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Final Rule: RHS Civil Money Penalties

Background

In January 2013, the U.S. Department of Agriculture (USDA), Rural Housing Service (RHS), issued a [proposed rule](#) to provide additional procedural detail on how the agency seeks to implement civil monetary penalties (CMPs) provisions while at the same time “providing due process protection to program participants.”

Stakeholders were offered the opportunity by RHS to comment on the 2013 proposed rule and the use of CMPs on owners or managers of rural affordable housing programs assisted by RHS. After gathering feedback from members involved in the management of rural affordable housing programs, NAHMA submitted comments on the 2013 proposed rule. After reviewing NAHMA’s comments and the comments of other stakeholder groups, RHS made alterations to the proposed rule changes. The Agency recently issued its [final rule](#) concerning CMPs on August 23, 2016. This rule goes into effect on September 22, 2016. However, RHS stated in the final rule that there will be an implementation period for this rule to allow adequate time for the publication of proper guidance. The implementation date is December 21, 2016.

This NAHMAanalysis will examine the comments made to the 2013 proposed rule in comparison with the final rule.

2013 CMP Proposed Rule

The proposed rule issued by RHS in 2013 outlined general parameters for when a CMP may be imposed against an individual or property entity, including its owners, officers, general partners, limited partners, or employees who knowingly violate, or participate in the violation of, the provisions of the RHS programs.

Under the proposed rule, actions which could result in a CMP included:

1. Submitting information to the Agency that is false;
2. Providing the Agency with false certifications;
3. Failing to submit information requested by the Agency in a timely manner;
4. Failing to maintain the property (subject to program loans or grants) in good repair and condition;
5. Failing to provide management for a project that received a loan or grant. Failures could relate to fiscal management, such as failure to maintain reserve accounts and

unauthorized use of funds in such reserve accounts, failure to handle vacancies in accordance with RHS regulations, or failure to handle rent collection in accordance with regulations; and

6. Failing to comply with the provisions of applicable civil rights statutes and regulations.

In the proposed rule, RHS did note that the CMP amount would be assessed after considering:

1. The gravity of the offense;
2. Any history of prior offenses;
3. Any injury to tenants or to the public;
4. Any benefits received as a result of the violation;
5. Deterrence of future violations;
6. The degree of culpability; and
7. The Respondent's ability to pay the penalty.

NAHMA members' opposition to the rule was strong. Members rejected RHS's proposal to implement CMPs as written. In our comments, NAHMA noted that owners understand CMPs as an available regulatory tool and did not object to RHS's goal of updating its rules for implementing CMPs, in of itself. Instead, NAHMA emphasized the proposed rule was far too broad to be acceptable in the terms proposed by RHS. NAHMA highlighted the proposed rule completely failed to define the scope of penalties and the examples of covered actions subject to CMPs were not all-inclusive. Likewise, members were unable to determine exactly which individuals and/or entities RHS would pursue CMPs against for specific violations.

Additionally, members expressed extreme concern that the proposal failed to recognize the real difficulty of maintaining properties in the absence of adequate resources from RHS. The prospect of facing CMPs, for physical or financial conditions of properties which RHS has denied rent increases or additional funding to properly maintain the property, was troubling and unfair.

2016 Final CMP Rule

After reviewing the comments submitted by NAHMA and other stakeholder groups, RHS issued its final rule regarding CMPs on August 23, 2016 with specific responses to comments submitted by stakeholders and the public. Some comments and suggestions were adopted while others were addressed but the policy remains unchanged from the proposed rule.

Duplication and Vagueness of CMP Guidelines

Similar to NAHMA's comments, many responders were critical of the proposed rule's broad guidelines and vagueness. There were also comments expressing concern about the duplication and overlap of existing rules created by the proposed rule. Several commenters identified the duplicative factors that would occur should the Agency include additional provisions from the Program Fraud Civil Remedies Act (PFCRA) for RHS in the proposed rule. The PFCRA was enacted in 1986 so that smaller claims could be handled in an administrative process since it is not feasible for the government to handle every conceivable case of a false claim in procurement under the False Claims Act. The PFCRA has a \$150,000 cap on damages, rendering it inadequate for the prosecution of large-scale fraud.

Commenters asked the Agency to explain why it was pursuing incorporation of the PFCRA into RHS policy through the proposed rule since, as previously noted, RHS had begun development

of CMP use under the PFCRA in its programs in the 2004 rule change. Upon review, RHS agreed that the inclusion of PFCRA provisions in the proposed rule created repetition and overlap, and ultimately it has been removed from the final rule.

Enforcement Process and Civil Monetary Hearings

Although the 2013 proposal included provisions for owners to challenge CMP decisions, these provisions failed to completely address the concerns of all stakeholders. The 2016 final rule outlined some of the concerns raised in the comments. One commenter raised concern over the use of the Attorney General as written in the proposed rule. RHS had originally proposed that the Attorney General of the United States could possibly bring action in a District Court to obtain monetary judgment against the owner should they fail to comply with a final determination imposing a CMP.

The concern was that the use of the United States Attorney's office could take years, delaying completion of any CMP against the individual or entity organization. There was additional concern about the role of the USDA Office of General Counsel (OGC), and the resulting impact on the length of time for completing a CMP case, and whether OGC had adequate staff to handle the additional workload.

With these concerns in mind, RHS ultimately changed the rule by explicitly enlisting the Office of Administrative Law Judges (OALJ) to administer civil monetary hearings to address the concerns of due process. OGC will still review CMP cases to ensure legal sufficiency as well as represent the Agency on any cases that they recommend to move forward. The timing of the process will depend on the caseload of OALJ. They will also use the criteria in the final rule to determine the fees.

In our comments to the 2013 proposed rule, NAHMA stated that the proposed rule did give considerable thought to due process procedures for the individual and entity respondents. We agreed that notification procedures and the right to request a hearing with the USDA Office of Administrative Law Judges were appropriate administrative mechanisms since the office conducts similar hearings for other USDA agencies.

Comments Rejected by RHS

While RHS was open to several recommendations from NAHMA and other rural housing stakeholders, they did reject some recommendations. For example, several commenters were concerned about the negative impact the rule would have on non-profit borrowers. Some commenters requested exempt status or a 24-month grace period for implementation when a non-profit obtains a property through a transfer and assumption.

RHS rejected the recommendation for a 24-month grace period because all borrowers, including non-profits, are required to adhere to the requirements of direct Multifamily Housing Loans and Grants provisions. In addition, RHS noted in the final rule that it will work with non-profit entities to assist them in bringing properties into compliance with current regulations.

RHS also rejected NAHMA's comment concerning CMPs being 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, even when the borrower has requested rental increases or additional loans or grants in order to maintain and repair the project. According to RHS, it is choosing not to adopt the comment because "the Agency is confident it can work with borrowers

on tools that are available under [the Multifamily Housing Loans and Grants provisions], which may include rent increases in accordance with and other servicing options available.”

Conclusion

Ultimately, the decision to proceed with implementation of CMP use is not ideal for properties assisted through RHS. RHS stated that the majority of borrowers and management agents within the portfolio comply with Agency regulations and procedures. They will not be affected by this rule. RHS estimates that less than five percent of the portfolio will be affected by the CMP rule. Still, NAHMA will meet with RHS leadership to understand the full scope of CMPs within the rural housing portfolio and to gather additional guidance for NAHMA members.