

Enforcement, Administrative Proceedings Division, Department of Housing and Urban Development, 1250 Maryland Avenue, Suite 200, Washington, DC 20024-0500; telephone (202) 708-2350 (this is not a toll-free number); e-mail:

Dane M. Narode@hud.gov. Hearing-or speech-impaired individuals may access the voice telephone number listed above by calling the toll-free Federal Information Relay Service during working hours at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

The January 23, 2002, Common Rule

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

HUD's July 22, 2002, Proposed Rule

HUD published a proposed rule on July 22, 2002 (67 FR 48006), to adopt the changes and amendments made in the common rule. Additionally, HUD proposed to adopt specific requirements that, along with the provisions in the common rule, would best serve HUD's programs. HUD's proposed rule added a paragraph regarding employment contracts to the definition of "covered transaction" found at § 24.200. HUD's addition made clear that each payment under an employment contract constitutes a new "covered transaction." HUD also enhanced the exclusion review that takes place in § 24.300. Under HUD's rule, a participant must ensure it is not entering into a covered transaction with an excluded or disqualified person. In reviewing for an exclusion, however, HUD's rule, at § 24.300(d), exempts participants from checking on the exemption status of their principals while making salary payments pursuant to an employment contract. Additionally, § 24.440 proposed to use terms or conditions to the award transaction as a means to enforce exclusions under HUD transactions rather than the use of written certifications.

HUD proposed rule provided examples for the debarment and suspension common rule definition of "principal" found at § 24.995. The expansion contains minor modifications consistent with HUD's present practice regarding the definition of "principal" for the purpose of debarments and

suspensions. The proposed rule advised that HUD would retain its definitions of "Hearing Officer" at § 24.947 and "Ultimate Beneficiary" at § 24.1017 as found in the current common rule. The proposed rule made clear in § 24.750 and § 24.845 that all fact-finding referrals for HUD suspensions and debarments will be made to hearing officers.

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

Finally, HUD's rule proposed to enact the requirements for maintaining a drug-free workplace as a new part 21, codifying HUD's drug-free workplace requirements.

The public comment period on the proposed rule closed on September 20, 2002. One commenter submitted comments on the proposed rule.

This Final Rule

This final rule follows publication of the July 22, 2002, proposed rule and takes into consideration the one public comment received. The public comment, along with the Department's responses to the comment, is treated below. However, the Department was not persuaded to change the rule. Accordingly, this final rule adopts the July 22, 2002, proposed rule without change except for the minor modifications identified below necessary to keep the Department's rule consistent with the common rule and existing practice.

In response to an internal comment, the Department has replaced the formulation used to refer to the "Agency head or designee" wherever used in the common rule. The proposed rule originally referred to the "HUD Debarment Official or designee." That formulation has been replaced with the "Secretary or designee" in the final rule. This text change does not modify the meaning of the proposed rule as all debarment authority within the Agency stems from the Secretary's delegable authority. Similarly, the textual modification is consistent with current practice in the Department.

The Department, based upon another internal comment, has made a minor modification to its procedures for when a suspension or proposed debarment has been issued subsequent to the issuance of a limited denial of participation. Under this modification, the hearing officer's jurisdiction over a limited denial of participation will not be immediately divested upon consolidation of the matter with a suspension or a proposed debarment. Upon consolidation, the suspending or debarment official must determine whether material facts are in dispute within 90 days of consolidation unless good cause exists to extend this time. In the event material facts are in dispute, the matters will be referred to the original hearing officer for fact-finding. The Department does not regard this as a material modification.

Comment: The commenter requested that the Department clarify the extent to which the drug-free workplace requirements apply to the residences of telecommuters and other remote workers.

HUD Response: The Department believes this issue was adequately addressed in the final governmentwide rule of May 25, 1990 (55 FR 21681), in response to comments regarding regulations promulgated pursuant to the Drug-Free Workplace Act of 1988. (See especially, 55 FR 21683.)

Comment: The commenter also asked whether the proposed rule intended that collective bargaining agreements be included in the term "employment contracts." The commenter wrote that the rule should clarify that the term "employment contracts" does not include a collective bargaining agreement between an employer and its employees' unions. According to the commenter, the exclusion of collective bargaining agreements as employment contracts is important because, if a principal of a union were excluded, the state would not be permitted to "contracts" with that union. The commenter further wrote that if "employment contracts" mean a consulting contract, it is a redundancy because consultant contracts are already covered in § 24.200.

HUD Response: The Department's proposal does not enlarge the scope of employment contracts (*i.e.*, those that are covered transactions, *e.g.*, a Housing Authority's employment of a Public Housing Executive Director using funds provided pursuant to a Consolidated Annual Contributions Contract) to include a collective bargaining agreement. The proposal merely reinforces the concept that each payment made under an employment