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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3560

RIN 0575-AC93

Civil Monetary Penalties

AGENCY: Rural Housing Service, USDA.

ACTION: Final Rule.

SUMMARY: The Rural Housing Service (RHS or Agency) is implementing its civil monetary penalty provision.

Currently, the Agency is limited to severe actions, such as acceleration and foreclosure, as a remedy for non-monetary compliance violations, actions that may not be in the best interest of the government. New Civil Monetary Penalties regulations will enable the Agency to target the non-monetary default issues and elicit compliance by the borrower without such a drastic step as foreclosure. By implementing procedures for Civil Monetary Penalties, the Agency will be provided an important tool to enforce compliance with the regulations.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. However,

there will be an implementation period for this rule that will allow the Agency to ensure that proper guidance is disseminated. The implementation date is [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stephanie White,
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SUPPLEMENTARY INFORMATION:

Executive Order 12866, Classification

This rule has been determined to be not significant for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB).

Authority

The civil monetary penalty provision is authorized under section 543(b) of the Housing Act of 1949, as amended (42 U.S.C. 1490s(b)).

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1970. RHS has determined that this action does not constitute a major Federal action significantly

affecting the quality of the environment. In accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., an Environmental Impact Statement is not required.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Under Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency has determined and certified by signature on this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded program nor does it require any more action on the part of a small business than required of a large entity.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This rule does not impose substantial direct compliance costs on State and local

Governments; therefore, consultation with the States is not required.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

Unfunded Mandate Reform Act (UMRA)

Title II of the UMRA, Pub. L. 104-4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal Agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with "Federal mandates" that may result in expenditures to State, local, or tribal

Governments, in the aggregate, or to the private sector, of \$100 million or more in any 1-year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Paperwork Reduction Act of 1995

The revisions in this rulemaking for 7 CFR part 3560 are subject to the Paperwork Reduction Act package with the assigned OMB control number of 0575-0189. No changes would impact that package.

E-Government Act Compliance

RHS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities

for citizen access to Government information and services and for other purposes.

Programs Affected

The programs affected by this regulation are listed in the Catalog of Federal Domestic Assistance under Section 514 program and Section 516 program (10.405); Section 515 program (10.415); Section 521 (10.427); and Section 542 (10.448).

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

This executive order imposes requirements on RHS in the development of regulatory policies that have tribal implications or preempt tribal laws. RHS has determined that the rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, the rule is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RHS on this rule, they are encouraged to contact USDA's Office of Tribal Relations or Rural Development's Native American Coordinator at (720) 544-2911 or AIAN@wdc.usda.gov

to request such consultation.

Executive Order 12372, Intergovernmental Review of Federal Programs

This final rule is subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. RHS conducts intergovernmental consultations for each loan and grant in a manner delineated in 7 CFR part 3015 subpart V.

Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identification (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases

apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

- 1) mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9410;
- 2) fax: (202) 690-7442; or

3) e-mail: program.intake@usda.gov.

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I. Background

Section 543(b) of the Housing Act of 1949 as amended (hereinafter the Act) (42 USC 1490s(b)) states for 5 different types of violations, "the Secretary may, after notice and opportunity for a hearing, impose a civil monetary penalty (CMP) against any individual or entity, including its owners, officers, directors, general partners, limited partners, or employees, who knowingly and materially violate, or participate in the violation of the Act or its regulations."

In the proposed rule published in the Federal Register on January 4, 2013 (78 FR 672) RHS proposed to implement two civil monetary penalty provisions. First, RHS proposed to amend its regulations to create a new section for imposing civil monetary penalties under the authority of 42 U.S.C. 1490s (section 543 of the Housing Act of 1949, as amended (Act)) (Housing Act CMP). Second, RHS proposed to adopt the USDA civil monetary penalty provisions for the Program Fraud Civil Remedies Act of 1986 (PFCRA) in a

revision to an existing regulation (PFCRA CMP). In the proposed rule, RHS addressed the following issues for CMP:

1. Procedures for the determination of the civil monetary penalties;
2. Procedures for the administrative hearing;
3. Establishing fines; and
4. Procedures for the collection of fines.

In the final rule, Multi-Family Housing (MFH) will set out procedures to use the USDA Administrative Law Judges' office to conduct the hearings for the civil monetary penalty program. The Administrative Law Judges conduct similar hearings for other USDA agencies. The Administrative Law Judges' regulations allow within its jurisdiction, "other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration." See 7 CFR 1.131(b)(6) Rural Housing Service (RHS) received concurrence in conducting MFH's civil monetary penalty hearings through the Administrative Law Judges' office.

The Agency expects about 50 CMP cases annually.

II. Summary of Comments and Responses:

On January 4, 2013 (78 FR 672), the Agency published a proposed rule for Civil Monetary Penalties. A thirty-day

comment period that ended February 4, 2013, was provided. Fifty-one comments were received from eleven stakeholders, including housing associations, housing advocates, and individuals. RHS is also including five comments relating to civil monetary penalties received from an interim rule titled "Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs", which was published on November 26, 2004 (69 FR 69032-69176). Of the comments received, two comments were deemed not relevant to the rule, as the comments were not related to the CMP proposed rule.

The Agency will adopt the following comments:

Duplication and vagueness of CMP/PFCRA: Twenty-one comments mentioned that the proposed rule was broad and vague. Comments expressed concern about the duplication and overlap of existing rules created by the proposed rule. Several commenters requested that the Agency explain the need for Program Fraud Civil Remedies Act (PFCRA) in the proposed rule. The Agency has reviewed the comments and agrees that the inclusion of PFCRA provisions in the proposed rule created repetition and overlap, so they have been removed. Accordingly, the Agency has determined that 7 CFR part 1, subpart L, Procedures Related to Administrative Hearings Under the Program Fraud Civil

Remedies Act of 1986, will be replaced with references to 7 CFR part 1, subpart H-Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes.

The majority of borrowers and management agents within the multifamily portfolio comply with Agency regulations and procedures and will not be affected by this rule. We estimate that less than five percent of the multifamily portfolio will be affected by the CMP rule.

CMP Process: Ten comments expressed concerns about the CMP process. Those concerns included:

- Two comments concerning the timeliness and use of the Attorney General. The concern was that the use of the United States Attorney's office could take years delaying completion of any civil monetary penalty against the individual or entity.

- One commenter raised a concern about the role of the Office of General Counsel (OGC) and its impact on the length of time for completing a CMP case and whether it had adequate staffing to handle such matters.

- One comment requested clearer guidance on the role and process of the Fraud Claims Officer, and the designation of the reviewing official.
- One comment objected to the pre-penalty notices warning that a penalty may be coming if the Agency did not receive adequate performance.
- Five comments were received that raised concerns about the complicated methodology of the process, ambiguous deadlines, and the standards for maintaining a property.
- Another comment suggested that the rule clearly limit which portions of Part 1 apply so, for example, the Agency is clear that it is not seeking to take on the Office of Inspector General (OIG) investigation powers, but is still providing full and adequate discovery and hearing procedures.
- Another commenter suggested an initial process using the State Director or Program Director.
- The Agency considered all of the comments above and changed the rule by enlisting the Office of Administrative Law Judges to administer civil monetary hearings to address the concerns of due process. References to the Fraud Office, of which there is no equivalent in USDA have been removed. No specific pre-

penalty notice will be provided. Instead the Agency will use servicing letters in the existing guidance provided in the Serving Handbook. The Administrative Law Judges conduct similar hearings for other U.S. Department of Agriculture agencies. The Administrative Law Judges' regulations allow within its jurisdiction, "other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration." See 7 CFR 1.131(b)(6). The Agency process will be similar to that used by Investigative and Enforcement Services of the Animal and Plant Health Inspection Service (APHIS). Borrowers will have an opportunity to resolve the findings or deficiencies by working with the State Director and Agency staff prior through its regulatory loan servicing procedures prior to a CMP hearing. As with other loan servicing actions, the Agency will complete its loan servicing pursuant to 7 CFR part 3560 of the Borrower's loan account before pursuing civil monetary penalties. Pursuant to 7 CFR 3560.456(b), the Agency will make a determination on whether to proceed with an acceleration or seek CMPs. The Office of General Counsel will review the cases to ensure legal sufficiency as well as represent the Agency on any cases that they recommend to move forward.

Once forwarded, the timing of the process will be incumbent on the caseload of the Office of the Administrative Law Judges.

The Agency will amend §3560.461(b)(2) adding references to 7 CFR part 1 subpart H-Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes. In response to comments concerning duplicity, due process and procedural concerns the Agency determined it will use its authority in section 543(b) Housing Act authority and this subpart rather than 7 CFR part 1, subpart L.

CMP Fees: Three commenters expressed concerns about the fee structure and its reasonableness. As described in the proposed rule, the CMP fees will be assessed in accordance with 7 CFR part 3, subpart I. The Administrative Law Judge will use the criteria in the final rule and the requirements in section 3.91(b)(8) to determine the fees. The Agency believes that the fees set in the final rule will be reasonable. With the threshold of the fees independently established in USDA regulation and the assessment of the CMP fees imposed by the Administrative Law Judges, the Agency believes these measures eliminate any potential RHS subjectivity or bias.

- **Failure to Disclose:** One commenter requested that the Agency add a section to the rule that specifies the failure to disclose proper identity-of-interest information on site managers and contractors as a cause to impose CMP. We agree this should be included and have adopted the comment. This requirement is addressed in §3560.461(b)(1)(iii) entitled, "Failing to submit information requested by the Agency in a timely manner."

The Agency will not adopt the following comments:

Non-profits: Six commenters were concerned about the negative impact of the rule on non-profit borrowers. Some requested exempt status or a 24-month grace period for implementation when a non-profit obtains a property through a transfer and assumption.

The Agency does not see a need to adopt the comment because all borrowers, including non-profits, are required to adhere to the requirements of 7 CFR part 3560. In addition, MFH will work with the non-profits to assist them in bringing the properties into compliance with MFH regulations. As a result, MFH does not think it is necessary to implement a 24 month grace period.

Liability Concerns: One commenter expressed concerns about liability in the case of a Limited Liability

Corporation (LLC) and whether the tenant could be liable. It is ultimately the borrower's responsibility to remain compliant with the program regulations. False information provided by the tenant resulting in unauthorized benefits may be pursued under 7 CFR part 3560, subpart O-Unauthorized Assistance. The Agency will determine borrower liability on a case-by-case basis and as the regulation and law allows. A Tenant may be liable under the CMP and is subject to the requirements of this rule.

Lack of Resources: One commenter requested that the rule clarify that civil monetary penalties will not be sought or assessed under circumstances where the primary cause of a failure to properly manage or maintain a project results from a lack of available funds where the borrower has requested rental increases or additional loans or grants in order to maintain and repair the project, but such requests have been denied. The Agency understands the commenter's concern. The Agency is choosing not to adopt the comment because the Agency is confident it can work with borrowers on tools that are available, which may include rent increases in accordance with 7 CFR part 3560, subpart E and other servicing options available under subpart J.

List of Subjects in 7 CFR Part 3560

Aged, Loan programs-Agriculture, Loan programs-Housing and Community Development, Low and moderate income housing, Public housing, Rent subsidies.

For the reasons set forth in the preamble, chapter XXXV, Title 7 of the Code of Federal Regulations is amended as follows:

PART 3560 - DIRECT MULTI-FAMILY HOUSING LOANS AND GRANTS

1. The authority citation for part 3560 continues to read as follows:

Authority: 42 U.S.C. 1480.

Subpart J--Special Servicing, Enforcement, Liquidation, and Other Actions

2. Amend § 3560.461 by revising paragraphs (b) (2) and (b) (4) to read as follows:

§ 3560.461 Enforcement provisions.

* * * * *

(b) ***

(2) *Amount.* Civil penalties shall be assessed in accordance with 7 CFR part 3, subpart I. In determining

the amount of a civil monetary penalty under this section,
the Agency must take into consideration:

(i) The gravity of the offense;

(ii) Any history of prior offenses by the violator
(including offenses occurring prior to the enactment of
this section);

(iii) Any injury to tenants;

(iv) Any injury to the public;

(v) Any benefits received by the violator as a result
of the violation;

(vi) Deterrence of future violations; and

(vii) Such other factors as the Agency may establish
by regulation.

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(4) Hearings under this part shall be conducted in
accordance with the procedures applicable to hearings in
accordance with 7 CFR part 1, subpart H.

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Tony Hernandez
Administrator
Rural Housing Service

July 25, 2016
Date

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