

CONTACT PERSON FOR MORE

INFORMATION: Alvin H. Brown, Office of Government and Public Affairs, Telephone: (202) 275-7252.

Noreta R. McGee,

Secretary.

[FR Doc. 89-3176 Filed 2-7-89; 1:38 pm]

BILLING CODE 7035-01-M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

"FEDERAL REGISTER" CITATION OF

PREVIOUS ANNOUNCEMENT: [54 FR 5301 February 2, 1989]

STATUS: Closed meeting.

PLACE: 450 Fifth Street, N.W., Washington, D.C.

DATE PREVIOUSLY ANNOUNCED: Friday, January 27, 1989.

CHANGES IN THE MEETING: Additional items.

The following additional items will be considered at a closed meeting scheduled for Tuesday, February 7, 1989, at 2:30 p.m.:

Settlement of injunctive action.
Formal orders of investigation.

Commissioner Fleischman, as duty officer, determined that Commission business required the above changes.

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: Karen Burgess at (202) 272-2000.

Jonathan G. Katz,

Secretary.

February 6, 1989.

[FR Doc. 89-3301 Filed 2-8-89; 1:14 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register

Vol. 54, No. 27

Friday, February 10, 1989

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 179

[Docket Nos. 81N-0004 and 84F-0230]

Irradiation in the Production, Processing, and Handling of Food

Correction

In rule document 88-29885 beginning on page 53176 in the issue of Friday,

December 30, 1988, make the following correction:

On page 53208, in the second column, in the last line, "January 30, 1988" should read "January 30, 1989".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Norden Laboratories, Inc.; Withdrawal of Approval of NADA'S

Correction

In notice document 89-634 appearing on page 1241 in the issue of Thursday, January 12, 1989, make the following correction:

In the third column, in the first complete paragraph, in the fifth line, "520.480(b)(1)" should read "520.580(b)(1)".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

[OST Docket No. 45884; Notice 89-1]

Statement of Enforcement Policy on Rebating

Correction

In proposed rule document 89-2578 appearing on page 5497 in the issue of Friday, February 3, 1989, make the following correction:

In the second column, under **SUMMARY**, in the third line, "88-5" should read "88-15".

BILLING CODE 1505-01-D

The Bureau of the Census has been authorized to conduct a study of the health and nutrition of the population of the United States. This study is being conducted in cooperation with the Department of Health and Human Services. The study will be conducted in two phases. The first phase will be a survey of the health and nutrition of the population of the United States. The second phase will be a study of the health and nutrition of the population of the United States.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Division of Food and Drug Administration

Office of Food and Drug Administration

Office of Food and Drug Administration

Office of Food and Drug Administration

Office of Food and Drug Administration

Office of Food and Drug Administration

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Division of Food and Drug Administration

Office of Food and Drug Administration

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Office of Food and Drug Administration

Federal Register

**Friday
February 10, 1989**

Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 2

Office of Hearings and Appeals

43 CFR Part 4

**Appeals From Administrative Actions,
and Department Hearings and Appeals
Procedures; Final Rule**

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 2

Appeals From Administrative Actions

November 29, 1988.

AGENCY: Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

SUMMARY: The final rule revises the Bureau of Indian Affairs (BIA) rules governing the appeals process used for requesting review of actions by BIA officials which adversely affect an appellant.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT:

Anne Bolton, Management Analyst, Division of Personnel Management, Bureau of Indian Affairs, Room 320, Interior South, 1951 Constitution, NW., Washington, DC 20245, telephone number (202) 343-4689.

SUPPLEMENTARY INFORMATION:

Authority to issue rules and regulations is vested in the Secretary of the Interior by 5 U.S.C. 301 and sections 463 and 465 of the revised Statutes (25 U.S.C. 2 and 9). This final rule is published in exercise of rulemaking authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8. The BIA published a proposed rule on November 6, 1987 (52 FR 43006), offering the public an opportunity to comment on appeals from administrative actions.

This rule does not contain collections of information which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The final rule is published as previously titled, Appeals from Administrative Actions. This revision eliminates Central Office action on many of the appeals which originate in the field. Most appeals will be sent directly to the Interior Board of Indian Appeals (IBIA) from the field.

Comments were received from sixteen sources including Indian tribes, tribal attorneys, government solicitors and Bureau officials. The following paragraphs summarize the comments and suggestions received and actions taken.

Section 2.2: One commenter suggested that the definition of "appeal" in proposed § 2.2 be amended to include the words "or the inaction" after the word "action". This change has been made to reflect the intent of the regulation that either an action or an inaction may be subject to appeal. The words "is in error" have been added to the definition of "statement of reasons" as recommended by another commenter.

Section 2.3 One commenter recommended that in § 2.3(a) the words "may be" replace "are or will be" to clarify that appellants do not have to prove that they are adversely affected, only to allege it. This comment is accepted.

One commenter noted that, under the National Environmental Policy Act, environmental matters may be appealed to the Federal courts without first going through the Bureau appeals process.

Subsection 2.3(b) makes the appeal procedures in Part 2 inapplicable where another regulation or a Federal statute provides a different procedure. Therefore, no change is necessary.

Section 2.4: A new § 2.4(d) has been added providing that a Deputy to the Assistant Secretary—Indian Affairs may issue a decision in an appeal if that responsibility has been assigned to him/her by the Assistant Secretary—Indian Affairs pursuant to § 2.20(c). See the discussion under § 2.20.

Section 2.4(e) (proposed § 2.4(d)) has been revised to provide that the Interior Board of Indian Appeals will hear appeals from decisions of a Deputy to the Assistant Secretary—Indian Affairs made pursuant to an assignment of responsibility under § 2.20(c). This subsection has been further revised to delete the authority of the Board to hear appeals from decisions of the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs). Appeals from decisions of this official will be made to the Assistant Secretary—Indian Affairs for the reasons discussed under § 2.20(g).

Section 2.5: Six comments were received on this section. Three commenters were concerned that indigent appellants might not be able to post an appeal bond if required to do so. Two commenters were concerned that

collateral proceedings would delay proceedings in the appeal. One suggested that an interlocutory appeal procedure be set out. After thorough consideration of these comments, it has been decided that the bond provision is necessary for the protection of Indians and should be retained. The Bureau and the Interior Board of Indian Appeals have had bond provisions in their appeal regulations since 1960 and 1975, respectively. These provisions have been implemented without undue hardship to appellants.

A new § 2.5(c) has been added to make clear that the deciding official must give notice when he/she issues a decision requiring a bond or denying a request that a bond be required. Although no specific interlocutory appeal provisions are included in § 2.5, aggrieved parties may appeal from these decisions.

Section 2.6: One commenter believed that proposed § 2.6(a), which stated that a decision of the Assistant Secretary is final for the Department and effective immediately unless the Assistant Secretary provides otherwise, did not clearly indicate how the Assistant Secretary would provide otherwise. This subsection, now § 2.6(c), has been revised to state that such a provision must appear in the decision itself.

A new provision at § 2.6(b) clarifies that a decision made by a BIA official becomes final when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

Section 2.7: Two commenters noted that the term "effective notice" in proposed § 2.7(b) was not defined. Section 2.7(b) has been reworded to state that time to file an appeal does not begin to run until notice has been given in accordance with § 2.7(c), which sets out the information concerning appeal procedures which must be contained in the notice of a decision.

Two commenters objected to the wording of proposed § 2.7(c) because it did not clearly identify which decisions were appealable and which were not. Two commenters suggested that the subsection be revised to identify more specifically the information regarding appeal procedures which is required to be included in BIA decisions. The

subsection has been reworded to make clear that only decisions which are final for the Department pursuant to § 2.6(c) are not administratively appealable and to state more specifically the appeal information to be included in decisions.

Section 2.8: The comments generally favored this provision, which sets out a procedure for appealing from inaction of a BIA official. Three commenters recommended that a time limit be set for the "reasonable later date" for making a decision which § 2.8(b) requires a BIA official to establish. § 2.8(b) has been revised to provide that the date must be no later than 60 days from the date of the request for a decision.

Proposed §§ 2.8 (a)(3) and (b), 2.9(a), and 2.19(a) included new provisions for student appeals pertaining to expulsions and suspensions. These have been deleted from the final rule in order to preserve the status quo of regulations concerning Indian education, as required by § 5106 of the Indian Education Amendments of 1988, 102 Stat. 367.

Section 2.9: Four commenters recommended that the time for an appellant to file a notice of appeal should begin to be counted from the date that the appellant received the notice of administrative action rather than the date that it was mailed. Also, four comments on this section and § 2.13 recommended that appeal documents submitted by the appellant should be considered filed when they were mailed, rather than when they were received by the decisionmaker. Section 2.9(a), and corresponding provisions throughout the regulation, have been revised to incorporate each recommendation in its entirety.

One commenter objected to the omission from the proposed regulations of the present requirement that BIA officials render assistance to appellant Indians and Indian tribes not represented by counsel. This provision has been reinstated in a new § 2.9(b).

Section 2.9(c)(5), § 2.10 (a) and (b), and § 2.11(b) have been reworded and expanded to clarify the original intent as suggested by several comments received.

One commenter objected to the requirement for labeling of envelopes in § 2.9(c)(3), § 2.10(d)(2) and § 2.11(e)(2) as being superfluous. Appeal documents are not always self-evident. The purpose of identifying the contents on the envelope is to speed processing. Failure to include this on the envelope, however, is not grounds for summary dismissal.

Section 2.10: One commenter stated that failure to conform to the formal requirements for a statement of reasons

described in this section should not be grounds for summary dismissal under § 2.17. The revision of § 2.17 discussed below responds to this comment.

Section 2.13: One commenter questioned whether § 2.13(c), concerning misdirected appeal documents, included notices of appeal. This subsection has been revised to make clear that a BIA official will allow late filing of a misdirected notice of appeal where the official determines that the misdirection is the fault of the government.

Other revisions to § 2.13 are discussed under § 2.9.

Section 2.17: One commenter recommended adding failure to file a timely notice of appeal to the grounds for summary dismissal. This section has been revised to incorporate the provision, also set out in § 2.9(a), which requires the dismissal of an appeal when the notice of appeal is not timely filed.

Two commenters recommended revisions concerning the provision in proposed § 2.17 that permitted summary dismissal for failure to file a statement of reasons. In response to these comments, this section has been revised to allow summary dismissal only where the reasons for the appeal cannot be determined from the appeal documents taken as a whole and only after the appellant has been given an opportunity to amend his/her appeal documents.

Section 2.19: Two commenters suggested that § 2.19(a) be revised to identify more specifically the information regarding appeals procedures, in particular the 30-day time limit for filing a notice of appeal, required to be included in decisions by BIA officials. This section has been revised to incorporate these suggestions.

One commenter recommended that a specific provision be included allowing appeal to the next level when a BIA official fails to issue a decision within the time allowed. When an appeal level is skipped, the administrative record may not be properly developed, making effective consideration of the appeal at a higher level difficult. Further, the opportunity to resolve the appeal at the lower level is foregone. For these reasons, this comment is not accepted. BIA officials are expected to issue decisions in accordance with the time deadlines in these regulations.

Section 2.20: Three commenters either objected to the inclusion of the Assistant Secretary—Indian Affairs in the appeal process or recommended that the Assistant Secretary's decisions be subject to review by the Interior Board of Indian Appeals (IBIA). One commenter recommended that appellants be allowed to choose

whether to appeal to the Assistant Secretary or the IBIA. Another suggested that some appellants might seek to have the Assistant Secretary assume jurisdiction over their appeals by filing petitions with that official.

The comments recommending exclusion of the Assistant Secretary from the appeal process or making his/her decisions subject to review by the IBIA are not accepted. Certain appeals involve policy matters requiring the attention of the Assistant Secretary. Further, the IBIA does not have jurisdiction to review discretionary decisions of BIA officials. (See the discussion of 43 CFR Part 4 Subpart D, immediately following.) In order to make clear that this section is not intended to give the parties to an appeal a choice of forum, but rather is intended to vest the exclusive authority to assume jurisdiction over an appeal in the Assistant Secretary, a sentence has been added to § 2.20(c) stating, "The Assistant Secretary—Indian Affairs will not consider petitions to exercise this authority."

Section 2.20(c) has been further revised to authorize the Assistant Secretary—Indian Affairs to assign the responsibility to issue a decision in an appeal to a Deputy to the Assistant Secretary—Indian Affairs. A decision made by a Deputy to the Assistant Secretary pursuant to such an assignment may be appealed to the Board of Indian Appeals except as provided for in § 2.20(g).

One commenter recommended clarification of the extent to which the IBIA could review BIA decisions that it receives pursuant to § 2.20(e). In response to this recommendation, § 2.20(e) has been revised to make clear that IBIA jurisdiction over appeals received pursuant to this subsection are subject to 43 CFR 4.337(b), as are other appeals from BIA decisions.

A new § 2.20(g) has been added providing for decisions by the Assistant Secretary—Indian Affairs in appeals from decisions of the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).

The proposed rule provided that appeals from this official would be made to the Interior Board of Indian Appeals. The change has been made to preserve the status quo of existing appeal procedures for education appeals, as required by § 5106 of the Indian Education Amendments of 1988, 102 Stat. 367.

Section 2.21: Three commenters recommended revision of § 2.21(b) to allow the parties to an appeal to obtain copies of documents considered by the

decisionmaker but not included in the administrative record and to provide a specific time for response by the parties. The subsection has been revised to incorporate these recommendations.

One commenter requested a 30 day period for reconsideration by the initial decisionmaker. The decisionmaker under these proposed regulations would already have an opportunity to reverse the initial decision at the time the notice of appeal is filed with him/her before forwarding the appeal information to the next highest appeal level. Consequently, it was felt that adoption of this process would only serve to lengthen the total process. The comment is therefore not accepted.

The primary author of this document is Anne Bolton, Management Analyst, Division of Personnel Management, Bureau of Indian Affairs, Room 320, Interior South, 1951 Constitution Ave., NW., Washington, DC 20245, telephone number (202) 343-4689.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment and no detailed statement is required pursuant to the National Environmental Policy Act of 1969. The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). These regulations will affect only administrative appeals from decisions by certain BIA officials.

The final rule governing appeals to the Interior Board of Indian Appeals, 43 CFR 4.310-4.340, immediately follows this rule.

List of Subjects in 25 CFR Part 2

Administrative practice and procedure.

For the reasons set forth in the preamble, Part 2 of Title 25, Chapter 1, Subchapter A of the Code of Federal Regulations is revised as follows:

PART 2—APPEALS FROM ADMINISTRATIVE ACTIONS

- Sec.
- 2.1 Information collection.
 - 2.2 Definitions.
 - 2.3 Applicability.
 - 2.4 Officials who may decide appeals.
 - 2.5 Appeal bond.
 - 2.6 Finality of decisions.
 - 2.7 Notice of administrative decision or action.
 - 2.8 Appeal from inaction of official.
 - 2.9 Notice of an appeal.
 - 2.10 Statement of reasons.
 - 2.11 Answer of interested party.

- Sec.
- 2.12 Service of appeal documents.
 - 2.13 Filing documents.
 - 2.14 Record address.
 - 2.15 Computation of time.
 - 2.16 Extensions of time.
 - 2.17 Summary dismissal.
 - 2.18 Consolidation of appeals.
 - 2.19 Action by Area Directors and Education Programs officials on appeal.
 - 2.20 Action by the Assistant Secretary—Indian Affairs on appeal.
 - 2.21 Scope of review.

Authority: R.S. 463, 465; 5 U.S.C. 301, 25 U.S.C. 2, 9.

§ 2.1 Information collection.

In accordance with Office of Management and Budget regulations in 5 CFR 1320.3(c), approval of information collections contained in this regulation is not required.

§ 2.2 Definitions.

"Appeal" means a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request.

"Appellant" means any interested party who files an appeal under this part.

"Interested party" means any person whose interests could be adversely affected by a decision in an appeal.

"Legal holiday" means a Federal holiday as designated by the President or the Congress of the United States.

"Notice of appeal" means the written document sent to the official designated in this part, indicating that a decision is being appealed (see § 2.9).

"Person" includes any Indian or non Indian individual, corporation, tribe or other organization.

"Statement of reasons" means a written document submitted by the appellant explaining why the decisions being appealed is in error (see § 2.10).

§ 2.3 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.

(b) This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.

§ 2.4 Officials who may decide appeals.

The following officials may decide appeals:

(a) An Area Director, if the subject of appeal is a decision by a person under the authority of that Area Director.

(b) An Area Education Programs Administrator, Agency Superintendent

for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs), if the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.

(c) The Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20 of this part.

(d) A Deputy to the Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20(c) of this part.

(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR Part 4, Subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs other than the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).

§ 2.5 Appeal bond.

(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal.

(c) In those cases in which the official before whom an appeal is pending determines that a bond is necessary to protect the financial interests of an Indian or Indian tribe, that official may require the posting of a bond on his/her own initiative.

(d) Where the official before whom an appeal is pending requires a bond to be posted or denies a request that a bond be posted, he/she shall give notice of his/her decision pursuant to § 2.7.

§ 2.6 Finality of decisions.

(a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

(b) Decisions made by officials of the Bureau of Indian Affairs shall be

effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

(c) Decisions made by this Assistant Secretary—Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

§ 2.7 Notice of administrative decision or action.

(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

§ 2.8 Appeal from inaction of official.

(a) A person or persons whose interests are adversely affected, or whose ability to protect interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

(1) Request in writing that the official take the action originally asked of him/her;

(2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;

(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If

the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's inaction shall be appealable to the next official in the process established in this part.

§ 2.9 Notice of an appeal.

(a) An appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in § 2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with § 2.6(b).

(b) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(c) The notice of appeal shall:

(1) Include name, address, and phone number of appellant.

(2) Be clearly labeled or titled with the words "NOTICE OF APPEAL."

(3) Have on the face of any envelope in which the notice is mailed or delivered, in addition to the address, the clearly visible words "NOTICE OF APPEAL."

(4) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

(5) If possible, attach either a copy of the notice of the administrative decision received under § 2.7, or when an official has failed to make a decision or take any action, attach a copy of the appellant's request for a decision or action under § 2.8 with a written statement that the official failed to make a decision or take any action or to establish a date by which a decision would be made upon the request.

(6) Certify that copies of the notice of appeal have been served on interested parties, as prescribed in § 2.12(a).

§ 2.10 Statement of reasons.

(a) A statement of reasons shall be filed by the appellant in every appeal, and shall be accompanied by or otherwise incorporate all supporting documents.

(b) The statement of reasons may be included in or filed with the notice of appeal.

(c) If the statement of reasons is not filed with the notice of appeal, the appellant shall file a separate statement of reasons in the office of the official whose decision is being appealed within 30 days after the notice of appeal was filed in that office.

(d) The statement of reasons whether filed with the notice of appeal or filed separately should:

(1) Be clearly labeled "STATEMENT OF REASONS".

(2) Have on the face of any envelope in which the statement of reasons is mailed or delivered, in addition to the address, the clearly visible words "STATEMENT OF REASONS".

§ 2.11 Answer of interested party.

(a) Any interested party wishing to participate in an appeal proceeding should file a written answer responding to the appellant's notice of appeal and statement of reasons. An answer should describe the party's interest.

(b) An answer shall state the party's position or response to the appeal in any manner the party deems appropriate and may be accompanied by or otherwise incorporate supporting documents.

(c) An answer must be filed within 30 days after receipt of the statement of reasons by the person filing an answer.

(d) An answer and any supporting documents shall be filed in the office of the official before whom the appeal is pending as specified in § 2.13.

(e) An answer should:

(1) Be clearly labeled or titled with the words "ANSWER OF INTERESTED PARTY."

(2) Have on the face of any envelope in which the answer is mailed or delivered, in addition to the address, the clearly visible words "ANSWER OF INTERESTED PARTY," and

(3) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

§ 2.12 Service of appeal documents.

(a) Persons filing documents in an appeal must serve copies of those documents on all other interested parties known to the person making the filing. A person serving a document either by mail or personal delivery must,

at the time of filing the document, also file a written statement certifying service on each interested party, showing the document involved, the name and address of the party served, and the date of service.

(b) If an appeal is filed with the Interior Board of Indian Appeals, a copy of the notice of appeal shall also be sent to the Assistant Secretary—Indian Affairs. The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) If the appellant is an Indian or Indian tribe not represented by counsel, the official with whom the appeal is filed (i.e., official making the decision being appealed) shall, in the manner prescribed in this section, personally or by mail serve a copy of all appeal documents on the official who will decide the appeal and on each interested party known to the official making such service.

(d) Service of any document under this part shall be by personal delivery or by mail to the record address as specified in § 2.14. Service on a tribe shall be to the principal or designated tribal official or to the governing body.

(e) In all cases where a party is represented by an attorney in an appeal, service of any document on the attorney is service on the party represented. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney shall include the name of the party whom the attorney represents and indicate that service was made on the attorney representing that party.

(f) When an official deciding an appeal determines that there has not been service of a document affecting a person's interest, the official shall either serve the document on the person or direct the appropriate legal counsel to serve the document on the person and allow the person an opportunity to respond.

§ 2.13 Filing documents.

(a) An appeal document is properly filed with an official of the Bureau of Indian Affairs:

(1) By personal delivery during regular business hours to the person designated to receive mail in the immediate office of the official, or

(2) By mail to the facility officially designated for receipt of mail addressed to the official; the document is considered filed by mail on the date that it is postmarked.

(b) Bureau of Indian Affairs offices receiving a misdirected appeal

document shall forward the document to the proper office promptly. If a person delivers an appeal document to the wrong office or mails an appeal document to an incorrect address, no extension of time should be allowed because of the time necessary for a Bureau office to redirect the document to the correct address.

(c) Notwithstanding any other provision of this section, an official deciding an appeal shall allow late filing of a misdirected document, including a notice of appeal, where the official finds that the misdirection is the fault of the government.

§ 2.14 Record address.

(a) Every interested party who files a document in connection with an appeal shall, when he/she files the document, also indicate his/her address. Thereafter, any change of address shall be promptly reported to the official with whom the previous address was filed. The most current address on file under this subsection shall be deemed the proper address for all purposes under this part.

(b) The successors in interest of a party shall also promptly inform the official specified in paragraph (a) of this section of their interest in the appeal and their address.

(c) An appellant or interested party failing to file an address or change of address as specified in this section may not object to lack of notice or service attributable to his/her failure to indicate a new address.

§ 2.15 Computation of time.

In computing any period of time prescribed or allowed in this part, calendar days shall be used. Computation shall not include the day on which a decision being appealed was made, service or notice was received, a document was filed, or other event occurred causing time to begin to run. Computation shall include the last day of the period, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

§ 2.16 Extensions of time.

An official to whom an appeal is made may, upon a showing of good cause by a party and with notice to all other parties, extend the period for filing or serving any document; *provided*, however, that no extension will be granted for filing a notice of appeal under § 2.9 of this part or serve by itself to extend any period specified by law or regulation other than in this part.

§ 2.17 Summary dismissal.

(a) An appeal under this part will be dismissed if the notice of appeal is not filed within the time specified in § 2.9(a).

(b) An appeal under this part may be subject to summary dismissal for the following causes:

(1) If after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents, or

(2) If the appellant has been required to post a bond and fails to do so.

§ 2.18 Consolidation of appeals.

Separate proceedings pending before one official under this part and involving common questions of law or fact may be consolidated by the official conducting such proceedings, pursuant to a motion by any party or on the initiative of the official.

§ 2.19 Action by Area Directors and Education Programs officials on appeal.

(a) Area Directors, Area Education Programs Administrators, Agency Superintendents for Education, Presidents of Post-Secondary Schools and the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired. The decision shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

(b) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

§ 2.20 Action by the Assistant Secretary—Indian Affairs on appeal.

(a) When a decision is appealed to the Interior Board of Indian appeals, a copy of the notice of appeal shall be sent to the Assistant Secretary—Indian Affairs.

(b) The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) In accordance with the provisions of § 4.332(b) of Title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the

Assistant Secretary—Indian Affairs shall have authority to decide to:

- (1) Issue a decision in the appeal, or
- (2) Assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs.

The Assistant Secretary—Indian Affairs will not consider petitions to exercise this authority. If the Assistant Secretary—Indian Affairs decides to issue a decision in the appeal or to assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs, he/she shall notify the Board of Indian Appeals, the deciding official, the appellant, and interested parties within 15 days of his/her receipt of a copy of the notice of appeal. Upon receipt of such notification, the Board of Indian Appeals shall transfer the appeal to the Assistant Secretary—Indian Affairs. The decision shall be signed by the Assistant Secretary—Indian Affairs or a Deputy to the Assistant Secretary—Indian Affairs within 60 days after all time for pleadings (including all extensions granted) has expired. If the decision is signed by the Assistant Secretary—Indian Affairs, it shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision. Except as otherwise provided in § 2.20(g), if the decision is signed by a Deputy to the Assistant Secretary—Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR Part 4, Subpart D.

(d) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

(e) If the Assistant Secretary—Indian Affairs or the Deputy to the Assistant Secretary—Indian Affairs to whom the authority to issue a decision has been assigned pursuant to § 2.20(c) does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction subject to 43 CFR 4.337(b). A motion for Board decision under this section shall invest the Board with jurisdiction as of the date the motion is received by the Board.

(f) When the Board of Indian Appeals, in accordance with 43 CFR 4.337(b), refers an appeal containing one or more discretionary issues to the Assistant Secretary—Indian Affairs for further consideration, the Assistant Secretary—Indian Affairs shall take action on the

appeal consistent with the procedures in this section.

(g) The Assistant Secretary—Indian Affairs shall render a written decision in an appeal from a decision of the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) within 60 days after all time for pleadings (including all extensions granted) has expired. A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record. The decision shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

§ 2.21 Scope of review.

(a) When a decision has been appealed, any information available to the reviewing official may be used in reaching a decision whether part of the record or not.

(b) When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided. The deciding official shall include in the record copies of documents or a description of the information used in arriving at the decision. Except where disclosure of the actual documents used may be prohibited by law, copies of the information shall be made available to the parties upon request and at their expense.

Ross O. Swimmer,

Assistant Secretary—Indian Affairs.

[FR Doc. 89-3090 Filed 2-9-89; 8:45 am]

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Office of Hearings and Appeals

43 CFR Part 4

Department Hearings and Appeals Procedures

AGENCY: Office of Hearings and Appeals, Interior.

ACTION: Final rule.

SUMMARY: This office is amending its regulations concerning appeals to the Board of Indian Appeals in order to ensure compatibility between those regulations and regulations of the

Bureau of Indian Affairs. These amendments also incorporate substantive changes to several specific regulations that were previously proposed as separate rulemakings.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Kathryn A. Lynn, Chief Administrative Judge, Board of Indian Appeals, 703-235-3816.

SUPPLEMENTARY INFORMATION: On November 6, 1987, the Office of Hearings and Appeals published proposed regulations providing for the amendment of its regulations concerning appeals to the Board of Indian Appeals. 52 FR 43009 (Nov. 6, 1987). The amendments would ensure compatibility between the appeal provisions set forth by the Bureau of Indian Affairs in 25 CFR Part 2 and those of this office in 34 CFR Part 4.

Six public comments were received concerning the proposed changes to 43 CFR Part 4. These comments will be addressed with reference to the sections of Part 4 to which they relate.

Section 4.200: When the proposed regulations were written, a reference to the appeals provisions, located in 43 CFR 4.200, was inadvertently overlooked. This omission is being corrected in the final rules to show that procedural rules relating to appeals to the Board from decisions of officials of the Bureau of Indian Affairs are contained in 43 CFR 4.330 through 4.340.

Section 4.310(b): The service provisions are being expanded based upon an internal comment. The provision will state explicitly that service upon an attorney or other authorized representative is service upon the party and incorporates the provision of 43 CFR 4.22 noting that when a party is represented by more than one attorney, service on any one attorney is sufficient. These clarifications are intended to reduce, when possible, the number of people who must be served, and to be consistent with Bureau regulations.

Section 4.311(d): This subparagraph is being amended based upon an internal comment. The amended subparagraph will request that documents not be bound along the side.

Section 4.312: One commenter suggested inserting "BIA official" before "administrative law judge" so that the section will clearly set forth the Board's authority to adopt, modify, reverse, or set aside any finding, conclusion, or order of a Bureau official. The suggestion is accepted.

Section 4.320: One commenter objected to the proposed change

requiring an Indian tribe to first seek rehearing from the administrative law judge (Indian probate), rather than appealing directly to the Board, when the issue involved in an appeal is an escheat of an interest in Indian trust or restricted property to the tribe. The language of the section is being changed in order not to give Indian tribes different appeal rights than individuals, and to carry out the original intent of the regulation, which was obscured by inartful language. The comment is not accepted.

Section 4.320(a): Based upon an internal comment, a sentence is being added explicitly stating that a notice of appeal not timely filed will be dismissed for lack of jurisdiction. This statement is in accordance with long-standing Board practice.

Sections 4.320(c) and 4.323: The language of these regulations is being corrected to include regulatory changes that became effective on August 13, 1987, after publication in the *Federal Register*, 52 FR 26344 (July 14, 1987), as corrected in 52 FR 35557 (Sept. 22, 1987). The changes were inadvertently omitted from this proposed rulemaking.

Sections 4.330(b)(2) and 4.337(b): Three commenters questioned the continuation of the limitation on the Board's jurisdiction that prevents it from reviewing discretionary decisions of the Bureau. One commenter noted that review of Bureau decisions by the Board was intended to ensure objective and independent administrative review; the other two commenters noted that no other appeals board in the Office of Hearings and Appeals is prohibited from reviewing discretionary decisions. The commenters suggested that the discretion/law distinction should be dropped and the Board should be given full authority to review all Bureau decisions. One commenter urged that discretionary decisions should at least be reviewable by the Board on an arbitrary, capricious, or abuse of discretion standard.

In this same context, one commenter suggested that the provisions regarding treatment of discretionary decisions in § 4.337(b) should be dropped and the Board given full authority to review such decisions. Two other commenters believed that if the distinction was retained, standards needed to be specified in the regulation for whether the Board would dismiss an appeal from a discretionary decision, or refer it to the Assistant Secretary—Indian Affairs.

The Board is not the only appeals board within the Office of Hearings and Appeals limited in its review of discretionary decisions. Under 43 CFR 4.1(b)(4) and 4.700, appeals not falling

within the jurisdiction of a standing appeals board are assigned to ad hoc boards of appeal which are prohibited from reviewing discretionary decisions. At this time, the Department believes the discretion/law distinction in review of Bureau decisions should be retained. The comments are, accordingly, not accepted.

Section 4.330(b)(3): One commenter questioned the provision requiring Bureau decisions based on recommendations or actions of officials of the Minerals Management Service to be decided by the Board of Land Appeals rather than the Board of Indian Appeals. The commenter believed that such decisions routinely involve questions of Federal Indian law and the expertise of the Board of Indian Appeals should be utilized in reviewing these decisions.

The Department continues to believe that the broader mineral law expertise of the Board of Land Appeals should be applied to decisions arising from recommendations or actions of the Minerals Management Service. Those cases involving Indian minerals, which are not based on recommendations or actions of the Minerals Management Service will, however, be decided by the Board of Indian Appeals. The comment is not accepted.

Section 4.331(b): One commenter questioned the provision restricting the Board's review authority over decisions that are approved in writing by the Assistant Secretary—Indian Affairs prior to issuance. As a Secretarial-level official, the Assistant Secretary—Indian Affairs has authority to issue or approve decisions that are final for the Department. The Board has not been delegated general review authority over such decisions. The comment is not accepted.

Section 4.332(a): Three comments were received concerning the proposed reduction of the time for filing a notice of appeal with the Board from 60 days to 30 days. The change was proposed so that the appeal periods would be the same throughout the review process for Bureau administrative decisions and so that final resolution of appeals would not be unnecessarily delayed. The commenters objected to the use of the date of mailing as the start of the appeal period, rather than the date of receipt. One commenter noted that date of receipt should be used because decisions were sent by certified mail, return receipt requested.

The comments are accepted in part. Section 4.332(a) is being revised to provide that the appeal period begins upon receipt of the decision by the

appellant. However, the time for filing a notice of appeal will remain 30 days.

Section 4.332(b): Three comments were received relating to the procedures for allowing the Assistant Secretary—Indian Affairs to assume jurisdiction over appeals filed with the Board. Two commenters believed that the Assistant Secretary—Indian Affairs should not have this authority; the third commenter believed that appellants should be given an explicit right to choose whether they wanted their appeals considered by the Board or by the Assistant Secretary—Indian Affairs.

The Office of Hearings and Appeals was created as a separate office within the Office of the Secretary of the Interior in 1970 to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs." 40 FR 20819 (May 13, 1975).

The usual appeal procedures within the Department do not include appeals to the Assistant Secretaries. If the Assistant Secretaries were to handle appeals routinely, they would have to create, in effect, an Office of Hearings and Appeals within their own offices. The Assistant Secretary—Indian Affairs has recently been a part of the Bureau appeal process because of the vacancy in the position of Commissioner of Indian Affairs, the official who previously handled administrative appeals from the Bureau. It was never contemplated that the Assistant Secretary—Indian Affairs would handle administrative appeals as a routine or frequent part of his official duties. Therefore, the comment suggesting that appellants be given a choice of forum for administrative consideration of their appeals is not accepted.

It is also recognized, however, that there are some decisions involving Indians and Indian tribes that involve policy considerations that cannot adequately be addressed through the usual appeal procedures. It is anticipated that the Assistant Secretary—Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal. The Assistant Secretary—Indian Affairs is

aware that such assumption of jurisdiction will operate to alter the legitimate expectations of the parties as to normal processing of their appeals. For this reason, the final regulations issued by the Bureau of Indian Affairs show that the authority to assume jurisdiction over an appeal lies exclusively with the Assistant Secretary—Indian Affairs and he or she will not consider petitions filed by the parties asking for such review. Because the Department continues to believe that there are some instances in which it may be appropriate for the Assistant Secretary—Indian Affairs to review an appeal, the comments suggesting that that official be entirely removed from the review process are not accepted.

Section 4.332(c): One comment was received suggesting that this provision was an improper limitation on the duty of Bureau officials to assist Indians who are not represented by counsel in preparing an appeal. The only substantive change proposed from the existing regulation was the addition of the words "not represented by counsel." The change was proposed to clarify that the duty to assist in the preparation of appeals extends to those Indians or Indian tribes who are not being represented by legal counsel. The Department does not believe the change would limit the prior duty of Bureau officials to assist Indians who are not represented by counsel and, therefore, does not accept the comment.

Section 4.332(d): One commenter suggested that an appeal bond should be required only in extraordinary circumstances. The language of the proposed regulation, which was not changed from the existing regulation, states that "an appropriate bond may be required." Because of the diversity of circumstances that may exist in which a bond is requested, it is believed that case-by-case consideration of bond requests must be allowed. The interests of the appellant in prosecuting the appeal must be weighted against the possible disadvantage to other parties should the appeal be decided against the appellant who may then be found not to have the financial resources to carry out the obligations imposed by the decision. It is not believed that changes need to be made to this regulation.

Section 4.336: One commenter suggested that a briefing schedule should not be established until all objections to the composition of the administrative record are resolved. Few cases presently before the Board involve challenges to the composition of the administrative record and it is not anticipated that the new procedures will

substantially increase this type of challenge. The Board has previously been able to accommodate challenges to the composition of the administrative record on a case-by-case basis, and expects to do so in the future. No need is seen at this time to provide specific time-frames for challenges to the administrative record. Therefore, the comment is not accepted.

Another commenter suggested that the right to seek review of Board decisions by the Assistant Secretary—Indian Affairs should be made explicit. This comment was based on the erroneous belief that the Assistant Secretary—Indian Affairs presently has the right to review Board decisions. There is no authority for the Assistant Secretary—Indian Affairs to review a decision of the Board. The comment is, therefore, not accepted.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance With Other Acts

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department of the Interior has also determined that the rule does not constitute a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347).

This rule was written by Kathryn Lynn, Office of Hearings and Appeals.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure, Indians.

Accordingly, 43 CFR Part 4 is amended as set forth below.

Dated: December 13, 1988.

Earl E. Gjelde,
Under Secretary.

PART 4—[AMENDED]

Subpart A—General; Office of Hearings and Appeals

1. The authority citation for Part 4, Subpart A, continues to read as follows:

Authority: R.S. 2478, as amended, 43 U.S.C. sec. 1201, unless otherwise noted.

2. In § 4.1, paragraph (b)(2) is revised to read as follows:

§ 4.1 Scope of authority; applicable regulations.

* * *

(b) * * *

(2) *Board of Indian Appeals.* The Board decides finally for the Department appeals to the head of the Department pertaining to:

(i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR Chapter I, except as limited in 25 CFR Chapter I or § 4.330 of this part, and

(ii) Orders and decisions of administrative law judges in Indian probate matters other than those involving estates of the Five Civilized Tribes of Indians and Osage Indian wills. The Board also decides such other matters pertaining to Indians as are referred to it by the Secretary, the Director of the Office of Hearings and Appeals, or the Assistant Secretary—Indian Affairs for exercise of review authority of the Secretary. Special regulations applicable to proceedings before the Board are contained in Subpart D of this part.

* * *

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

3. The authority citation for Part 4, Subpart D, continues to read as follows:

Authority: Secs. 1, 2, 36 Stat. 855, as amended, 856, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a, 373b.

4. In § 4.200 the second to the last sentence is revised to read as follows:

§ 4.200 Scope of regulations.

* * * Included within §§ 4.330 through 4.340 are procedural rules applicable to appeals to the Board of Indian Appeals from administrative actions or decisions issued by the Bureau of Indian Affairs as set forth in § 4.330. * * *

General Rules Applicable to Proceedings on Appeal Before the Interior Board of Indian Appeals

5. The authority citation for Part 4, Subpart D, §§ 4.310-4.317 is removed.

6. §§ 4.310-4.317 are revised and the revised regulations, comprising §§ 4.310-4.318, read as follows:

§ 4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery, except that a motion for the Board to assume

jurisdiction over an appeal under 25 CFR 2.20(e) shall be effective the date it is received by the Board.

(b) *Service.* Notices of appeal and pleadings shall be served on all parties in interest in any proceeding before the Interior Board of Indian Appeals by the party filing the notice or pleading with the Board. Service shall be accomplished upon personal delivery or mailing. Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney or representative shall include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.

(d) *Extensions of time.* (1) The time for filing or serving any document except a notice of appeal may be extended by the Board.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

§ 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receipt of the notice of docketing. Appellant shall serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel shall have 30 days from receipt of appellant's brief to file answer briefs, copies of which shall be served upon the appellant or counsel and all other parties in interest. A certificate showing service of the answer brief upon all parties or counsel shall be attached to the answer filed with the Board.

(b) Appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel shall be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) The Bureau of Indian Affairs shall be considered an interested party in any proceeding before the Board. The Board may request that the Bureau submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date shall not be less than the appropriate period of time established in this section.

§ 4.312 Decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse or set aside any proposed finding, conclusion or order of an official of the Bureau of Indian Affairs or an administrative law judge. Distribution of decisions shall be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and shall be given immediate effect.

§ 4.313 Amicus Curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene or to join other parties or to appear as amicus curiae or to obtain an order in an appeal before the Board shall apply in writing to the Board stating the grounds for the action sought. Permission to intervene, to join parties, to appear, or for other relief, may be granted for purposes and subject to limitations established by the

Board. This section shall be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board shall be served in the same manner as appeal briefs.

§ 4.315 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge or an official of the Bureau of Indian Affairs, which at the time of its rendition is subject to appeal to the Board, shall be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless made effective pending decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition shall not stay the effect of any decision or order and shall not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any court to the Board for further proceedings, the Board will either remand the matter to an administrative law judge or to the Bureau of Indian Affairs, or to the extent the court's directive and time limitations will permit, the parties shall be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries with respect to any matter pending before the Board shall be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the Director of the Office of Hearings and Appeals shall determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the official of the Bureau of Indian Affairs on review. However, except as specifically limited in this part or in Title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

Appeals to the Board of Indian Appeals in Probate Matters

7. The authority citation for Part 4, Subpart D, §§ 4.320–4.323 is removed.

8. §§ 4.320–4.323 are revised to read as follows:

§ 4.320 Who may appeal.

A party in interest shall have a right of appeal to the Board of Indian Appeals from an order of an administrative law judge on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.

(a) *Notice of Appeal.* Within 60 days from the date of the decision, an appellant shall file a written notice of appeal signed by appellant, appellant's attorney, or other qualified representative as provided in 43 CFR 1.3, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. A statement of the errors of fact and law upon which the appeal is based shall be included in either the notice of appeal or in any brief filed. The notice of appeal shall include the names and addresses of parties served. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction.

(b) *Service of copies of notice of appeal.* The appellant shall personally deliver or mail the original notice of appeal to the Board of Indian Appeals. A copy shall be served upon the

administrative law judge whose decision is appealed as well as all interested parties. The notice of appeal filed with the Board shall include a certification that service was made as required by this section.

(c) *Action by administrative law judge; record inspection.* The administrative law judge, upon receiving a copy of the notice of appeal, shall notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b) and 4.241(d), or under § 4.242(f) of this part, to the Land Titles and Records Office designated under § 4.236(b) of this part. The duplicate record shall be conformed to the original by the Land Titles and Records Office and shall thereafter be available for inspection either at the Land Titles and Records Office or at the office of the Superintendent. In those cases in which a transcript of the hearing was not prepared, the administrative law judge shall have a transcript prepared which shall be forwarded to the Board within 30 days from receipt of a copy of the notice of appeal.

§ 4.321 Notice of transmittal of record on appeal.

The original record on appeal shall be forwarded by the Land Titles and Records Office to the Board by certified mail. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing issued under § 4.332 of this part.

§ 4.322 Docketing.

The appeal shall be docketed by the Board upon receipt of the administrative record from the Land Titles and Records Office. All interested parties as shown by the record on appeal shall be notified of the docketing. The docketing notice shall specify the time within which briefs may be filed and shall cite the procedural regulations governing the appeal.

§ 4.323 Disposition of the record.

Subsequent to a decision of the Board, other than remands, the record filed with the Board and all documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision, shall be forwarded by the Board to the Land Titles and Records Office designated under § 4.236(b) of this part. Upon receipt of the record by the Land Titles and Records Office, the duplicate record required by § 4.320(c) of this part shall be conformed to the original and forwarded to the Superintendent concerned.

Appeals to the Board of Indian Appeals From Administrative Actions of Officials of the Bureau of Indian Affairs: Administrative Review in Other Indian Matters Not Relating to Probate Proceedings

9. The authority citation for Part 4, Subpart D, §§ 4.330–4.340, is removed.

10. §§ 4.330–4.340 are revised to read as follows:

§ 4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR Chapter 1, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

- (1) Tribal enrollment disputes;
- (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or
- (3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

§ 4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

- (1) A full identification of the case;
- (2) A statement of the reasons for the appeal and of the relief sought; and
- (3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with

the Board shall certify that service was made as required by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in § 4.332 of this part, may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

- (1) The decision appealed from;
- (2) The notice of appeal or copy thereof; and
- (3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§ 4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown

by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§ 4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other comments regarding the recommended decision with the Board in accordance with § 4.339 of this part.

§ 4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may

file exceptions to or other comments on the decision with the Board.

§ 4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

[FR Doc. 89-3091 Filed 2-9-89; 8:45 am]

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Order Paper

Friday
February 10, 1989

Part III

Department of Housing and Urban Development

Office of the Assistant Secretary for Fair
Housing and Equal Opportunity

24 CFR Part 125

Fair Housing Initiatives Program; Final
Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Part 125

[Docket No. R-89-1395; FR-2486]

Fair Housing Initiatives Program

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Final rule.

SUMMARY: HUD is adopting regulations to govern its new Fair Housing Initiatives Program (FHIP). Under this program, HUD will fund State and local government agencies, public and private nonprofit organizations, and other public and private entities formulating or carrying out programs to prevent or eliminate discriminatory housing practices. The regulations provide for three categories of funding under FHIP: (1) The Administrative Enforcement Initiative, (2) the Education and Outreach Initiative, and (3) the Private Enforcement Initiative.

FHIP is designed to strengthen and enhance enforcement of and compliance with the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) and State and local laws recognized by the Secretary of HUD as providing substantially equivalent rights and remedies to those provided in the Fair Housing Act.

EFFECTIVE DATE: May 9, 1989.

FOR FURTHER INFORMATION CONTACT: Maxine B. Cunningham, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410 Telephone: (202) 755-0455 (V and TDD); this is not a toll-free number.

SUPPLEMENTARY INFORMATION: The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 and have been assigned OMB control number 2529-0033. The public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the preamble heading, *Other Matters*. Send comments regarding these burden

estimates or any other aspect of these collections of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988), 42 U.S.C. 3600-3620, charges the Secretary of HUD with responsibility to accept and investigate complaints alleging discrimination based on race, color, religion, sex, handicap, familial status, or national origin in the sale, rental or financing of most housing. In addition, the Fair Housing Act directs the Secretary to coordinate with State and local agencies administering fair housing laws and to cooperate with and to render technical assistance to public or private entities carrying out programs to prevent or eliminate discriminatory housing practices.

The Fair Housing Initiatives Program (FHIP), authorized in section 561 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988) authorizes the Secretary to provide funding to State and local governments or their agencies, public or private nonprofit organizations, or other public or private entities formulating or carrying out programs to prevent or eliminate discriminatory housing practices. These funds will enable the recipients to carry out activities designed to obtain enforcement of the rights granted by the Fair Housing Act or by substantially equivalent State or local fair housing laws, and education and outreach activities designed to inform the public concerning rights and obligations under such Federal, State or local laws prohibiting discrimination. Funding for enforcement of fair housing laws includes activities involving use of judicial as well as administrative enforcement procedures.

On July 7, 1988, HUD published in the *Federal Register* (53 FR 25576) a proposed rule to implement the FHIP authority by adoption of a new Part 125 in Title 24 of the Code of Federal Regulations. The proposed regulations provided for funding in three distinct areas under FHIP:

1. The Administrative Enforcement Initiative (Subpart B of the new Part 125);

2. The Education and Outreach Initiative (Subpart C of the new Part 125); and

3. The Private Enforcement Initiative (Subpart D of the new Part 125).

The proposal provided a 30-day period for submission of comments by the public, ending August 8, 1988. HUD received a total of 33 public comments on the proposed new Part 125. Nine comments were from the National Association of Realtors (NAR) and affiliated organizations, including 5 local Boards of Realtors, 2 State Associations of Realtors, and the NAR-affiliated Institute of Real Estate Management (IREM). Individual Realtors submitted 6 comments, and attorneys who represent Realtors submitted 3 comments. Six comments came from fair housing or civil rights groups, and 6 were from State or local enforcement agencies (including one comment from an organization representing such agencies in a four-State region). In addition, there was a comment from the United States League of Savings Institution, one from a Community Housing Resource Board (CHRB), and one from an attorney involved in both prosecution and defense of housing discrimination cases.

Three comments generally supported the proposed rule as written, and 24 commenters supported the proposal with comments on specific provisions. Two commenters were generally opposed to the proposal, and 4 commenters limited their comments to a suggestion that real estate brokers be compensated for time lost as a result of testing.

Statutory Requirements

The statutory authorization for FHIP contains several requirements relating to program administration:

(1) A requirement for submitting 30-day advance notification of each proposed grant, contract or cooperative agreement under FHIP to the House and Senate Banking Committees (section 561(b)(1));

(2) A requirement for providing to the House and Senate Banking Committees a quarterly report that summarizes the activities funded under FHIP and describes the geographical distribution of FHIP grants, contracts, or cooperative agreements (section 561(b)(2)); and

(3) A requirement for submitting to Congress, within 6 months after the end of the FHIP demonstration period (September 30, 1989), an evaluation of the effectiveness of the guidelines for testing activities funded under the Private Enforcement Initiative of FHIP (section 561(c)(2)).

The NAR recommended that the final regulations contain a statement of these three requirements. Four additional commenters made similar recommendations with respect to the first two requirements, and two additional commenters joined NAR with respect to the third requirement.

All three of the statutory requirements apply to HUD without regard to their inclusion in the final regulations. The thrust of the comments urging the insertion of those requirements into the regulations was to ensure public awareness of the requirements of the law. However, HUD sees no need to include these requirements in the text of the final regulations. Further, inclusion of the statutory requirement for the submission of an evaluation of the guidelines for testing contained in this regulation within 6 months after the end of the demonstration period could result in confusion regarding evaluation of further testing activities should the authorization for FHIP be extended.

The NAR and two other commenters recommended that a statement be inserted in the final regulations concerning the \$3,000,000 limitation (in section 561(d)) on the amount which HUD may allocate to the Private Enforcement Initiative for fiscal year 1989. In addition, one commenter suggested that guidelines for HUD's determination as to allocation of funds be provided in the final regulations. HUD considers it unnecessary to include a statement of the statutory limitation on funding in the final program regulations, since the limitation will apply to HUD in any event. Moreover, the limitation may change if the program is extended beyond the presently scheduled termination date of September 30, 1989. HUD considers the addition of guidelines to be inappropriate because it would operate to restrict HUD's future flexibility in an area that has been left to HUD's discretion by the statute. Moreover, any notice of funding availability for the Private Enforcement Initiative, which notice would have to be published in the *Federal Register* pursuant to 24 CFR 125.104(d), will contain a statement of the statutory limitation and a discussion of HUD's allocation of funds to activities under the Private Enforcement Initiative, together with the reasons for such allocation.

Regulatory Flexibility Act Certification

Three commenters, including the NAR and IREM, stated their belief that HUD activities under FHIP will involve a substantial number of small entities. Accordingly, they recommend that HUD prepare a regulatory flexibility analysis

which describes the impact of the proposed rule on small entities.

In response, HUD points out that, under 5 U.S.C. 605(b), the requirements for preparation of regulatory flexibility analyses do not apply if the Secretary certifies that the rule will not, if promulgated, have "a significant economic impact on a substantial number of small entities." Although the regulations may, as the commenters suggested, affect a substantial number of small entities, HUD does not believe that there would be "a significant economic impact" on any of them, except in a case in which testing confirms an allegation of a discriminatory housing practice. Therefore, HUD believes that a regulatory flexibility analysis is not required for this final rule.

Subpart A—General

Subpart A of Part 125 contains statements of the policy and purpose of FHIP, definitions applicable to the provisions of Part 125, and descriptions of the method by which HUD will administer the program and make awards of funding.

Comments were received with respect to only one section of Subpart A—§ 125.105, which lists the requirements for applications for FHIP funding. The NAR, IREM and a State Association of Realtors stated their support for the requirement for a description of the specific activities to be conducted with FHIP funds. The State Association also suggested that recipients should be monitored to assure that they are conducting their activities in accordance with their applications. Since procedures for monitoring program activities and funding are already provided for in § 125.104(e), under which the Assistant Secretary will establish specific accounting controls and require monitoring of records on a periodic basis by HUD Field staff, the suggested changes have not been made in § 125.105.

However, HUD has added clarification in § 125.105 to the effect that applications for FHIP funding must address each of the criteria for selection set forth in the rule and in notices of funding availability for FHIP published in the *Federal Register*.

Subpart B—Administrative Enforcement Initiative

Under the Administrative Enforcement Initiative, HUD will provide funding to substantially equivalent State and local fair housing enforcement agencies in support of initiatives designed to broaden the range of enforcement and compliance activities which they conduct.

Only one commenter was concerned with Subpart B. A local human relations commission noted that the regulations in Subpart B specifically provide for funding for conducting investigations of systemic discrimination but fail to mention the continuation of funding for individual housing discrimination case processing. Funding for individual case processing by State and local agencies will be continued by HUD under the Fair Housing Assistance Program (24 CFR Part 111).

This same commenter also recommended simplification of the application process for funding under Subpart B. Since the Administrative Enforcement Initiative will provide funding for specific projects, as opposed to contributions for processing of individual fair housing complaints on an ongoing basis, specific applications and approvals will be necessary. However, the application requirements for FHIP Subpart B funding will not affect the program administrative requirements for complaint processing contributions under the Fair Housing Assistance Program.

Subpart C—Education and Outreach Initiative

The Education and Outreach Initiative will provide funding to develop, implement, carry out, or coordinate education and outreach programs designed to inform the public of their rights and obligations under the Fair Housing Act and substantially equivalent State and local fair housing laws. Funding will be provided for educational projects which advise the general public and housing industry groups about fair housing rights and responsibilities and outreach projects which promote specialized support and coordinated methods to provide for fair housing.

The organization representing State and local agencies in a four-State region and the Nebraska Equal Opportunity Commission criticized the regulations on education and outreach for limiting the types of activities that could be undertaken by State and local agencies administering substantially equivalent fair housing laws and for extending the availability of funds to groups who may not have the same fair housing interests as the State and local enforcement agencies. These same commenters also raised the issue of conflict in strategies for fair housing efforts and recommended the establishment by HUD of an oversight group, which would include representation from State and local enforcement agencies, to coordinate strategies, make

recommendations as to funding and monitor program efforts. HUD agrees that there is a need for non-governmental applicants to coordinate activities to be funded under the Education and Outreach Initiative with any State or local enforcement agency in jurisdictions with substantially equivalent fair housing laws. However, the responsibility for oversight has to remain with HUD. A requirement to that effect has been added to the regulations in Subpart C.

Section 125.303 provides examples of the types of educational and outreach projects which may be funded under the Education and Outreach Initiative of FHIP. HUD received a number of comments concerning specific provisions of this section.

One commenter, an attorney who represents several Boards of Realtors, recommended that paragraphs (a)(1)-(3) of that section clearly provide for the development of informative material, education programs and educational seminars for real estate practitioners. HUD intends that real estate practitioners be included among the "housing industry groups" and "other groups" for whom education programs may be developed and educational seminars may be provided. Therefore, no change is necessary in those provisions.

With regard to paragraph (b)(3), the NAR, IREM and two local Boards of Realtors believe that the "outreach projects" specifically permitted under that paragraph could be construed to include "benign steering" programs designed to maintain the minority population of a community at or below a "tipping point", and one civil rights group took a position against an interpretation of the fair housing law as "promoting integration goals". In addition, the NAR, IREM and the two State Associations of Realtors recommended that HUD amend paragraph (b)(3) to clarify that the "outreach projects" eligible for funding do not include integration maintenance, "benign steering" or other programs designed to limit minority residence in a neighborhood or housing complex. It is not HUD's intention to construe paragraph (b)(3) as including "benign steering" or integration maintenance activities within the meaning of "outreach projects", and HUD does not believe that the language of paragraph (b)(3) as set forth in the proposed rule requires clarification on that point.

Paragraph (b)(4) of § 125.303 specifically permits funding of programs relating to "new or more sophisticated" discriminatory housing practices. The NAR, IREM and an attorney who

represents several Boards of Realtors recommended that the modest funding available under this Initiative should be targeted exclusively at the more "traditional" forms of discrimination that are acknowledged to exist and that can most easily be identified by testing, rather than at "sophisticated" techniques of discrimination. In response, HUD notes that FHIP is intended to function as a program under which a variety of enforcement efforts can be utilized. Therefore, HUD does not believe that limiting FHIP funding to traditional forms of discrimination as recommended by these commenters is consistent with the purposes of the program.

Subpart D—Private Enforcement Initiative

The Private Enforcement Initiative will provide funding, to non-profit organizations and other private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, for projects designed to enhance efforts to enforce the provisions of the Fair Housing Act and substantially equivalent State and local fair housing laws.

As an overall comment, the U.S. League of Savings Institutions suggested that the regulations for this initiative "enumerate with some specificity" the requirements for obtaining funds. HUD believes that the requirements set out in the general provisions of Subpart A concerning applications and in the more specific provisions of Subpart D already accomplish that purpose. Accordingly, no changes are needed in this regard.

Section 125.402—Eligible Applicants

Section 125.402 states that applicants eligible to receive assistance under this initiative are private non-profit organizations and other private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices. A fair housing group commented that the definition of eligible applicants, while appropriate for the Education and Outreach Initiative in Subpart C, is too broad for the activities described in § 125.403 (a) and (b). This group urged that the definition of "eligible applicants" be revised by adding to the first sentence of § 125.402 the following phrase: " * * by investigating fair housing complaints and seeking resolution through administrative or judicial actions." HUD believes that this additional language would unduly restrict the operation of the program under this initiative, and the suggested change has not been made.

Section 125.403—Eligible Activities

Section 125.403 sets forth four examples of projects eligible for funding under this initiative. Paragraph (d) includes as an eligible activity "establishing effective means of meeting legal expenses in support of litigation of fair housing cases." Seven commenters, including the NAR, IREM and the two State Associations of Realtors, objected to the use of Federal enforcement funds for this purpose. Four commenters, including the NAR and IREM, recommended that paragraph (d) be revised to make it clear that the payment of attorneys' fees for fair housing plaintiffs is not an activity eligible for funding.

The Private Enforcement Initiative was designed to fund a variety of activities in support of fair housing enforcement through appropriate judicial or administrative proceedings. One such activity could be the establishment of a mechanism, such as a revolving loan fund, to assist aggrieved persons in vindicating their fair housing rights through litigation. HUD does not believe that providing assistance in support of private individuals seeking to vindicate protected rights is inconsistent with the purposes of FHIP. Therefore, HUD has not made any change in paragraph (d).

Section 125.405—Guidelines for Private Enforcement Testing

The Guidelines contained in this section will apply to testing activities funded under the Private Enforcement Initiatives. The NAR and eight other commenters specifically stated their support for the Guidelines as written. Two commenters, both civil rights organizations, opposed the Guidelines in their entirety (see discussion below). Most of the commenters had suggestions or recommendations with respect to specific provisions of § 125.405.

Three civil rights/fair housing organizations raised the issue of the negotiation of the Guidelines by HUD and members of the real estate industry, without involvement by the private fair housing and civil rights groups who have been for many years proponents of testing as the major investigative method in fair housing cases. The fair housing group merely noted that the Guidelines were developed without taking account of the extensive experience which the private groups have in developing evidence which meets the high standards of the federal courts.

The two civil rights groups went further, claiming the HUD's admitted

intention, prior to the enactment of the FHIP legislation, to include the Guidelines negotiated with the NAR into the FHIP regulations arguably represented a violation of the Administrative Procedure Act. Moreover, it was argued that HUD's actions "certainly raise the appearance of impropriety," since the NAR, an entity which represents both the subject of testing (Realtors) and potential FHIP grantees (Community Housing Resource Boards), was included in private negotiations on regulations before the program was enacted. Finally, it was asserted that HUD's actions "raise serious questions about the integrity of the comment process," since those groups who recommend revision or removal of parts of the Guidelines already have been informed of HUD's intention to incorporate the Guidelines in the regulations. Accordingly, the civil rights groups recommended that the Guidelines be omitted from the regulations.

Subsection (c)(2) of section 561 of the Housing and Community Development Act of 1987, the authorizing legislation for FHIP, requires the Secretary to establish guidelines for testing activities funded under the Private Enforcement Initiative of FHIP. The stated purpose of these guidelines is to ensure that investigations in support of fair housing enforcement efforts will "develop credible and objective evidence of discriminatory housing practices." Since regulations regarding the conduct of testing in support of fair housing enforcement efforts are required by the authorizing statute, HUD determined to include testing guidelines in the program regulations.

HUD believes that the objections raised by the three civil rights/fair housing organizations are without substance. HUD has conducted several studies which involved extensive fair housing testing on a nationwide basis and had sufficient experience in the area for development of proposed guidelines which would meet the statutory standard described above. HUD has now had the benefit of public comment with respect to the guidelines contained in its proposed rule and the views of all commenters have received consideration in the preparation of the final version of the testing Guidelines. A discussion of the various issues raised by these commenters with respect to specific provisions of the Guidelines is set forth below.

Section 125.405(b)—Definitions

Paragraph (b) of § 125.405 contains definitions used in that section. Paragraph (b)(1) contains the definition

of "bona fide allegation". The NAR, IREM and 8 other commenters specifically supported the requirement that funded tests may be undertaken only if there has been a "bona fide allegation" of a discriminatory housing practice. Seven commenters opposed the requirement.

Since the Private Enforcement Initiative is a demonstration program of limited duration and with limited financial resources, HUD believes that it should use a specifically structured testing program. FHIP was presented to Congress as a program to support the enforcement of the fair housing laws and not as a research effort to document whether discrimination exists. HUD therefore believes that it is reasonable to narrow the use of the limited resources available for this initiative to cases in which there is an indication of a violation of the fair housing laws. Accordingly, the bona fide allegation requirement has been retained in the final rule.

The NAR and four other commenters specifically supported the elimination of tester complaints from the definition of "bona fide allegation" in paragraph (b)(1). Seven commenters (four fair housing or civil rights groups, two State agencies, and the regional organization representing State and local agencies) opposed such elimination.

The proposed rule excluded allegations by testers and testing organizations in order to ensure the "bona fides" of bona fide allegations. There is no doubt that testers or testing organizations can be aggrieved and can file complaints. However, given the specific purpose of FHIP to provide assistance in support of individual cases and the limited resources available, HUD believes that the proposed limitation is reasonable and appropriate. The final rule retains this provision as proposed.

HUD notes that the exclusion of tester complaints does not prevent an organization participating in Private Enforcement testing from using other information which is not the result of testing as a bona fide allegation for the purpose of commencing an investigation and conducting funded testing. In addition, this exclusion does not compromise the rights of testers or the organizations participating in testing activities under the demonstration to seek relief under the Fair Housing Act and the U.S. Supreme Court decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1962).

Two commenters proposed a revision of the definition of "bona fide allegation". One of the fair housing

groups suggested that the definition be changed to read: "an assertion of a discriminatory housing practice unlawful under federal fair housing law by any individual which is attributable to a specific housing provider by an objective method." The Colorado Civil Rights Division stated that there are problems with the requirement of a statement of specific date, time and place of a prior discrimination. The fair housing group also noted that the proposed provision was unclear as to whether a test could be undertaken without knowing the address or owner before sending out the testers.

In response to the above comments, HUD has revised the definition to permit an approximation of the date, time or place of the alleged discrimination. Moreover, a sentence has been added to indicate that the definition of bona fide allegation does not impose a requirement that all such allegations be reduced to writing as a condition of the conduct of testing funded under FHIP.

With regard to paragraph (b)(2), a fair housing group suggested adding "42 U.S.C. 1982" to the definition of discriminatory housing practice. Since the statute limits programs or activities under FHIP to those designed to obtain enforcement of the rights granted by the Fair Housing Act or by substantially equivalent State or local laws, HUD cannot make the suggested addition. However, the definition has been modified to reflect the recent amendment of the Fair Housing Act which, among other things, expanded the definition of "discriminatory housing practice" to include acts made unlawful by section 818 of the amended act (prohibiting interference, coercion or intimidation with regard to the exercise or enjoyment of other rights protected by the Fair Housing Act).

Paragraph (b)(3) defines "test" and imposes several limitations on the types of tests which may be funded under the Private Enforcement Initiative. Two of these limitations—the requirement for testing the same agent and the requirement for two matched testers—were the subject of all of the comments on paragraph (b)(3). The NAR, IREM and six other commenters specifically supported either or both of these limitations. Five civil rights or fair housing groups and the Colorado Civil Rights Division opposed either or both of the limitations.

HUD has considered the arguments both for and against these two limitations and has decided to make no change in the regulations with respect to either of them. However, in the event that a participant in FHIP makes a good

faith effort, in conducting a test, to comply with these requirements but finds it impossible to meet one or both of them, HUD can nevertheless permit the use of FHIP Funds to pay for the testing activity. Reimbursement in these circumstances may be appropriate so that participants are not discouraged from conducting FHIP testing activities in response to all bona fide allegations, and it is also consistent with HUD's position that the Guidelines in this regulation are not intended to establish the only method of obtaining credible and objective evidence through testing in fair housing cases.

HUD has made an editorial change in the introductory language of paragraph (b)(3) to make it clear that any "test" conducted under the Guidelines must be in response to a bona fide allegation.

Section 125.405(c)—Eligible Activities

Paragraph (c) provides certain procedures which must be followed in conducting eligible testing activities. Paragraph (c)(2)(i) requires the careful recordation of all relevant information, after a test, on standardized forms. An attorney suggested adding language to require the tester to fill out the tester form in his or her own words. HUD does not believe that such a requirement is necessary; it is enough to have the tester sign the form to attest to its accuracy. Accordingly, the words "signed by the respective testers" have been inserted in paragraph (c)(2)(i).

As proposed, paragraph (c)(2)(ii) would have prohibited any contact or communication between pairs of testers until all information has been recorded and the testers debriefed by the testing coordinator. Four fair housing or civil rights groups took the position that there should be no prohibition on contact between testers, only on communication of testing experiences. One of these groups asked whether the proposed language was intended to prohibit visual contacts between testers (for coordination of tests).

HUD agrees with these commenters that the restriction in the proposed rule was not intended to prohibit all communication between testers. In response, HUD has revised paragraph (c)(2)(ii) to require a prohibition on communication between pairs of testers relating to the conduct of the test or to testing experiences or results. Thus, while matters related to the conduct or coordination of the tests would have to be handled by the testing coordinator, contact or communication between the testers themselves would be permitted for other purposes, such as sharing of transportation.

A fair housing group opposed the requirement in paragraph (c)(2)(iii) that the same or substantially equivalent type of housing accommodations, financing, or service be requested in a test. HUD believes that this requirement is needed for evidentiary purposes, and no change has been made.

The same fair housing group recommended that a definition of the term "systemic", which is used in paragraph (c)(2)(iv), be included in the regulations. In response, HUD has inserted the parenthetical phrase "a pattern or practice of discriminatory housing practices by a housing provider or lender" after the phrase "systemic discrimination" in the second sentence of paragraph (c)(2)(iv).

In paragraph (c)(2)(iv)(C), a fair housing group suggested substitution of the word "initiate" for "conduct", to allow for trips away from the office to visit houses or apartments during the course of a test. HUD has made the suggested change.

A fair housing group raised several issues with respect to the "paired tester" requirements of paragraph (c)(2)(iv)(A-D). First, the group took the position that, if a duplication of the complainant's profile is not required in systemic cases, there is no basis to require such duplication in the "individual" testers' profiles for non-systemic cases. Further, it should not be necessary to duplicate the profile or housing needs of the complainant in all respects; it should be sufficient for the testers to match each other. Finally, the group noted that the proposed provision is unclear as to which particular aspects of a complainant's profile need to be duplicated.

In response, HUD notes that in the systemic testing situation a number of tests will be conducted, while in testing for discrimination against an individual, only one test will usually be needed. In the systemic multi-test situation, it would not be practical to require that all testers' profiles match the profile of the complainant, since such a requirement would unduly restrict the range of systemic testing that could be conducted. Moreover, such a requirement would make it obvious to the respondent that testing was being conducted. However, in the single-test individual complaint situation, the profile-matching requirement would not cause the same problem. Nevertheless, HUD acknowledges that even in some individual complaint situations it may be difficult or undesirable to match the testers' profiles with that of the complainant. For example, in a case where the person making the bona fide

complaint has unusual housing needs or an unusual source of income, it may not be possible to have the testers represent that they have equivalent housing needs or a similar income source. Accordingly, HUD has inserted language in the first sentence of paragraph (c)(2)(iv) to indicate that the testers' profiles must match the complainant's profile only to the extent that it is practicable to do so.

With respect to the last of the fair housing group's comments, HUD believes that the proposed language concerning demographic profiles provides a degree of flexibility which would be lost if the provision were revised to specify which particular aspects of a complainant's profile must be duplicated.

In addition, the words "handicap" and "familial status" have been inserted in two places in paragraph (c)(2)(iv) to reflect amendments to the Fair Housing Act made by the Fair Housing Amendments Act of 1988.

Paragraph (c)(3)(i) prohibits testers and the testing organization from having an economic interest in the outcome of the test. A fair housing group asked whether "economic interest" includes a court-ordered requirement for management training. Also, does the provision bar fees for monitoring services?

Although a later, court-imposed provision for management training of a respondent's staff would not constitute an "economic interest" in the outcome of a test, such a provision would be barred by paragraph (d)(2), under which an applicant for funding of testing activities must agree not to "seek to provide fair housing educational services" to a respondent organization for compensation. With regard to the question of fees for monitoring services, HUD has revised paragraph (d)(2) to make it clear that educational and other services would be barred if compensation were involved.

There were several comments concerning paragraph (c)(3)(ii), which is designed to prevent conflicts of interest with respect to testers and testing organizations. A fair housing group asked whether that paragraph's conflict of interest provisions would operate to bar licensed housing providers from the board of directors of a fair housing agency. Instead, this commenter recommended setting a limit on the percentage of the organization's board which may be comprised of such persons. Since the members of an organization's board of directors are neither employees nor agents of the organization, the presence of licensed housing providers on the board would

not prevent the organization from engaging in testing activities under FHIP. Thus, it is not necessary to adopt the commenter's recommendation in order to allow housing providers to serve on the board of a testing organization.

The same commenter found it unclear whether the conduct of housing placement services by a fair housing organization would disqualify it from testing as a "licensed competitor". This commenter also questioned whether development of affordable housing would disqualify a fair housing organization. The commenter believes that such activities should not disqualify otherwise eligible fair housing groups from FHIP testing. If the nature of the services performed by the fair housing organization requires it to obtain a license, then the organization could be a licensed competitor of a testing subject "in the listing, rental, sale or financing of real estate property," thereby disqualifying the organization from using FHIP funds to test that subject. In the interest of keeping FHIP free of conflict of interest problems, HUD has not changed the regulations in response to this commenter's suggestion.

The Colorado Civil Rights Division recommended that there be an exception in paragraph (c)(3)(ii) for testing for Boards of Realtors and apartment associations that wish to do testing of their own members for self-policing or educational purposes. Under the authorizing statute, the primary purpose of the Private Enforcement Initiative demonstration is funding of programs or activities designed to obtain enforcement of the rights granted by the Fair Housing Act or substantially equivalent State or local laws. Therefore, HUD wishes to concentrate the limited resources available for testing activities on testing for enforcement purposes rather than spread the funding out to include testing of housing industry group members for self-policing or educational purposes. Accordingly, this recommended change has not been adopted.

A fair housing group commented that paragraph (c)(3)(ii) is too broad and too general. This commenter felt that while it is legitimate to bar those who might have a direct conflict of interest, there is no good reason to bar all real estate persons from testing. This group suggested two language changes. First, that the provision on prior employment or affiliation be revised by adding the words "within one year". Second, that the language on "licensed competitor" be changed to read:

"... is an active participant in a real estate sales, rental or financing business in the same immediate market, except that such a person exclusively engaged in rental real estate is not barred from acting as a tester of firms or agents exclusively engaged in real estate sales and such a person exclusively engaged in real estate sales is not barred from acting as a tester of firms or agents exclusively engaged in real estate rentals;"

HUD has adopted this group's first suggestion, since the provision as proposed would be too far-reaching and could serve to insulate a particular housing industry firm from testing if any former employee was now participating with a fair housing group conducting a testing program.

HUD has not adopted the second suggestion, to revise the "licensed competitor" language. HUD believes that this suggestion would draw too fine a distinction as to what constituted an impermissible conflict of interest for testing purposes and would unnecessarily complicate a clear and simple rule.

Section 125.405(d)—Application Requirements

Paragraph (d) of § 125.405 contains special requirements for applications for funding of testing activities.

The NAR, IREM and a local Board of Realtors specifically supported the requirement in paragraph (d)(1) that the applicant have at least one year of fair housing enforcement experience. The Colorado Civil Rights Division recommended an amendment to provide that an applicant agency may be acceptable, even in the absence of the required experience, if the agency can demonstrate that it will hire personnel, consultants or firms with demonstrated competence in the program proposed to be funded. HUD believed that the requirement in paragraph (d)(1) for a continuing commitment to fair housing enforcement is important as a prerequisite for participation in the testing program, and the suggested change has not been made.

A fair housing group suggested limiting the language of paragraph (d)(1) by adding the following: "by investigating fair housing complaints and seeking resolution through administrative or judicial actions." HUD believes that this additional requirement would be too restrictive and has not adopted the group's suggestion. However, HUD has added a requirement that the applicant show that it has sufficient knowledge of fair housing testing to enable it to implement a testing program successfully.

Paragraph (d)(2) bans solicitation of funds or compensation for services by

applicants from subjects of testing. The NAR, IREM and four other commenters specifically supported this provision. Two fair housing groups opposed it. As noted in the discussion of paragraph (c)(3)(i) above, HUD has made a clarifying change in paragraph (d)(2).

Section 125.405(e)—Performance Monitoring

A fair housing group recommended that the sanctions described in paragraph (e) not be applied to organizations acting in good faith. Since sanctions are discretionary rather than mandatory, it is contemplated that HUD will consider the "good faith" of an organization's actions in determining whether or not to impose sanctions on it.

Miscellaneous Comments

The U.S. League of Savings Institutions suggested that HUD publish, on an annual basis, an accounting of how FHIP funds were used in various program areas. Since the accounting suggested by this commenter would largely duplicate information to be contained in the quarterly report required to be submitted to the Senate and House Banking Committees (see discussion under "Statutory Requirements" above), HUD has not adopted the suggestion.

A local Board of Realtors and three individual Realtors made suggestions for compensation of real estate brokers for time lost as a result of testing. HUD points out that there is no provision in the authorizing legislation for the payment of such compensation. Accordingly, these suggestions have not been adopted.

The State of Connecticut Comprehensive Planning Division recommended that the regulations include a provision to allow for extensions of an agreement due to delay caused by circumstances beyond the grantee's control, such as loss of key personnel responsible for administration of the project. Extensions of time to perform specified activities under a contract, grant or cooperative agreement may be given by HUD on a case-by-case basis, as circumstances may warrant. There is no need to include such a provision in the FHIP regulations.

Other Matters

Under the provisions in the FHIP authorizing legislation, the Secretary, before providing any assistance under this program, is required to issue regulations governing applications for funding. Such regulations cannot be effective prior to the expiration of 90 calendar days from the date those

regulations are submitted to the House and Senate Banking Committees.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement 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 public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10278, 451 Seventh Street SW., Washington, DC 20410.

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.

Under 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. Although the activities to be undertaken with funding under FHIP may have some economic impact on a substantial number of smaller entities, HUD does not expect that there will be many cases in which the economic impact will be substantial. In addition, this rule would not significantly increase or decrease the administrative burden on persons conducting activities relating to the sale, rental or financing of dwellings.

HUD has determined that the policies contained in this rule do not have federalism implications within the meaning of E.O. 12612—*Federalism*, because it does not have substantial

direct effects on the States (including their political subdivisions), or on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government.

HUD has determined that this rule is not likely to have a significant impact on family formation, maintenance, and general well-being with the meaning of E.O. 12606—*The Family*, because it does not affect the role or institution of the family in society.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980 and have been assigned OMB Control Number 2529-0033. Sections 125.104(e), 125.105 and 125.404(d) of this final rule have been determined by the Department to contain collection of information requirements. Information on these requirements is provided as follows:

TABULATION OF ANNUAL REPORTING BURDEN FINAL RULE—FAIR HOUSING INITIATIVES PROGRAM

Description of information collection	Section of 24 CFR affected	Number of respondents	Total annual responses	Hours per response	Total hours
Application submission (2529-0033).....	§§ 125.105 and 125.404(d).....	500	1	71	35,500
Cooperative agreement, narrative and voucher submission report (2529-0033).....	§125.104(e).....	180	2	2	720
Recordkeeping for reports (2525-0033).....	§ 125.104(e).....	180	2	.5	180
Total annual burden.....					36,400

This rule was listed as Sequence Number 1042 in the Department's Semiannual Agenda of Regulations published on October 24, 1988 (53 FR 41974, 42006) under Executive Order 12991 and the Regulatory Flexibility Act.

The Catalogue of Federal Domestic Assistance Programs title and program numbers are:

- 14.408 Fair Housing Initiatives Program—Administrative Enforcement Initiative.
- 14.409 Fair Housing Initiatives Program—Education and Outreach Initiative.
- 14.410 Fair Housing Initiatives Program—Private Enforcement Initiative.

List of Subjects in 24 CFR Part 125

Fair housing, Grant programs, Housing and community development.

For the reasons set forth in the preamble, Title 24 of the Code of Federal Regulations is hereby amended by adding a new Part 125, to Subchapter A to read as follows:

PART 125—FAIR HOUSING INITIATIVES PROGRAM

Subpart A—General

- Sec.
- 125.101 Policy.
- 125.102 Purpose.
- 125.103 Definitions.
- 125.104 Program administration.105 Applications requirements.
- 125.106 Selection criteria.

Subpart B—Administrative Enforcement Initiative

- 125.201 Purpose.
- 125.202 Eligible agencies.
- 125.203 Eligible activities.

Subpart C—Education and Outreach Initiative

- 125.301 Purpose.
- 125.302 Eligible applicants.
- 125.303 Eligible activities.

Subpart D—Private Enforcement Initiative

- 125.401 Purpose.
- 125.402 Eligible applicants.
- 125.403 Eligible activities.
- 125.404 Use of funds for litigation.
- 125.405 Guidelines for Private Enforcement Testing.

Authority: Sec. 561, Housing and Community Development Act of 1987 (Pub. L. 100-242); section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General

§ 125.101 Policy.

Section 561 of the Housing and Community Development Act of 1987 established the Fair Housing Initiatives Program to strengthen the Department's effort to enforce Title VIII of the Civil Rights Act of 1968 (Title VIII) and to further fair housing. This program is intended to assist projects and activities designed to enhance compliance with Title VIII and substantially equivalent State and local fair housing laws.

§ 125.102 Purpose.

Under the Fair Housing Initiatives Program, the Department is authorized to make grants to, or enter into contracts or cooperative agreements with, State or local governments or their agencies, public or private non-profit organizations or institutions, or other

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public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.

§ 125.103 Definitions.

As used in this part

(a) "Assistant Secretary" means the Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development.

(b) "Department" means Department of Housing and Urban Development.

(c) "Discriminatory housing practice" means an act that is unlawful under sections 804, 805, 806 or 818 of Title VIII.

(d) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families (a family includes a single individual), or any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.

(e) "FHIP" means the Fair Housing Initiatives Program authorized by section 561 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988).

(f) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers and fiduciaries.

(g) "State" means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Title VIII" means Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3600-3620), commonly cited as the Fair Housing Act.

§ 125.104 Program administration.

(a) The Fair Housing Initiatives Program is administered by the Assistant Secretary.

(b) All funding in the Fair Housing Initiatives Program will be awarded on a competitive basis.

(c) The Department will provide funding in three separate areas:

- (1) The Administrative Enforcement Initiative (Subpart B);
- (2) The Education and Outreach Initiative (Subpart C); and
- (3) The Private Enforcement Initiative (Subpart D).

(d) Notices of Funding Availability under this program will be published periodically in the *Federal Register*. Such notices will announce the amount

of funds available, the funding available for any initiative and the maximum amounts to be awarded to applicants and may limit funding to one or more of the initiatives. The Notice of Funding Availability will include specific factors for award in addition to the specific criteria set forth in section 125.106 which the Assistant Secretary will use in selection of recipients to be funded and will indicate the relative weight of all selection criteria. The criteria for selection announced in Notices of Funding Availability will address the specific types of activities and projects to be solicited pursuant to the varied objectives of the three separate components of the FHIP, and will be designed to foster selections which are most likely to achieve results consistent with the objectives of each component of the program.

(e) All recipients of funds under this program must conform to reporting and record maintenance requirements determined appropriate by the Assistant Secretary. Procedures for monitoring program activities and funding will be established by the Assistant Secretary. Each funding instrument will include provisions under which the Department may suspend, terminate or recapture funds if the recipient does not conform to these requirements.

(f) All recipients of funds under this program which are State or local governments or agencies of State or local governments must conduct audits in accordance with Part 44 of this Title.

§ 125.105 Applications requirements.

Each application for funding under the Fair Housing Initiatives Program must contain the items set forth below. Each application will be assessed against specific selection criteria set forth in a Notice of Funding Availability.

(a) A description of the practice (or practices) at the community, regional or national level which has affected adversely the achievement of the goal of fair housing. This description must include a discussion and analysis of the housing practice(s) identified, including available information and studies relating to discriminatory housing practices and their historical background, and relevant demographic data indicating the nature and extent of the impact of such practices on persons seeking dwellings or services related to the sale, rental and financing of dwellings in the general location where the applicant proposes to undertake activities;

(b) A description of the specific activities to be conducted with funds including the final product(s) and/or any reports to be produced; and the cost of

each activity proposed and a schedule for completion of the funded activities;

(c) A description of the applicant's experience in formulating or carrying out programs to prevent or eliminate discriminatory housing practices;

(d) A statement indicating the need for Federal funding in support of the proposed project; and an estimate of such other public or private resources as may be available to assist the proposed activities;

(e) A description of the procedures to be used for monitoring conduct and assessing results of the proposed activities;

(f) A description of the benefits which successful completion of the project will produce to enhance fair housing and the concerns identified, and the indicators by which these benefits are to be measured;

(g) A description of the expected long term viability of project results;

(h) Any additional information which may be required by a Notice of Funding Availability for the Fair Housing Initiatives Program published in the *Federal Register*.

(Approved by the Office of Management and Budget under control number 2529-0033.)

§ 125.106 Selection criteria.

(a) Projects proposed in applications will be ranked based on the following criteria for selection:

- (1) The anticipated impact of the project proposed on the concerns identified in the application;
- (2) The extent to which the project utilizes other public or private resources that may be available;
- (3) The extent to which the applicant's professional and organizational experience will further the achievement of the project goal(s);
- (4) The extent to which the project provide the project will provide the maximum impact on the concerns identified in a cost effective manner;
- (5) The extent to which the project will provide benefits in support of fair housing after funded activities have been completed.

(b) The relative weight to be assigned to these selection criteria as well as additional factors which will be considered in reviewing applications will be included in the Notice of Funding Availability, together with a stated rationale, justifying the additional factors selected in terms of the specific goals of each initiative for which funds are being made available.

Subpart B—Administrative Enforcement Initiative

§ 125.201 Purpose.

The Administrative Enforcement Initiative provides funding to State and local fair housing agencies administering fair housing laws recognized by the secretary as providing rights and remedies which are substantially equivalent to those provided in Title VIII.

§ 125.202 Eligible agencies.

A State or local fair housing agency, to be eligible to participate in the Administrative Enforcement Initiative, must be certified by the Assistant Secretary as substantially equivalent (or considered to be so certified) under § 115.6 of this subchapter.

§ 125.203 Eligible activities.

Funding will be available to support activities designed to strengthen and broaden the range of enforcement and compliance activities conducted by eligible State and local agencies. Such activities may include (but are not limited to) the following:

- (a) Providing technical assistance to State and local government agencies administering housing and community development programs concerning applicable fair housing laws and regulations;
- (b) Implementing fair housing testing programs; and
- (c) Conducting investigations of systemic discrimination for further enforcement processing by State or local agencies, or for referral to HUD and the Department of Justice.

Subpart C—Education and Outreach Initiative

§ 125.301 Purpose.

The Education and Outreach Initiative of the Fair Housing Initiatives Program provides funding for the purpose of developing, implementing, carrying out, or coordinating education and outreach programs designed to inform members of the public concerning their rights and obligations under the provisions of fair housing laws. Funding is provided under this Initiative for the development of national, regional or local media campaigns (written or audio-visual materials) or other special efforts to educate the general public and housing industry groups about fair housing rights and obligations.

§ 125.302 Eligible applicants.

The following types of organizations are eligible to receive funding under the Education and Outreach Initiative:

- (a) State or local governments;

(b) Public or private non-profit organizations or institutions, and other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.

§ 125.303 Eligible activities.

(a) *Educational projects.* Educational projects that may be funded under the Educational and Outreach Initiatives may include (but are not limited to) the following:

- (1) Developing informative material on fair housing rights and responsibilities;
- (2) Developing fair housing and affirmative marketing instructional material for education programs for national, regional and local housing industry groups;
- (3) Providing educational seminars and working sessions for civic associations, community-based organizations, and other groups; and
- (4) Developing educational material targeted at persons in need of specific or additional information on their fair housing rights.

(b) *Outreach projects.* Outreach projects that may be funded under the Educational and Outreach Initiative may include (but are not limited to) the following:

- (1) Developing national, regional or local media campaigns regarding fair housing;
- (2) Bringing housing industry and civic or fair housing groups together to identify illegal real estate practices and to determine how to correct them;
- (3) Designing specialized outreach projects to inform all persons of the availability of housing opportunities;
- (4) Developing and implementing a response to new or more sophisticated practices that result in discriminatory housing practices; and
- (5) Developing mechanisms for the identification of, and quick response to, housing discrimination cases involving the threat of physical harm.

(c) *Classes or competition.* The Notice of Funding Availability for the Educational and Outreach Initiative may be divided funding into classes based on the type of projects (e.g., educational or outreach projects) and the scope of projects (e.g., local, regional or national).

(d) *Coordination of activities.* Each non-governmental applicant for funding which is located within the jurisdiction of a State or local enforcement agency or agencies administering a fair housing law which have been certified by the Department under Part 115 of this subchapter as being substantially equivalent must provide with its application evidence that it has

consulted with the agency or agencies to coordinate activities to be funded under the Education and Outreach Initiative.

Subpart D—Private Enforcement Initiative

§ 125.401 Purpose.

The Private Enforcement Initiative of the Fair Housing Initiatives Program will provide funding to non-profit organizations and other private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices. The purpose of these awards is to assist in the developing, implementing, carrying out, or coordinating programs or activities designed to obtain enforcement of the rights granted by Title VIII or State or local laws that provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies provided in Title VIII.

§ 125.402 Eligible applicants.

Organizations which are eligible to receive assistance under the Private Enforcement Initiatives are private non-profit organizations and other private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices. Organizations which can be eligible include, for example, private nonprofit fair housing and civil rights groups.

§ 125.403 Eligible activities.

Projects that will be funded under the Private Enforcement Initiative may include (but are not limited to) the following:

- (a) Conducting investigations of systemic housing discrimination.
- (b) Professionally conducting testing or other investigative support for administrative and judicial enforcement;
- (c) Linking fair housing organizations regionally in enforcement activities designed to combat broader housing market discriminatory practices; and
- (d) Establishing effective means of meeting legal expenses in support of litigation of fair housing cases.

§ 125.404 Use of funds for litigation.

No recipient of assistance under the Private Enforcement Initiative may use any funds provided by the Department for the payment of expenses in connection with litigation against the United States.

§ 125.405 Guidelines for private enforcement testing.

(a) The guidelines contained in this section apply to testing activities funded under the Private Enforcement Initiative.

These guidelines apply only to testing activities funded under this initiative and do not limit or restrict the use of facts secured through other testing activities in any legal proceeding under Federal fair housing laws. Nothing in this section restricts individuals or entities participating in the Fair Housing Initiatives Program from pursuing any right or remedy guaranteed by Federal law, or from the conduct of other testing or other investigative activities not funded under the Private Enforcement Initiative.

(b) *Definitions.* As used in this section:

(1) The term "bona fide allegation" means an assertion of a discriminatory housing practice unlawful under Federal fair housing law. For purposes of these guidelines, an allegation by a person engaged as a tester, whether or not compensated, or by any organization, employee, or agent engaged directly in the initiation, administration, evaluation, or conduct of tests is not a bona fide allegation. The allegation must state specifically and in detail the facts and circumstances which are believed to constitute the discriminatory housing practice; these facts should include the date, time, and place (or an approximation of the date, time or place) of the alleged discrimination, and the name of each person or firm allegedly engaged in the discriminatory housing practice. However, while the allegation must be documented, it need not be reduced to writing prior to the conduct of a test.

(2) The term "discriminatory housing practice" means any action made unlawful by section 804, 805, 806 or 818 of Title VIII (42 U.S.C. 3604, 3605, 3606 or 3618).

(3) The term "test" means a method of gathering credible and objective evidence of whether a discriminatory housing practice has occurred, conducted in response to a bona fide allegation. For purposes of tests conducted under these guidelines:

(i) In the case of a test conducted in response to an allegation involving the rental or financing of a home or apartment, a test must include one or more visits by at least two individual testers to the lender, rental agent, management firm or owner alleged to have discriminated.

(ii) In the case of a test conducted in response to an allegation involving the purchase of a home, a test must include one or more visits by at least two individual testers to the individual sales agent or owner alleged to have discriminated; or if a firm is alleged to have engaged in discriminatory housing practices and if no sales agent of the

firm has been identified as having discriminated, then the test must include one or more visits by at least two paired testers as defined in paragraph (c)(2)(iv) of this section to any sales agent identified by the testing program. The test requirements specified shall not excuse any employer, broker, firm, or owner from such liability as the law imposes on them for the conduct of their employees or licensees affiliated with them. Nothing here shall limit the number of test visits which can be made or funded.

(4) The term "testers" means individuals, who without an intent to rent, purchase, or finance a home or apartment, pose as renters, purchasers, or borrowers for the purpose of collecting evidence of discriminatory housing practices.

(c) *Eligible activities.* Eligible testing activities must be conducted in accordance with procedures contained in the application for assistance. These procedures shall include the following:

(1) A formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers. Recruits must not have prior felony convictions or convictions of crimes involving fraud or perjury.

(2) A tester training program which will—

(i) Require the careful recollection of all relevant information on standardized forms, signed by the respective testers, following completion of the test;

(ii) Prohibit any communication between pairs of testers relating to the conduct of the test or to testing experiences or results until all information has been recorded and the testers debriefed by the testing coordinator;

(iii) Require that the same or substantially equivalent type of housing accommodations, financing, or service be requested; and

(iv) Require that, to the extent practicable, testers identify themselves as having the same or substantially equivalent housing needs and demographic profiles as the person who made the bona fide allegation, except for the person's race, color, religion, sex, handicap, familial status, nationality, or other attribute which is the basis of the alleged discrimination. In cases of testing for systemic discrimination (e.g., a pattern or practice of discriminatory housing practices by a housing provider or lender), demographic profiles may vary from that of the person who made the bona fide allegation so long as the test of each agent or owner is a "paired" test. For the purpose of these guidelines, a "paired test" means that the two

testers who will conduct the "paired test" shall—

(A) Have the same or substantially similar demographic profiles, except for their race, color, religion, handicap, familial status, sex, nationality, or other attribute which is the basis of the alleged discrimination;

(B) Have the same or substantially similar housing requirements;

(C) Initiate the test at the same office or in the same or substantially similar transactional conditions and circumstances; and

(D) Conduct the test in a timely manner.

(3) A tester assignment and control system which will assure that neither the tester, nor the organization conducting the test, including its employees and agents—

(i) Has an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury (see, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), 3 PHEOH ¶ 15,341); or

(ii) Has a specific bias toward either the person who made the bona fide allegation or the respondent; is a relative of one of the parties in the case; has had any employment or affiliation within one year with the person or organization to be tested; is a licensed competitor of such person or organization in the listing, rental, sale, or financing of real estate property; or has any other specific bias or conflict of interest which would prevent or limit his or her objectivity or fairness.

(d) *Application requirements.* Applications for funding of testing activities must include, in addition to the requirements set forth in § 125.105:

(1) Documentation that the applicant has at least one year of experience in carrying out a program to prevent or eliminate discriminatory housing practices and has sufficient knowledge of fair housing testing to enable the applicant to implement a testing program successfully.

(2) A certification providing that the applicant will not solicit funds from or seek to provide fair housing educational or other services or products for compensation, directly or indirectly, to any person or organization which has been the subject of testing by the applicant for a 12-month period following a test;

(3) A description of the process to be used to recruit testers;

(4) A description of the tester training program; and

(5) Copies of forms used to document allegations and to record the experience of testers.

(Approved by the Office of Management and Budget under control number 2529-0033, expires May 31, 1991.)

(e) *Performance monitoring.* An applicant failing to comply with the testing requirements or the procedures

set forth in its application for funding shall be liable for such sanctions as may be authorized by law. These sanctions include repayment of improperly used funds, termination of further participation in the initiative, reduction or limitation of further funding for investigatory activities, recapture of improperly expended funds, and denial

of further participation in programs of the Department or any Federal agency.

Dated: January 6, 1989.

Judith Y. Brachman,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 89-3200 Filed 2-9-89; 8:45 am]

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