his official responsibility; and

(3) Statements required to be made under penalty for perjury or contempt.

(e) A special Government employee seeking to engage in one of the excepted activities should consult in advance with a Deputy Counselor.

(f) The Secretary may allow a special Government employee to represent his or her regular employer or another person or organization before the Department in the performance of work under a grant or a contract. The Secretary must first certify in the Federal Register that such representation is in the national interest. (18 U.S.C. 205).

(g) The prohibitions set forth in paragraphs (b) and (c) of this section are in addition to any other restrictions contained in this subpart and do not permit any activities which are otherwise prohibited.

§ 0.735-403 Political activities.

Special Government employees are bound by the political activity restrictions cited in § 0.735-211. Such restrictions also apply to a special Government employee engaged on an irregular or occasional basis, but only on days in which service is rendered and then for the entire 24 hours of such service day.

§ 0.735-404 Financial reporting.

(a) Special Government employees who will work more than 60 days in a calendar year must submit public financial disclosure reports in accordance with the provisions of Title II of the Ethics in Government Act of 1978 when their rate of pay is equal to or greater than the basic rate for GS-16, Step 1. Such employees are covered by the reporting requirements at 5 CFR Part 734.

(b) All special Government employees not required to file under paragraph (a) of this section shall submit Confidential Statements of Employment and Financial Interests and supplementary statements to the appropriate Deputy Counselor for review and custody.

(c) The provisions of §§ 0.735-304 and 0.735-305 are applicable to a special Government employee who is required to file a statement under paragraph (b) of this section.

§ 735-405 Post employment restrictions.

All special Government employees are bound by the restrictions concerning post employment set forth in § 0.735-501 (a) and (b) and are subject to the provisions regarding disciplinary proceedings set forth in Subpart E. However, the restrictions set forth in § 0.735-501 (c) and (d) apply only to special Government employees who serve as Senior Employees, as defined in 5 CFR 737.3(a)(6), over sixty days in any calendar year. The exception to the post employment restrictions set forth in § 0.735-501(f) for former employees employed by an Indian tribe also apply to former special Government employees.

Subpart E—Conduct and Responsibilities of Former Employees

§ 0.735-501 Prohibited activities by former employees.

(a) No former employee, after terminating Government employment, shall knowingly act as agent or attorney for, or otherwise represent another in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of another to, any agency, employee or court of the United States or the District of Columbia, in connection with any particular Government matter involving a specific party, in which matter such employee participated personally and substantially as a Department employee.

(b) No former employee, within two years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent another in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of another to, any agency, employee or court of the United States or the District of Columbia, in connection with any particular Government matter involving a specific party, if such matter was actually pending under the employee's official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility.

(c) No former Senior Employee, as defined in 5 CFR 737.3(a)(6), within two years after terminating employment by the United States, shall knowingly represent or aid, counsel, advise, consult, or assist in representing another by personal presence at any formal or informal appearance before any agency, employee or court of the United States or the District of Columbia, in connection with any particular Government matter involving a specific party, in which matter he or she participated personally and substantially.

(d) For a period of one year after terminating employment by the United States, no former Senior Employee shall knowingly act as an agent or attorney for, or otherwise represent, anyone in a formal or informal appearance before, or with the intent to influence, make any written or oral communication on behalf of anyone, to the Department or any of its officers or employees, in connection with any particular Government matter, whether or not involving a specific party, which is pending before the Department, or in which it has a direct and substantial interest.

(e) The prohibitions set forth in paragraphs (a) through (d) of this section will be applied in accordance with regulations of the Office of Government Ethics as set forth in 5 CFR Part 737.

(f) The prohibitions in paragraphs (a) through (d) of this section do not bar a former employee employed by an Indian tribe from representing the tribe in connection with any matter pending before any Federal department, agency, court or commission. However, a former employee who intends to engage in representational activities must advise the head of the department, agency, court, or commission, in writing, of any personal and substantial involvement he or she may have had as a federal employee in the matter. 25 U.S.C. 450i(f).

§ 0.735-502 Disciplinary action.

(a) Disciplinary action may be taken against any former Department employee or special Government employee (hereafter referred to as "former employee") found under this subpart to have violated the post employment restrictions set forth in §§ 0.735-405 and 0.735-501 of this Part.

(b) The Department Counselor or a Deputy Counselor may initiate disciplinary proceedings. For purposes of this subpart, such an official is referred to as an Initiating Official.

(c) Disciplinary action may consist of:

(1) Prohibiting the former employee from making, on behalf of another, except the United States, any informal or formal appearance before, or with the intent to influence, any oral or written communication to the Department, on any matter of business for a period not to exceed five years. This prohibition may be accomplished by directing Department personnel to refuse to participate in any such appearance or to accept any such communication; or

(2) Other appropriate disciplinary actions, including but not limited to:

(i) Prohibiting, for a definite period of not more than five years, the former employee from any representational activity in connection with a specific office in the Department, or with a specific matter, in which the employee had an interest;

(ii) Issuing a letter of warning to the former employee.

§ 0.735-503 Initiating disciplinary proceedings.

(a) The Initiating Official, upon receiving information indicating grounds for disciplinary action, shall request that the Office of the Inspector General conduct an investigation and report all relevant investigative findings back to the Initiating Official.

(b) The Inspector General shall coordinate all investigations under this subpart with the Department of Justice as appropriate.

(c) All investigations under this subpart shall be conducted in a manner which protects the privacy of former employees. To the extent possible, information received as a result of the Inspector General's investigation shall remain confidential except as necessary to carry out the purposes of this subpart.

(d) After the Inspector General reports the facts of the investigation to the Initiating Official, the Initiating Official shall determine either:

(1) That there is reasonable cause to believe that a violation has occurred, in which event the Initiating Official shall expeditiously provide all relevant information, along with any comments or agency regulations, to the Director of the Office of Government Ethics (OGE); in addition, the Initiating Official shall commence disciplinary action against the former employee by serving notice in accordance with § 0.735-504; or

(2) That there is no reasonable basis for believing that a violation has occurred, in which event the Initiating Official shall advise the former employee and the Inspector General's office of that determination.

(e) In the event disciplinary action is initiated, the Department Counselor shall promptly appoint an impartial hearing officer who shall be a member of the HUD Board of Contract Appeals or an Administrative Law Judge. The hearing officer shall not have participated in any manner in the decision to initiate disciplinary action.

§ 0.735-504 Notice.

(a) The Initiating Official shall notify the former employee of the proposed disciplinary action in writing, by registered or certified mail, return receipt requested, or by any other means which gives actual notice or is reasonably calculated to give actual notice.

(b) The Notice shall include:

(1) A statement of allegations and the basis thereof sufficiently detailed to enable the former employee to prepare an adequate defense;

(2) A statement that the former employee is entitled to a hearing with a right to counsel if he or she requests a hearing within 15 days after receiving the notice;

(3) A statement explaining the method by which a hearing may be requested including the name, business address, and telephone number of the person to be contacted if there are further questions;

(4) A statement explaining the right to submit documentary evidence and a report to the hearing officer if a hearing is not requested and the method by which evidence may be submitted; and

(5) The disciplinary action proposed.

§ 0.735-505 Hearings.

(a) Formal rules of evidence and procedure applicable to a proceeding in a court of law will not be applied. Parties may object to clearly irrelevant material, but technical objections to testimony as used in a court of law will not be sustained.

(b) A former employee, against whom disciplinary action is proposed, is entitled to a hearing upon a written request submitted to the hearing officer within 15 days after the former employee receives notice as set forth in § 0.735-504. If no timely request is made, the hearing officer may proceed under § 0.735-506 to make a decision without a hearing.

(c) An attorney from the Department's legal staff shall represent the Department in the matter.

(d) The hearing shall be conducted at a reasonable time, date, and place as set by the hearing officer.

(1) In setting a hearing date, the hearing officer shall give due regard to the former employee's need for adequate time to prepare a defense and to an expeditious resolution of allegations that may be damaging to the former employee's reputation.

(2) Notice of the time, date, and place of such hearing shall be transmitted in writing to all interested parties by the hearing officer and shall include a statement indicating the nature of the proceedings and their purpose.

(e) At a hearing, the former employee shall have the right to:

(1) Represent himself or herself or be represented by counsel;

(2) Introduce and examine witnesses and submit relevant evidence;

(3) Confront and cross-examine adverse witnesses;

(4) Present oral argument; and

(5) Receive a transcript or recording of the proceedings, upon request.

(f) In a hearing, the Department has the burden of proof and must establish substantial evidence of a violation.

(g) The hearing officer shall make a determination based exclusively on matters of record in the proceeding and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

§ 0.735-506 Decision without a hearing.

(a) If no hearing is requested under § 0.735-505(b), the hearing officer shall make a decision on the basis of evidence submitted under paragraph (b) of this section. The proposed disciplinary action shall be sustained upon a showing, by substantial evidence, of cause as specified in § 0.735-502. Notice shall be provided to all interested parties stating the findings of fact and conclusions of law, the sanctions to be imposed if a violation has been found, and the procedure for filing an appeal to the Secretary.

(b) If no hearing is requested, the former employee and the Initiating Official may submit relevant information and reports on their behalf to the hearing officer. In making a decision the hearing officer shall consider all evidence and reports received prior to the decision.

§ 0.735-507 Appeals.

(a) The former employee may appeal the hearing officer's decision finding a violation of the post-employment restrictions, as set forth in §§ 0.735-405 and 0.735-501 of this Part, to the Secretary by making a written request within 20 days of the decision.

(b) Upon receiving an appeal, the Secretary or his or her designee shall review the decision of the hearing officer. The decision of the Secretary or designee shall be based solely on:

(1) The record of the proceedings if there has been a hearing;

(2) The record upon which the hearing officer made his or her decision if there has not been a hearing; or

(3) Those portions of the record cited by the parties to limit the issues.

(c) If the decision of the hearing officer is modified or reversed, the decision by the Secretary or designee shall state any findings of fact or conclusions of law which differ from the findings or conclusions of the hearing officer.

§ 0.735-508 Sanctions.

Disciplinary action may be imposed by the hearing officer if there was no appeal, or by the Secretary or his or her designee if there was an appeal, against a former government employee found to have violated the post-employment restrictions set forth in §§ 0.735-405 and 0.735-501 of this Part. The sanctions shall not exceed those proposed by the Initiating Official in the notice which initiated the disciplinary action against the former employee.

§ 0.735-509 Judicial review.

Any person found to have violated the post-employment restrictions set forth in §§ 0.735-405 and 0.735-501 of this Part, may seek judicial review of the Department's final administrative determination.

Dated: July 7, 1987.

Samuel R. Pierce, Jr.,

Secretary, Department of Housing and Urban Development.

[FR Doc. 87-16248 Filed 7-16-87; 8:45 am]

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Friday
July 17, 1987

Part III

Department of Housing and Urban Development

Office of the Secretary

24 CFR Parts 14 and 20

Implementation of the Equal Access to Justice Act in Administrative Proceedings; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 14 and 20

[Docket No. R-87-1327, FR-2156]

Implementation of the Equal Access to Justice Act in Administrative Proceedings

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: HUD is issuing final regulations implementing the Equal Access to Justice Act (the Act), which was recently reauthorized and amended. The Act provides for the award of attorney fees and other expenses to parties who prevail over the Federal government in certain administrative adjudications. This rule establishes procedures for the submission and consideration of applications for awards of fees and expenses in connection with adversary adjudications within HUD.

EFFECTIVE DATE: September 18, 1987.

FOR FURTHER INFORMATION CONTACT: Grant E. Mitchell, Assistant General Counsel for Fiscal Management and Energy, Office of General Counsel, Department of Housing and Urban Development, Room 10248, Washington, DC 20410; telephone (202) 755-6550. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

I. Background

The Equal Access to Justice Act (the Act), Pub. L. 96-481, (Approved October 21, 1980) amended title 5 of the United States Code by adding a new section 504, which provides for the award of fees and other expenses to parties who prevail over the Federal government in certain administrative adjudications under 5 U.S.C. 554. The Act requires agencies to establish uniform procedures for the submission and consideration of applications for these awards. This rule follows the final revised model rule issued on May 6, 1986 (51 FR 16659) by the Administrative Conference of the United States pursuant to its consultative role under section 504. Certain modifications have been made to adapt the model rule to the responsibilities and organization of the Department.

The Act applies only to adjudications under 5 U.S.C. 554, and thus does not apply to those Departmental proceedings not required by statute. Section 14.115(a) identifies the adversary adjudications that the Department is required by statute to conduct under 5 U.S.C. 554: all adjudications under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1715; adjudications of alleged discrimination under Title VI, section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a), section 305(a) of the Age Discrimination Act of 1975 (42 U.S.C. 6104(a)); section 3 of the HUD Act of 1968 (Employment Opportunities for Business and Lower Income Persons in Connection with Assisted Projects), 12 U.S.C. 1701u; the Debt Collection Act (Salary Offset), 5 U.S.C. 5514; the Manufactured Home Construction and Safety Standards Act of 1974, 42 U.S.C. 5401; section 111 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. 5311; and appeals of decisions made pursuant to section 6 of the Contract Disputes Act of 1978, 41 U.S.C. 605, before the HUD Board of Contract Appeals as provided in section 8 of that Act, 41 U.S.C. 607.

HUD published a proposed rule to implement the Equal Access to Justice Act in Administrative Proceedings (24 CFR Part 14) on January 26, 1984 (49 FR 3202). Only one comment (Administrative Conference of the United States, ACUS) was received on the proposed rule. ACUS generally suggested that HUD follow more closely the model rule issued on June 25, 1981 (46 FR 32900). ACUS also suggested adding governmental entities to the list of covered parties. HUD had precluded governmental units from receiving attorney fees awards based upon its statutory interpretation and court decisions. However, section 1(c) of Pub. L. 99-80 (Approved, August 5, 1985), which reauthorized and amended the Act, revised the definition of party to include units of local government, and HUD has accordingly revised its rule. ACUS also questioned HUD's requirement for documentation of attorney fees (24 CFR 14.210). HUD requires, in cases where no hourly rate is paid by the majority of clients, that the attorney provide information about two attorneys with similar experience, who perform similar work, stating their hourly rate. HUD believes this requirement is necessary to determine the reasonableness of the fee by showing the market comparables.

The Department has decided to issue a final rule implementing the EAJA and its amendments. The Department believes another proposed rule is unwarranted, because only minor changes have been made to the proposed rule and because the conforming amendment to Part 20 is a required statutory change which does not require comment. The Department has consulted ACUS, the only previous commenting entity, in the preparation of this final rule and has adopted its suggestions.

II. Section-by-Section Analysis

For each section of Part 14, this portion of the preamble will discuss the changes required by Pub. L. 99-80, and the principal difference between the Department's rule and the model rule issued by ACUS. References to regulation § 14.____ are to the HUD rule and those to § 315.____ are to the ACUS model rule. HUD has decided to include proceedings before the HUD Board of Contract Appeals and has added a cross-reference to Part 14 in Part 20 (Board of Contract Appeals).

The definition of adversary adjudication in § 14.50 has been revised to include appeals of decisions of contracting officers pursuant to section 6 of the Contract Disputes Act of 1978. Section 14.105 has been revised to refer to the agency's "position" rather than its "position in the proceeding". This change is based on statutory amendments intended to clarify that the position that must be substantially justified is not limited to the litigation position alone.

Section 14.110 has been revised in response to Pub. L. 99-80. The Act and Part 14 apply to cases pending on or commenced after August 5, 1985, cases commenced on or after October 1, 1984 and finally disposed of before August 5, 1985 (provided applications for fees were filed no later than 30 days after August 5, 1985), and cases pending on or commenced on or after October 1, 1981, in which fee applications were timely filed and dismissed for lack of jurisdiction.

Section 14.115 describes the HUD proceedings covered by the Act. In addition to the four proceedings listed in the proposed rule, HUD has added: (1) Section 3 of the HUD Act of 1968 (Employment Opportunities for Business and Lower Income Persons in Connection with Assisted Projects); (2) the Debt Collection Act of 1982 (Salary Offset); (3) the Manufactured Home Construction and Safety Standards Act of 1974; (4) Section 111 of Title I of the Housing and Community Development Act of 1974; and (5) Appeals of decisions made pursuant to section 6 of the Contract Disputes Act of 1978 before the HUD Board of Contract Appeals. Proceedings (1) through (4) above are added because these are adversary adjudications that the Department is required by statute or regulation to conduct under 5 U.S.C. 554. Contract appeals are added because of changes in the Act made by Pub. L. 99-80. A new § 14.115(b) is added which parallels the

ACUS model rule. This section provides that the Department's failure to identify a type of proceeding as an adversary adjudication will not preclude the filing of an application by a party who believes the proceeding is covered by the Act.

Section 14.120 is revised to reflect the increased eligibility ceilings in the Act ($2 million net worth for individuals and $7 million for businesses and organizations other than tax-exempt organizations and agricultural cooperatives, which are exempt from the net worth limitations). Units of local government that meet the limits on net worth and number of employees are also added because of Pub. L. 99-80. HUD believes certain units of local government are separable (*e.g.*, a public housing agency may be separable from a city), but prefers to resolve any controversies on a case-by-case basis.

Section 14.125 incorporates a provision of Pub. L. 99-80 that the "position of the agency" includes any action or failure to act on which the proceeding is based, in addition to the agency's litigation position. Section 14.125(b) is revised to reduce or deny an award if the applicant has falsified the application (see § 14.200), including documentation (see § 14.210) or the net worth exhibit (see § 14.205). If the applicant has falsified a material part of the application, the award will be denied under the Act. False statements of material fact in the application may also be actionable under 18 U.S.C. 1001, 18 U.S.C. 1012 or 31 U.S.C. 3729.

Sections 14.130-14.140 are basically unchanged from the proposed rule. The Department's final rule does not contain a counterpart to § 315.107(a) of the model rule, which states that the agency may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour. The Department prefers instead to use the approach contained in § 315.107(b) of the model rule, under which any person may file with the Department a petition for rulemaking to increase the maximum rate for attorney fees. This provision (in § 14.135) makes clear that in its rulemaking the Department will act on the basis of the statutory standard set forth at 5 U.S.C. 504(b)(1)(A)(ii). Section 14.135 of the Department's rule also simplifies paragraph (b) of § 315.107 of the model rule by cross-referencing the Department's general rulemaking procedures.

Section 315.109 of the model rule, delegating authority within an agency to take final action on matters pertaining to the Act, has been stricken from the Department's rule because it is HUD's policy to publish delegations of authority in the **Federal Register** as public notices rather than as provisions of codified rules. This policy avoids the need for amendments to rules whenever a Departmental reorganization or change in delegation of authority occurs.

Section 14.200 has been revised to parallel the model rule. The phrase "in the proceeding" is removed, and eligibility ceilings are adjusted because of Pub. L. 99-80.

Section 14.205 of the Department's rule includes a paragraph (b) not found in § 315.202 of the model rule. The addition requires the submission of data which will enable the adjudicative officer to determine whether an applicant for an award has manipulated its net worth or the size of its work force in order to establish eligibility for an award under the Act and the rule. Section 14.205(c) includes a sentence indicating that disclosure of information in the net worth exhibit shall be subject to the provisions of the Privacy Act of 1974 and the Department's regulations thereunder.

Section 14.210 elaborates upon § 315.203 of the model rule. The added provisions require that the attorney, agent, or expert witness submit an affidavit setting forth detailed information on the services performed, rates charged and expenses incurred in order to justify the rates claimed. This will help to assure responsible and accurate reporting in the application and the submission of information useful in determining an appropriate award under the Act and the rule.

Section 14.215(a) states that an application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Department's final disposition of the proceeding. Sections 14.215 (b) and (c) follow the model rule.

Sections 14.300-14.325 are essentially unchanged from the proposed rule. Section 14.300 does not appear in the model rule. This section states that any provision of the Department's rules and regulations limiting or terminating the jurisdiction of an adjudicative officer upon the effective date of his or her decision in the underlying proceeding shall not affect his or her jurisdiction to render a decision under the Act. This addition is needed to preserve the jurisdiction of the adjudicative officer to render a decision under this part after the decision in an adjudication under the Interstate Land Sale Full Disclosure Act (see 24 CFR 1720.535(b)).

Section 14.310(a) of the Department's rule modifies a provision of § 315.302 of the model rule. The model rule states that failure of agency counsel to file an answer or otherwise respond to the application within 30 days may be treated as a consent to the award requested. The Department's rule permits the adjudicative officer to make an award under the Act where agency counsel has failed to respond within the 30-day period only upon a satisfactory showing of entitlement by the applicant. The change is considered necessary in order to avoid any implication that a failure by agency counsel to answer or contest the application for an award precludes a determination by the adjudicative officer of the eligibility of the applicant for an award under the Act.

The Department's rule does not include a counterpart to § 315.303 of the model rule. That section of the model rule allows the applicant to file a reply to the agency answer within 15 days, and states that if the reply is based on any alleged facts not already in the record of the proceeding, the applicant must include either supporting affidavits or a request for further proceedings. The Department's intent by deviating from the model rule is to follow the applicable procedures in the underlying adversary adjudication as far as setting the time period within which the applicant must file a reply to the agency answer.

Section 315.305 of the model rule provides that the applicant's and the agency's counsel may agree on a proposed settlement of the award in accordance with the agency's standard settlement procedure. Section 14.320 of the Department's rule modifies this section to reflect that the Department has no single standard settlement procedure. Instead, the rule provides that any settlement would be arrived at in accordance with the settlement procedures applicable to the underlying proceeding.

Section 14.325(a) remains unchanged from the proposed rule. Section 14.325(b) has been amended to parallel § 315.306. This section describes further proceedings. The phrase "on the basis of the administrative record, as a whole, which is made in the adversary adjudications for which fees and other expenses are sought" is taken from Pub. L. 99-80. This statutory provision prohibits discovery or evidentiary proceedings to determine substantial justification; the legislative history indicates that the administrative record includes affidavits submitted with the fee application and the government's answer, as well as the underlying record. House Committee on the Judiciary, H.R. Rep. No. 120, 99th Cong., 1st Sess. pp. 13–14 (1985). This section recognizes further submissions but does not allow discovery of new material.

Section 14.330 of the Department's rule provides that the adjudicative officer shall issue an initial decision on the application within 30 days after completion of the proceedings on the application, and states that the decision must contain written findings and conclusions on the matters specified. The rule modifies § 315.307 of the model rule to state more clearly the various issues on which the adjudicative officer is likely to be called upon to rule.

Section 14.335 of the Department's rule modifies § 315.308 of the model rule so that the procedure applicable to review of decisions of adjudicative officers under the Act parallel the Department's review or appeals procedures applicable to the underlying adversary adjudications. The only changes from the proposed rule are (1) the addition of a sentence to indicate that if review is taken, the Department will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings; and (2) an additional section regarding reconsideration under Rule 29, 24 CFR 20.10, Rules of the HUD Board of Contract Appeals.

Section 14.345 of the Department's rule modifies § 315.310 of the model rule. The Department's rule has been revised by adding a 60-day payment requirement as required by Pub. L. 99–80. Also, in identifying the submissions that must accompany a request for payment, the section tracks more closely the language of the Act. If a court reviews a departmental decision on a fee application pursuant to 5 U.S.C. 504(c)(2), then the applicant, under § 14.345, must submit a copy of the court's decision. Otherwise the applicant submits a copy of the final decision of the Department.

III. Other Matters

Regulatory Impact Analysis

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Semiannual Agenda of Regulations

This rule was listed as sequence number 889 in the Department's Semiannual Agenda of Regulations published on April 27, 1987 at 52 FR 14362, 14363.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with Part 50 of this title, which implements section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for inspection and copying during regular business hours at the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

Regulatory Flexibility Act

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that his rule does not have a significant economic impact on a substantial number of small entities, since the number of proceedings covered by the rule is extremely small.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 14.218, 14.219, 14.223, 14.225, 14.227, 14.228, 14.400, and 14.801.

List of Subjects

24 CFR Part 14

Equal access to justice; Lawyers; Claims.

24 CFR Part 20

Administrative practice and procedures; Government contracts; Organization and functions (Government agencies); Government procurement.

Accordingly, Title 24 of the Code of Federal Regulations is amended as follows:

1. Part 14 is added to read as follows:

PART 14—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN ADMINISTRATIVE PROCEEDINGS

Subpart A—General Provisions

Sec.

Sec.

Subpart B—Information Required From Applicants

Subpart C—Procedures for Considering Applications

Authority: Sec. 504(c)(1); The Equal Access to Justice Act (5 U.S.C. 504(c)(1)); Sec. 7(d); the Department of HUD Act (42 U.S.C. 3435(d)).

Subpart A—General Provisions

§ 14.50 Definitions.

"Act". The Equal Access to Justice Act, 5 U.S.C. 504, Title II of Pub. L. 96–481, as amended by Pub. L. 99–80.

"Adjudicative officer". The hearing examiner, administrative law judge, administrative judge of the HUD Board of Contract Appeals, or other officer designated by the Secretary or other responsible Department official, who presided at the adversary adjudication.

"Adversary adjudication".

(a) An adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but not including an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

(b) Appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before agency boards of contract appeals as provided in section 8 of that Act (41 U.S.C. 607).

"Agency counsel"

(a) When the position of the Department is being represented, the attorney or attorneys designated by the Department's General Counsel to represent the Department in a proceeding covered by this part, and

(b) When the position of another agency of the United States is being represented, the representative as designated by that agency.

"Department". The Department of Housing and Urban Development, or the organizational unit within the Department responsible for conducting an adversary adjudication subject to this part.

"Proceeding". An adversary adjudication as defined above.

"Secretary". The Secretary of Housing and Urban Development.

§ 14.100 Time computation.

Time periods stated in this part shall be computed in accordance with the Department's rules with respect to computation of time which apply to the underlying proceeding.

§ 14.105 Purpose of these rules.

The Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings ("adversary adjudications") before the Department. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. The rules in this part described the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards and the procedures and standards that the Department will use to make them.

§ 14.110 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before this Department on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in subpart B of these rules, has been filed with the Department no later than 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 14.115 Proceedings covered.

(a) The proceedings to which this part applies are adversary adjudications conducted by the Department under:

(1) The Interstate Land Sales Full Disclosure Act, as amended, 15 U.S.C. 1701 *et seq.*, pursuant to 15 U.S.C. 1715 and 24 CFR Part 1720;

(2) Section 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, and 24 CFR Parts 1 and 2;

(3) Section 505(a) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a, 28 CFR Part 41, and any applicable HUD regulations;

(4) Section 305(a) of the Age Discrimination Act of 1975, 42 U.S.C. 6104(a), 45 CFR Part 90 and any applicable HUD regulations;

(5) Section 3 of the HUD Act of 1968, 12 U.S.C. 170lu (Employment Opportunities for Business and Lower Income Persons in Connection with Assisted Projected), and 24 CFR Part 135;

(6) Debt Collection Act of 1982 (Salary Offset), 5 U.S.C. 5514, and 24 CFR 17.125-.140;

(7) Manufactured Home Construction and Safety Standards Act of 1974, 42 U.S.C. 5401 *et seq.*, and 24 CFR Part 3280;

(8) Section 111 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. 5311, and 24 CFR 570.913; or

(9) Appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before the HUD Board of Contract Appeals as provided in section 8 of that Act (41 U.S.C. 607).

(b) The Department's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 14.120 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in Subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees; or

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated. For the purpose of eligibility of applicants before the HUD Board of Contract Appeals, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the application prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationshsips of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 14.125 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an ineligible prevailing applicant because the agency's position was substantially justified is on the agency counsel, who may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding, if the applicant has falsified the application (including documentation) or net worth exhibit or if special circumstances make the award sought unjust.

§ 14.130 Allowable fees and expenses.

(a) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. However, an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(b) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for the kind and quality of services furnished in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in the light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(c) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 14.135 Rulemaking on maximum rates for attorney fees.

Any person may file with the Department a petition for rulemaking to increase the maximum rate for attorney fees as provided in 5 U.S.C. 504(b)(1)(A)(ii), in accordance with 24 CFR Part 10. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Department will respond to the petition in accordance with 24 CFR 10.20(b).

§ 14.140 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the Department and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 14.200 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Department or other agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a).

(c) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the applicant shall state that it did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall also itemize the amount of fees and expenses for which an award is sought.

(e) The application also may include any other matters that the applicant wishes the Department to consider in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant or an authorized officer with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the applicant's or authorized officer's information and belief.

[Approved by the Office of Management and Budget under control number 2510-0001]

§ 14.205 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or a qualified cooperative association must submit with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 14.120(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities, and is sufficient to determine whether the applicant qualifies under the standards of the Act and this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate, occurring in the one-year period before the date on which the proceeding was initiated, that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the applicant shall so state.

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act (5 U.S.C. 552(b) (1)-(9)), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Department's established procedures under the Freedom of Information Act, 24 CFR Part 15. In either case, disclosure shall be subject to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, and the Department's procedures implementing the Privacy Act of 1974 at 24 CFR Part 16.

[Approved by the Office of Management and Budget under control number 2510-0001]

§ 14.210 Documentation of fees and expenses.

(a) The application shall be accompanied by full and itemized documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent or expert witness representing or appearing in behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided. Vouchers, receipts, logs, or other substantiation for any expenses paid or payable shall be provided.

(d) The adjudicative officer may require the applicant to provide additional substantiation for any expenses claimed.

[Approved by the Office of Management and Budget under control number 2510-0001]

§ 14.215 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Department's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement of voluntary dismissal, become final and unappealable, both within the Department and to the courts.

(c) If review or reconsideration (under HUD Board of Contract Appeals Rule 29, 24 CFR 20.10) is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

Subpart C—Procedures for Considering Applications

§ 14.300 Jurisdiction of adjudicative officer.

Any provision in the Department's rules and regulations other than this part which limits or terminates the jurisdiction of an adjudicative officer upon the effective date of his or her decision in the underlying proceeding shall not in any way affect his or her jurisdiction to render a decision under this part.

§ 14.305 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 14.205(c) for confidential financial information.

§ 14.310 Answer to application.

(a) Within 30 days after service of an application, agency counsel may file an answer to the application. Agency counsel may request an extension of time for filing. If agency counsel fails to answer or otherwise fails to contest or settle the application, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's fees and other expenses under the Act.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 14.325.

§ 14.315 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served, or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 14.320 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the settlement procedure applicable to the underlying proceeding. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 14.325 Extensions of time and further proceedings.

(a) The adjudicative officer on motion and for good cause shown may grant extensions of time other than for filing an application for fees and expenses after final disposition in the adversary adjudication.

(b) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(c) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 14.330 Decision.

The adjudicative officer shall issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on such of the following as are relevant to the decision:

(a) The applicant's status as a prevailing party;

(b) The applicant's qualification as a "party" under 5 U.S.C. 504(b)(1)(B);

(c) Whether the agency's position was substantially justified;

(d) Whether special circumstances make an award unjust;

(e) Whether the applicant during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and

(f) The amounts, if any, awarded for fees and other expenses, with reasons for any difference between the amount requested and the amount awarded.

If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 14.335 Departmental review.

(a) Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Secretary (or his or her delegate, if any) may decide to review the decision on his or her own initiative, in accordance with the Department's review or appeals procedures applicable to the underlying proceeding. If neither the applicant nor agency counsel seeks review and the Secretary (or his or her delegate, if any) does not take review on his or her own initiative, the initial decision on the application shall become a final decision of the Department in the same manner as a decision in the underlying proceeding becomes final. Whether to review a decision is a matter within the discretion of the Secretary (or his or her delegate, if any). If review is taken, the Department will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

(b) Either party may seek reconsideration of the decision on the fee application in accordance with Rule 29, 24 CFR § 20.10.

§ 14.340 Judicial review.

Judicial review of final departmental decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 14.345 Payment of award.

An applicant seeking payment of an award shall submit a copy of the final decision granting the award to: Director, Office of Finance and Accounting, Room 2202, Department of Housing and Urban Development, Washington, DC 20410, with a copy to: Associate General Counsel for Equal Opportunity and Administrative Law, Room 10244, Department of Housing and Urban Development, Washington, DC 20410. A statement that review of the underlying decision is not being sought in the United States courts, or that the process for seeking review of the award, if initiated, has been completed, must also be included. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 20—BOARD OF CONTRACT APPEALS

2. The authority citation for 24 CFR Part 20 continues to read as follows:

Authority: The Contract Disputes Act of 1978 (41 U.S.C. 601–613); Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

3. Section 20.10 introductory text is revised to read as follows:

§ 20.10 Rules.

These rules govern the procedure in all matters before the Department of Housing and Urban Development Board of Contract Appeals, unless otherwise provided by applicable law or regulation. The Federal Rules of Civil Procedure may be applied where procedures are not otherwise provided in these rules. For applications and proceedings involving award of attorney fees and other expenses, the rules set forth in 24 CFR Part 14 shall apply.

* * * * *

Dated: July 8, 1987.

Samuel R. Pierce, Jr.,

Secretary of Housing and Urban Development.

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