

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In The Matter of:

LONNIE A. GARVIN,
Respondent.

HUDALJ 91-1724-DB
Decided: June 17, 1992

Steven D. Gordon, Esquire
For the Respondent

Ronnie Ann Wainwright, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

The Department of Housing and Urban Development ("the Department" or "HUD") debarred Lonnie A. Garvin, Jr. ("Respondent") from participation in primary and lower tier covered transactions with HUD and throughout the Executive Branch of the Federal government for a three-year period from June 19, 1989, to June 19, 1992, pursuant to 24 C.F.R. Part 24. On July 12, 1991, HUD notified Respondent that it had information that he had violated the terms of his pending debarment by directly or indirectly conducting business with HUD. Specifically, HUD alleged that Respondent, by virtue of his partnership positions, was involved in the sale of nine properties financed by loans insured by the Federal Housing Authority ("FHA loans").¹ The Department contends that Respondent's involvement constitutes cause for further debarment under 24 C.F.R. §§ 24.305(b), (d) and (f). Pursuant to 24 C.F.R. § 24.320(b), HUD proposes extending his existing debarment from three years to an indefinite period of time for the alleged violations.

Respondent requested a hearing to appeal the proposed indefinite debarment. A hearing was held in Washington, D.C., on February 26, 1992. At the outset of the

¹HUD enumerated seven properties in its July 12, 1991, letter to Respondent. HUD amended the letter on August 15, 1991, to include an eighth property. Finally, the Department's Amendment to its Complaint (Feb. 24, 1992) identified a ninth property. Respondent did not oppose the Amendment.

hearing, the Department's counsel read the parties' stipulations into the record. The parties submitted briefs on March 31, 1992.

On April 14, 1992, Respondent filed a Motion to Strike Exhibit 1 and related arguments from the Government's Posthearing Brief. Exhibit 1 is an affidavit of Marylea Byrd, Assistant General Counsel, HUD Field and Management Operations, concerning the intent of the suspension and debarment regulations. Respondent objects to submission of Ms. Byrd's written testimony based on a claim of prejudice. Specifically, Respondent asserts that he was denied the right to cross-examine Ms. Byrd during the hearing.

The Government opposes Respondent's Motion and contends that Respondent failed to articulate the prejudice that he would suffer. Furthermore, the Government attempts to analogize its Exhibit 1 to Respondent's hearing Exhibit 16. Respondent's Exhibit 16 is a portion of a prior debarment hearing transcript that includes testimony of character witnesses for Respondent. Exhibit 16 was admitted into evidence in light of the Government's argument that the exhibit should be afforded less weight because the Government did not have the opportunity to cross-examine the character witnesses as to the one issue of Respondent's involvement in certain companies. Finally, the Government argues for admission of Ms. Byrd's affidavit because it will assist this tribunal in its final determination.

Respondent's ability to cross-examine Ms. Byrd concerning her interpretation of the suspension and debarment regulations is essential in this particular proceeding because of the significance of the issue of regulatory intent. Moreover, the potential prejudice to Respondent is evident given that one of Respondent's proposed interpretations, as set forth in his brief, is contrary to Ms. Byrd's. *See, e.g.,* Respondent's Posthearing Brief at 27-28.

The Government's attempt to equate Exhibit 1 with Respondent's Exhibit 16 is unpersuasive. First, the Government was not deprived of its right of cross-examination concerning Exhibit 16. The Government had the opportunity at the prior debarment hearing to cross-examine the witnesses as to Respondent's character.² On the other hand, Respondent had no opportunity whatsoever to cross-examine Ms. Byrd concerning her interpretation of the regulations. Second, although the Government originally objected to admission of Exhibit 16, it ultimately withdrew its objection and argued instead that the exhibit should be given less weight. Respondent, however, has sought to have Exhibit 1 stricken from the record.

The assistance that the affidavit might offer would be minimal. Ms. Byrd's written testimony is a post-construction interpretation of the regulations that is entitled to no more weight than that afforded to a post-enactment statement of a legislator. In any event, the threatened prejudice to Respondent far outweighs any potential

²Exhibit 16 contains the Government's cross-examination which was conducted by the same attorney who is representing the Government in this proceeding.

assistance. Accordingly, Respondent's Motion is granted and Exhibit 1 to the Government's Posthearing Brief and any related arguments are stricken.

Findings of Fact

1. Respondent is a self-employed businessman. At various times in his career, he has been involved in mortgage banking and real estate development and sales in and around Aiken, South Carolina. Tr. 175-76.³ He has been doing business with HUD, on and off, since 1958. Tr. 206. In the mid-1980s Respondent shifted his primary focus from mortgage banking to real estate. Tr. 176. From approximately 1986 to 1989, Respondent was exclusively engaged in workout negotiations with HUD. Tr. 177.

2. Respondent and Edward F. Girardeau are 50% owners of River Bluff Developers, 1065 Silver Bluff Road, Aiken, South Carolina. The partners have known each other since 1960. They founded the company in 1986 to develop a subdivision comprised of 260 lots for single family homes known as the River Bluff Subdivision. Com. & Ans., para. 18; Tr. 178-79, 185-86. Respondent's principal source of income derived from the development of the subdivision and the sale of lots. Respondent was primarily responsible for selling the lots. Tr. 175, 178-79.

3. Both Respondent and Mr. Girardeau were 25% owners and Vice Presidents of Perkins Construction and Real Estate, Inc. ("Perkins"), 1065 Silver Bluff Road, Aiken, South Carolina. Timothy Perkins, Respondent's son-in-law, was the 50% owner of the company. Tr. 182; R. Ex. 1. Under the name of "Perkins Construction, Inc.," Perkins was established in early 1986 to build homes in the River Bluff Subdivision. Tr. 181, 188; Com. & Ans. para. 21. Later, Perkins began to list homes for sale through the multiple listing service to expedite purchases in the subdivision. At that time, it changed its name to "Perkins Construction and Real Estate, Inc." Tr. 188-89.

4. On June 20, 1989, Respondent and Mr. Girardeau resigned their positions and divested themselves of their interests in Perkins. Respondent transferred his stock in the company to Mr. Perkins. Mr. Girardeau transferred his interest to his son, Robert S. Girardeau. R. Exs. 1-3; Tr. 181-82; Stip. 6. Perkins is now involved in the construction of another subdivision, Plantation South. Tr. 182.

5. Around May of 1987, Edward Girardeau unofficially began using the name "River Bluff" instead of "Perkins" to list homes for sale to avoid offending the other builders in the River Bluff Subdivision who suspected that "Perkins" was promoting itself to their detriment. At this time Mr. Girardeau did not accept any commissions or fees for acting as a listing agent. Tr. 188-89. See G. Ex. 29.

³The following reference abbreviations are used in this decision: "Tr." for "Transcript," "G. Ex." for "Government's Exhibit," "R. Ex." for "Respondent's Exhibit," "Com. & Ans." for "Government's Complaint (October 4, 1991) and Respondent's Answer (October 30, 1991)," and "Stips." for "Joint Stipulations of Fact" found at pages 4-18 of the transcript.

6. Mr. Girardeau's "River Bluff" officially became River Bluff Realty, Inc. ("River Bluff Realty"), 1065 Silver Bluff Road, Aiken, South Carolina, when it was incorporated as an entity in January 1990. Respondent and Edward Girardeau are 50% owners of River Bluff Realty. Com. & Ans., para. 16; Tr. 180. Respondent and Mr. Girardeau each made an initial \$5000 capital contribution. Tr. 231.

7. River Bluff Realty was created to generate income from the sales of River Bluff homes. As of January 1990, River Bluff Realty began to collect sales commissions. Stip. 7; Tr. 180, 189. The company was created because Respondent considered the "number one source of income [to be] from the sale of lots." Tr. 193. Respondent believed that if River Bluff Realty could assist in the sale of a builder's home, then there was an increased chance of that builder purchasing additional lots in the subdivision. *Id.*

8. River Bluff Realty listed approximately 100 of the homes in the subdivision. Tr. 193-94. Of the 260 homes in the River Bluff subdivision, approximately five to eight percent were purchased with FHA or Veterans Administration ("VA") loans. Tr. 193-94. The last River Bluff home was sold in early 1991. Tr. 179. All River Bluff Realty sales, with the exception of three to four homes, were of homes located in the River Bluff Subdivision. Tr. 197.

9. Edward Girardeau is the President of River Bluff Realty; Respondent is Vice President and Treasurer; and Elizabeth Girardeau, Edward's wife, is Vice President and Secretary. Respondent and Edward Girardeau also are Directors of the company. Stip. 7; Tr. 214.

10. River Bluff Realty has four employees: Edward Girardeau, the agent-in-charge; Elizabeth Girardeau, a part-time sales agent; Respondent, a sales agent; and Jennifer Jolley, a part-time sales agent and Respondent's housemate. Tr. 198-99, 210-11, 213-14. Mr. Girardeau received his real estate license in mid-1989. Respondent obtained his license in July of 1990. Stip. 7; Tr. 180.

11. Respondent identified Edward Girardeau as having primary responsibility for the affairs of River Bluff Realty. Tr. 212, 215-16. While Respondent has shown homes and "sat" at open houses, he characterized himself as not being "at all involved in the day-to-day operations" of River Bluff Realty. He himself has sold only one house. It was located in the subdivision and was conventionally financed. Tr. 196-97.

12. Except for Edward Girardeau, River Bluff Realty does not have any full-time agents who sell homes. Tr. 216-17. Elizabeth Girardeau is the only agent who receives commissions. Tr. 211. She has received commissions for two sales. She also answers the telephone at the office. Ms. Girardeau does not depend on her sales commissions for her livelihood. Tr. 216-17. Ms. Jolley has a full-time job with the Savannah River Plant, in addition to her part-time position at River Bluff Realty. Tr. 217.

13. Respondent received \$15,000 on December 31, 1990, and \$20,000 on May 28, 1991, as compensation from River Bluff Realty. Stip. 8; Tr. 209; G. Exs. 20-21. Edward Girardeau and his wife also received approximately \$35,000 as compensation. The amount of compensation drawn by Respondent and the Girardeaus is not based on sales volume, but rather on the partners' need for income. Tr. 209-11. Any compensation that Respondent and the Girardeaus draw is from the profits of the corporation, which include sales commissions. Tr. 223, 231.

14. On June 19, 1989, HUD imposed a Limited Denial of Participation ("LDP") on Respondent, prohibiting his participation in programs administered by the HUD Assistant Secretary for Housing - Federal Housing Commissioner. Com. & Ans., para. 7; Stip. 1. The LDP was based, in part, upon Respondent's origination of a plan to use HUD's single family program to build and market over 1000 properties. Com. & Ans., para. 8.

15. Respondent did not appeal the LDP. Com. & Ans., para. 9; Stip. 1.

16. On June 13, 1990, HUD suspended Respondent and proposed to debar him, based on similar allegations as those supporting the LDP. Com. & Ans., para. 10; Stip. 2.

17. Respondent appealed the proposed debarment, requested a hearing, and was heard on the matter. Com. & Ans., para. 11; Stip. 4.

18. Respondent was debarred from participating in primary and lower tier covered transactions as a "participant" or "principal" at HUD and throughout the Executive Branch of the Federal government and from participating in procurement contracts with HUD for a three-year period from June 19, 1989, until June 19, 1992. Com. & Ans., paras. 12 and 13; Stip. 4.

19. Respondent has filed an appeal of the debarment with the United States District Court for the District of South Carolina. Com. & Ans., para. 14; Stip. 4.

20. From the inception of his debarment period, June 19, 1989, to the present, Respondent has maintained his ownership interests in and positions with River Bluff Realty and River Bluff Developers. Com. & Ans., paras. 16 and 18.

21. The sales of the following nine properties located in Aiken, South Carolina were FHA insured:⁴

⁴The sales are listed and referred to as one through nine, respectively, and correspond to G. Exs. 1-9, respectively.

<u>Address</u>	<u>FHA Loan Number</u>	<u>Seller/Buyer</u>
1. [REDACTED] Greenwich Drive	[REDACTED]	[REDACTED] Jolley/[REDACTED] [REDACTED] Tisler
2. [REDACTED] Suffolk Drive	[REDACTED]	[REDACTED] Edelman
3. [REDACTED] Suffolk Drive	[REDACTED]	[REDACTED] Kanagy/[REDACTED] [REDACTED] Driver
4. [REDACTED] Greenwich Drive	[REDACTED]	Perkins/[REDACTED] [REDACTED] Murphy
5. [REDACTED] Greenwich Drive	[REDACTED]	[REDACTED] Kanagy/[REDACTED] Chung
6. [REDACTED] Suffolk Drive	[REDACTED]	[REDACTED] Kanagy/[REDACTED] Bennett
7. [REDACTED] Darien Drive	[REDACTED]	Perkins/[REDACTED] Creaser & [REDACTED] DeLattre
8. [REDACTED] Greenwich Drive	[REDACTED]	Perkins/[REDACTED] [REDACTED] Bordwine
9. 912 Jones Drive	[REDACTED]	Perkins/[REDACTED] Walker.

G. Exs. 1-9; Stip. 5.

22. The dates of the contracts of sale, settlement, and FHA endorsement are as follows for the following properties:

<u>Contract of Sale</u>	<u>Settlement</u>	<u>FHA Endorsement</u>
1. 2/25/91	4/30/91	5/14/91
2. 6/12/90	7/31/90	8/21/90
3. 4/23/90	6/5/90	6/26/90
4. 3/28/90	6/7/90	6/18/90
5. 6/2/90	7/31/90	8/21/90
6. 2/2/91	2/28/91	3/19/91
7. 1/24/90	3/23/90	4/17/90
8. 4/17/90	9/28/90	10/19/90
9. 8/29/89	1/5/90	3/12/90

G. Exs. 1-9.

23. The first eight properties are located in the River Bluff Subdivision; the ninth is in Colonial Village. G. Exs. 1-9; Stip. 5. River Bluff Realty was the listing agent for the first six properties and also the selling agent for the second property. G. Exs. 1-6; Stip. 5. River Bluff Realty held the buyers' earnest money deposits and the keys for the sellers for transactions one through six. Stip. 5; Com. & Ans., paras. 23 and 25. River Bluff Realty's role as listing agent in the sales included advertising and promotional work. The company also took buyers' offers to sellers and conveyed any counteroffers.

River Bluff Realty had additional duties as selling agent for the second transaction. Respondent identified his partner, Mr. Girardeau, as the employee who participated on River Bluff Realty's behalf in all six sales. Tr. 211-12.

24. The HUD Application for Property Appraisal and Commitment, HUD form 92800, lists Lonnie Garvin as the broker for the first sale. G. Ex. 1b. Although River Bluff Realty was not, in fact, an agent for the last three sales, it was listed as the broker for them on the HUD forms 92800. G. Exs. 7b, 8b, and 9b; Tr. 202-03. The lender for the sales completes the HUD form 92800. Tr. 202. River Bluff Realty held the earnest money deposits for sales seven through nine. G. Exs. 7a, 8a, and 9a; Tr. 202-03.

25. Southern Mortgage Company, Inc. ("Southern Mortgage"), 1065 Silver Bluff Road, Aiken, South Carolina, was the lender for the nine sales. G. Exs. 1-9. Southern Mortgage is a mortgage correspondent that originates single family home loans. John Girardeau, Edward's son, is the owner and President of Southern Mortgage. Respondent holds no position with, nor has any ownership interest in the mortgage company. Tr. 183-84, 185.

26. River Bluff Realty received the following commissions for the following sales:

<u>Address</u>	<u>River Bluff's Commission</u>
1. [REDACTED] Greenwich Drive	\$2280
2. [REDACTED] Suffolk Drive	\$4389.15
3. [REDACTED] Suffolk Drive	\$2147.50
4. [REDACTED] Greenwich Drive	\$2200
5. [REDACTED] Greenwich Drive	\$2212.50
6. [REDACTED] Suffolk Drive	\$2190.

The company received the entire commission for the second sale. It received half of the commission for the remainder of the sales, with the other half going to the particular selling agent. No sales commissions were paid for the seventh and eighth transactions. An agent for another realtor received the entire commission for the ninth sale. Stip. 5; G. Exs. 7c at 2, 8c at 2; Tr. 202-06.

27. With respect to the first sale, River Bluff Realty returned approximately \$2162 of the \$2280 commission to the seller, Ms. Jolley. The company retained the remainder for advertising costs. Tr. 200. For the fourth sale, River Bluff Realty remitted approximately \$1700 of the \$2200 commission to the seller, Perkins. The remainder was used to reimburse River Bluff Realty for advertising expenses. Tr. 200-01.

28. When River Bluff Realty initially listed the six houses for sale, it could not know with certainty that FHA, as opposed to conventional financing would be involved. Tr. 194-96. However, as the listing agent, it was aware, at the time of listing, that either FHA, VA, or conventional financing was a possible method of financing any of those

transactions. Tr. 122-23, 194-96. The contracts of sale for the nine transactions state that the buyer would obtain FHA financing. Com. & Ans. 24; G. Exs. 1-9.⁵

29. In consideration of the existing debarment, Respondent and Edward Girardeau decided that River Bluff Realty would not list or sell houses built under FHA or VA supervision, such as those with an FHA conditional commitment. In addition, they prohibited the company from advertising FHA or VA financing. Tr. 207-08.

30. In the first transaction, Ms. Jolley sold her home at [REDACTED] Greenwich Drive to [REDACTED] Tisler for a purchase price of \$76,000. The Tislars rented the property from her from approximately mid-March of 1991, to the settlement date, April 30, 1991. Stip. 5; Tr. 91-92. Prior to the sale and rental, Ms. Jolley and Respondent occupied the house for approximately four years. Tr. 92, 198. Respondent never held an ownership interest in the house. Tr. 199.

31. Respondent furnished Ms. Tisler with an extra set of house keys during the first week of the Tislars' rental. At that time, Ms. Tisler asked Respondent for the mailbox keys, which he hand-delivered within a few days of her request. Tr. 92.

32. The Tislars and Ms. Jolley signed the sales contract on February 25, 1991. The Tisler's agent, Susan Christopher signed the contract, witnessing the buyers' signatures. Respondent signed the contract, witnessing Ms. Jolley's signature. G. Ex. 1a at 3; Tr. 93, 199.

33. The closing for the first transaction was held at the office of attorney Arthur Rich, who was in attendance along with the Tislars, Ms. Christopher, Ms. Jolley, and Respondent. Tr. 93. Mr. Rich introduced the parties to each other, presenting Respondent as representing River Bluff Realty. Tr. 94. At closing, Respondent collected the Tislars' rental check. *Id.* Respondent also accepted the commission check for River Bluff Realty. Tr. 200. Ms. Tisler presumed that Respondent was Ms. Jolley's agent and that Ms. Jolley's role was limited to that of the seller. Tr. 94-97.

Discussion

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the Federal government. *See* 24 C.F.R. § 24.115(a). *See also* *Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). "Responsibility" encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305. *See, e.g., Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C.Cir. 1964). Determining "responsibility" requires an assessment of the risk that the

⁵The sales contracts for all of the transactions, except four and six, initially provided that the buyer would obtain FHA financing. The contracts for four and six originally provided for conventional financing, but were subsequently changed to evidence FHA financing. Stip. 5; G. Exs. 1-9.

government likely would suffer injury by continuing to do business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986).

The debarment and suspension process is not intended as a punishment; rather, it is a remedial mechanism designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984); *see* 24 C.F.R. § 24.115. The government's authority to issue debarments and suspensions derives from the government's right not to contract with persons who would subject the government to excessive and unnecessary risk. *See Caiola v. Carroll*, 851 F.2d 395, 398-99 (D.C. Cir. 1988).

HUD has the burden of establishing, by a preponderance of the evidence, that cause for debarment exists; and a respondent has the burden of establishing any mitigating circumstances. 24 C.F.R. § 24.313(b)(3) and (4). The mere existence of a cause for debarment does not necessarily mandate that an individual be debarred. The sanction is a discretionary one that requires consideration of the seriousness of a respondent's acts or omissions, as well as any evidence in mitigation. 24 C.F.R. §§ 24.115(d) and 24.300. *See Agan*, 576 F. Supp. at 260-61.

HUD alleges that cause for Respondent's additional debarment exists, based on violations of the currently effective debarment and the preceding suspension and LDP. The Department further asserts that the violations are so egregious as to warrant imposition of an indefinite debarment period. Respondent counters that he did not violate the sanctions previously imposed on him. Even if he did commit such "breaches," Respondent continues, the regulations are so vague that they did not provide adequate notice that his actions could be considered misfeasance. Respondent further asserts that the lack of seriousness of the alleged violations militates against any further debarment.⁶ I find that cause for Respondent's further debarment exists, and that an additional period of debarment is warranted.

1. Cause for debarment exists.

Respondent was precluded from participating in primary and lower tier covered transactions as a participant or principal at HUD for a three-year period from June 19, 1989, until June 19, 1992. River Bluff Realty's contracts as listing and/or selling agent for FHA insured sales, constitute lower tier covered transactions under 24 C.F.R. § 24.110(a)(1)(ii)(C), and Respondent was a "participant" and "principal" in these transactions. Consequently, Respondent violated the terms of the current exclusion, and, therefore, cause exists for further debarment under 24 C.F.R. § 24.305(f).

⁶Respondent also contends that if the regulations are interpreted to reach his conduct, they are unconstitutional. An administrative forum, however, is not the appropriate arena to consider or decide this issue. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977).

a. River Bluff Realty's contracts as listing and/or selling agent are lower tier transactions.

There are two categories of covered transactions: primary and lower tier. Respondent was prohibited from participating in either. A primary covered transaction is defined as "any nonprocurement transaction between an agency and a person, regardless of type, including . . . insurance . . ." 24 C.F.R. § 24.110(a)(1)(i).⁷ Section 24.105(n) identifies a "person" as "[a]ny individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments"

The regulations define the following three types of lower tier covered transactions:

(A) Any transaction between a participant and a person other than a procurement contract⁸ for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

⁷A primary covered transaction consists of a *direct* relationship between HUD and a person. Under these particular facts, Southern Mortgage and the Department entered into a primary covered transaction when HUD provided mortgage insurance. HUD's single family mortgage insurance program provides mortgage insurance to commercial lenders to finance housing and construction. Upon default by the mortgagor, HUD accepts either an assignment of the mortgage or a conveyance of the property. 24 C.F.R. §§ 203.350 and 203.355. Therefore, HUD is exposed to certain risks under the program, and they are risks that the debarment procedures are designed to address.

⁸Executive Order 12,549 directed executive departments and agencies to issue regulations on *nonprocurement* debarments and suspensions that complied as closely as possible with governmentwide guidelines developed by an interagency task force under the auspices of the Office of Management and Budget ("OMB"). See Exec. Order No. 12,549, 51 Fed. Reg. 6370, 6371, 6372 (1986). Those guidelines, which resulted in the "common rule," were intended to be as compatible as possible with the *procurement* debarment and suspension regulations in the Federal Acquisition Regulation ("FAR"). See 51 Fed. Reg. 6372. Therefore, general use of the term "procurement contract" in HUD's definition of lower tier transactions refers simply to any contract for goods or services between private parties, and not to contracts regulated by the FAR. HUD's debarment regulations specifically state that they apply to "transactions under Federal *nonprocurement* programs." 24 C.F.R. § 24.110(a) (emphasis added). The contracts that are within the definition of lower tier transactions are "between a participant and a person," and not, as are those regulated by the FAR, between the Federal government and a party. See 24 C.F.R. § 24.110(a)(1)(ii)(B) and (C).

* * * *

- (4) Borrowers;
- (5) Purchasers of a property with a HUD-insured or Secretary-held mortgage;

* * * *

- (8) Fee appraisers and inspectors;
- (9) Real estate agents and brokers;
- (10) Management and marketing agents;
- (11) Accountants, consultants, investment bankers; architects, engineers, attorneys and others in a business relationship with participants in connection with a covered transaction under a HUD program;

* * * *

- (13) Closing agents; [and]

* * * *

- (20) Employees or agents of any of the above.

24 C.F.R. § 24.110(a)(1)(ii). A "participant" is:

Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

24 C.F.R. § 24.105(m).

The first type of lower tier transaction covers those which are other than for goods or services, for example, "subgrants under grants;"⁹ while the second and third

⁹This class of lower tier transaction "generally involve[s] the submission of applications or other documentation before the transaction is entered into" by the parties. Common Final Rule and Interim Final Rule, 53 Fed. Reg. 19,160, 19,164-65 (1988). The transaction between Southern Mortgage and the nine home buyers is a type (A) lower tier transaction. The insurance provided to Southern Mortgage by HUD is comparable to a grant, and the FHA-backed mortgage provided to the purchasers is similar to a subgrant. Upon approval of their mortgage application by Southern Mortgage, the buyers entered into covered transactions with that mortgagee and became participants. See 24 C.F.R. § 24.105(m).

Just as buyers are "participants" in covered transactions, so too are sellers because both reaped the benefits of FHA insurance. The sellers were able to consummate the sales only after the buyers obtained FHA insurance. Both buyers and sellers are required to make representations and certifications before issuance of FHA insurance. HUD relies on those certifications to shield itself against excessive risks.

types encompass any contract for goods or services. *Compare* 24 C.F.R. § 24.110(a)(1)(ii)(A) *with* 24 C.F.R. § 24.110(a)(1)(ii)(B) and (C).

The contracts between the sellers and River Bluff Realty as listing and/or selling agent are lower tier transactions under 24 C.F.R. § 24.110(a)(1)(ii)(C). The River Bluff Realty contracts are "contracts for services" to list and, in one instance, to sell homes. The contracts are between "participants," the sellers, and River Bluff Realty. River Bluff Realty as the listing and/or selling agent had "a critical influence" over the listing and/or selling contracts. River Bluff Realty is a "real estate agent or broker," one of the categories of "persons" specified by HUD in its individual modification of the common rule.¹⁰ *See* 24 C.F.R. § 24.110(a)(1)(ii)(C)(9). Lower tier transactions do not require firsthand dealings with HUD. Accordingly, inclusion of lower tier transactions extends debarment coverage beyond the comparatively narrow sphere of primary covered transactions.¹¹

Respondent contends, however, that River Bluff Realty's listing and/or sales contracts preceded the application for mortgage insurance and therefore did not "grow out of" or "come under" the primary covered transaction, a requirement imposed by the regulations. *See* 53 Fed. Reg. 19,164. Respondent's portrayal is not persuasive. At the outset, Respondent is incorrect in his characterization of River Bluff Realty's contracts as antecedent, and therefore unrelated to mortgage insurance. Although River Bluff Realty's contracts were entered into prior to the application for mortgage insurance, the sales transactions were not complete until the mortgage insurance was approved. It was not until then that River Bluff Realty received its commissions. The relative timing of the transactions is immaterial. What is pertinent is that all other contracts, including those between the sellers and their agents, the buyers and their agents, and the sales contracts between the sellers and purchasers, were not complete, until approval of the mortgage insurance. All other contracts depended upon ultimate approval of the

¹⁰"The final common rule [was] formatted to permit agencies to add to the example of such persons for purposes of their individual agency programs. . . . Only contracts with those persons listed, either in the common rule or as a result of agency specific additions, will be considered lower tier covered transactions under paragraph (a)(1)(ii)(C)." 53 Fed. Reg. 19,165.

¹¹OMB and the interagency task force specifically considered the scope of nonprocurement debarments and rejected a narrower approach that would have applied the regulations only to participants in primary transactions. *See* Notice, 52 Fed. Reg. 20,360, 20,361-62 (1987). They accepted several commenters' view that:

limiting the coverage to initial awards and federally-approved subtier awards would seriously hamper the effectiveness of debarment in management of [the individual agencies' and departments'] programs. . . . [B]ecause substantial amounts flow through State, local or *other recipients*, and substantive performance occurs at *these subtier levels*, misuse and the need for debarment and suspension protections occurs [sic] more often there than at the initial award or first tier level.

Accordingly, governmentwide "guidelines [should] reflect a 'broad' approach reaching *all tiers of participation*." 52 Fed. Reg. 20,360 (emphases added).

mortgage insurance. Therefore, the contracts "came under" or "grew out of" the primary covered transaction, i.e., the mortgage insurance.

The first six transactions, River Bluff Realty's contracts to list and sell those homes, are within those multiple subtiers of lower tier transactions that the regulations address. However, with regard to the last three sales, River Bluff Realty had no contract with any party, and therefore there were no covered transactions.¹²

b. Respondent was a principal and participant in lower tier transactions.

River Bluff Realty became a participant when it entered into the six lower tier transactions. Respondent was a "principal" in these transaction. A "principal" is defined as an "[o]fficer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction" 24 C.F.R. § 24.105(p).

Although Respondent characterized himself as not "at all involved in the day-to-day operations," the facts portray a partner with "primary management and supervisory responsibilities." Respondent is one of two 50% owners of a small, closely held corporation. Respondent and Edward Girardeau made equal capital contributions to form the company. Respondent is Vice President and Treasurer, as well one of only four employees. Respondent and his partner drew equal amounts of compensation from the company. Respondent showed some homes and sat at open houses. Finally, Respondent was primarily responsible for the sale of lots in the River Bluff subdivision, and he thought that assisting builders to sell their homes was a means of selling more lots. Accordingly, Respondent had an interest in promoting those sales to builders. Given all of these factors, Respondent is a "principal" in River Bluff Realty.¹³

Respondent also was a participant in his own right in the first transaction. On two separate occasions, he furnished keys to the purchasers while they were renting the house. Respondent signed the sales contract witnessing the seller's signature just as the buyers' agent witnessed their signatures. Respondent collected the buyers' last rental check and, more importantly, he accepted the commission check for River Bluff Realty. Furthermore, Respondent held himself out as representing River Bluff Realty at the

¹²Although HUD forms 92800 mistakenly list River Bluff Realty as a broker for the last three transactions, it was not an agent, nor did it have any contracts with the buyers or sellers. The existence of a contract, however, is not the sole determining factor in deciding whether a transaction is a covered one. The contract must also be "under" another covered transaction. For example, a contract between a seller and a painter to paint a house is not a covered transaction, and the painter is not a participant. Consummation of the contract between the painter and the seller is not dependent on obtaining FHA insurance, and HUD places no reliance upon the painter.

¹³This definition comports with the intent of the governmentwide guidelines that include individuals "who are working for a participant in a capacity of primary management . . . (e.g., not support staff)" as "principals." 53 Fed. Reg. 19,163.

closing. The buyer considered Respondent to be the agent for River Bluff Realty for this transaction. The closing attorney introduced Respondent as the company's agent, and Respondent failed to comment on or correct this representation.

Moreover, Respondent participated in the transactions because he received benefits from the sales. *See* 24 C.F.R. § 24.710(a)(2).¹⁴ Respondent drew compensation that included the commissions that River Bluff Realty received from the transactions. In addition to the commissions, Respondent received other benefits from the transactions. Respondent's "number one source of income" was from the sale of lots, and he saw the sale of homes as a way of achieving that goal. Thus, Respondent viewed house sales as ultimately increasing the marketability of the development.

c. Respondent's violations are grounds for further debarment under 24 C.F.R. § 24.305(f).

A "material violation of a . . . regulatory provision or program requirement applicable to a public agreement or transaction . . ." is cause for debarment. 24 C.F.R. § 24.305(f). Respondent's breach of the currently effective exclusion constitutes such a violation as set forth under 24 C.F.R. § 24.305(f).¹⁵

Section 24.200(b) of 24 C.F.R. states that "persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions . . . for the period of their debarment or suspension." Respondent's participation as a principal and participant in lower tier transactions is a material violation of this regulatory provision.

The violation is material because the very essence of 24 C.F.R. § 24.200(b) is a blanket prohibition of any participation whatsoever in any lower tier transaction. Respondent's particular actions are certainly material because his participation as a principal and participant is both substantive and significant. He shared in the profits and benefits from the FHA transactions, he was directly involved in the first transaction, and finally, he had a critical influence in the company that participated in the remaining five sales.

¹⁴The LDP subpart of the debarment and suspension regulations defines "participation" to include "receipt of any benefit or financial assistance through grants or contractual arrangements; benefits or assistance in the form of loan guarantees or insurance; and awards of procurement contracts, not withstanding any *quid pro quo* given and whether the Department gives anything in return." Although this definition is in the regulations "[f]or the purposes of [the LDP] subpart," it may be applied to the debarment and suspension subparts as well. *See* 2A N. Singer, *Sutherland Statutory Construction* §§ 47.06, 47.07, and 47.09 (4th ed. 1984).

¹⁵HUD also asserts subsections (b) and (d) of 24 C.F.R. § 24.305 as bases for debarment. I need not address these subsections, however, because I have determined that cause for debarment exists under 24 C.F.R. § 24.305(f).

2. Further debarment is warranted.

Further debarment is appropriate given the seriousness of Respondent's acts and omissions, and the lack of creditable mitigating factors. See 24 C.F.R. §§ 24.115(d) and 24.300. The act of violating the terms of a debarment, suspension, or LDP frustrates the purpose and administration of the governmentwide system of debarment and suspension, and, therefore, is precisely the type of activity that evidences "nonresponsibility." Respondent violated the terms of his debarment by his personal involvement in the first sale, and by his participation as a principal in River Bluff Realty which had an active role in the remaining five transactions. Both River Bluff Realty and Respondent profited from those transactions. Respondent failed to isolate himself completely from FHA insured transactions or to insure that he did not profit from them. Rather, he chose not to give serious consideration to the possibility that his activities might be considered participation in lower tier transactions.

Respondent argues that because the definition of "lower tier transaction" is unclear, he did not have adequate notice of what activities were proscribed by the debarment rules, and that therefore, he cannot be held accountable for any alleged violation. In the alternative, Respondent contends that the regulation's ambiguity constitutes a mitigating factor. Respondent's arguments are not persuasive.

Respondent cites *Satellite Broadcasting Co., Inc. v. Federal Communications Commission*, 824 F.2d 1, 3 (D.C. Cir. 1987)¹⁶ for the proposition that the regulations must provide adequate notice of the substance of a rule alleged to have been violated. Not only is there no penal rule to be applied in this case, but also it is clear that Respondent had fair warning of the proscribed conduct. Both the regulations and the terms of Respondent's debarment specifically forbid *any* participation in *any* (all) covered transactions. See 24 C.F.R. §§ 24.200(a) and (b). The regulations simply and generally prohibit any person who has been debarred or suspended from participating in a lower tier covered transaction. As detailed earlier, the regulations were drafted to be broad in scope, and the definition of a lower tier transaction clearly encompasses "any transaction...regardless of type, under a primary covered transaction" and "any...contract for goods or services...under a covered transaction" under which a "person will have a critical influence on or substantive control over that covered transaction." Significantly, the regulatory definition explicitly enumerates the following persons who may be involved in such a transaction: "real estate agents," "brokers," "management agents," "marketing agents," "closing agents," and their "employees and agents." 24 C.F.R. § 24.110(a)(1)(ii)(C). The definition puts those in any listed class of "persons" on notice that if they act in a listed capacity, with requisite influence on or control over a transaction, they are, *ipso facto*, engaging in a lower tier transaction. Such notice

¹⁶ Respondent's reliance on the standard enunciated in *Satellite* is misplaced. Both *Satellite* and the authority that that case relied upon, *Gates & Fox Co., Inc. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986), involved the application of penal sanctions. Here, the actions that may be taken against Respondent may only be for remedial purposes, and not for purposes of punishment. 24 CFR § 24.115(b).

obviously applies to any realtor actively involved in, or profiting from, an FHA transaction.

Respondent's claim of inadequate notice is belied by his background and his experience with the Department's regulatory process. He is a sophisticated businessman, experienced in mortgage banking, real estate development, and sales. He has dealt with HUD for over 30 years, and had been exclusively engaged in workout negotiations with the Department from 1986 to 1989. Because he has previously been the subject of a limited denial of participation, as well as a suspension and debarment, he is well aware of HUD's ability to impose limitations for "nonresponsible" conduct. He cannot claim the role of the naif. *Cf. Nat'l Indus. Constructors Inc. v. Occupational Safety and Health Review Comm'n*, 583 F.2d 1048, 1054 (8th Cir. 1978) ("In determining whether an administrative regulation provides adequate notice, courts have inquired whether an employer familiar with the circumstances of the industry could reasonably be expected to have had adequate warning of the conduct required by the regulation.").

Once an individual has been debarred, suspended, or subject to an LDP, that person must give heightened scrutiny to, and conscientious consideration of any activities and involvement which are potentially violative of the terms of the proscription. Where, as here, a debarred individual becomes involved in a transaction where the letters "FHA" appear on the paperwork, that individual begins to skate near the edge. As William M. Heyman, Director of the Office of Lender Activities and Land Sales Registration, the office responsible for recommending debarment actions, testified:

I think there's a responsibility that any of us have, especially someone who's been sanctioned, to know the limits of that sanction and to know the terms of the sanction and what that person can or cannot do.

Tr. 130.

Someone who has been sanctioned by the Department once can be held to a higher level of accountability and responsibility to make sure that they comply with the terms of the debarment/suspension.

Tr. 162.

I think that there [are] clear areas nobody has any questions on. So we get into the gray areas. Well, does this one fall over the line so that it's covered or...does this one So that when we get that close to the line, a responsible person would in fact check and question. If an individual is debarred from FHA, the fact that they're participating in anything that says FHA on it or thinking about participating in a transaction that says FHA on it in any way, shape or form in my opinion would send off some bells and whistles that say, maybe I'd better check with HUD and make sure this isn't in fact violating the terms of the debarment or suspension.

Tr. 163.

Respondent was directly involved in the sale of the residence at [REDACTED] Greenwich Drive. He was the housemate of the owner, furnished the buyers with house and mailbox keys, witnessed signatures to the contract, was introduced at the closing as representing River Bluff Realty, accepted rental and commission checks, and appeared to the buyers to be the agent for the seller. He was listed as the broker on the HUD Form 92800 that noted that it was a direct endorsement application; he witnessed the contract of sale that had an FHA Addendum to it; and he was present at the closing which involved execution of the following documents: (1) a settlement statement noting an FHA insurance premium; (2) addenda to the HUD-1 settlement statement that recited that the transaction was an "FHA-Insured Loan;" (3) an FHA multi-state note; (4) an FHA mortgage; and (5) two FHA assumption riders. G. Ex. 1.

Under the circumstances, Respondent was clearly a participant in a lower tier covered transaction. At a minimum, he should have made a diligent inquiry as to whether his participation in the transaction and its profits contravened the terms of his exclusion.

3. An additional twelve-month period is warranted.

HUD proposes extending Respondent's existing debarment indefinitely, pursuant to 24 C.F.R. § 24.320(b). I find that while an indefinite debarment would be punitive, an additional twelve-month period is appropriate.

The Department failed to prove that Respondent willfully breached the terms of his debarment. Respondent did, in fact, take some steps in an attempt to comply with those terms. He divested himself of an ownership interest and control in Perkins. He ensured that River Bluff Realty did not list or sell houses built under FHA or VA supervision. He restricted the company from advertising any offering of FHA or VA financing. Moreover, the violations were neither extensive nor egregious. Only 6 of approximately 100 homes that River Bluff Realty listed for sale in the subdivision were FHA financed. Respondent's *direct* involvement was with only one. Finally, this is a case of first impression, and, although Respondent may fairly be charged with violations of the regulations, the lack of precedent defining the conduct at issue as violative of an exclusion from lower tier transactions should be considered as militating against a more lengthy period of debarment.¹⁷


However, Respondent was certainly aware that he was directly involved in at least one FHA transaction, and indirectly profiting from others. Under the circumstances, his indifference to the terms of his exclusion from those transactions was not responsible conduct. A twelve-month additional period of debarment will afford Respondent an

¹⁷ Respondent also introduced character testimony at hearing. The testimony, however, does not address the issue of Respondent's participation in lower tier transactions after imposition of the debarment. Accordingly, the evidence fails to convince me that Respondent is presently responsible.

adequate period within which to demonstrate that he has taken steps to ensure that his wrongful conduct will not recur. *See Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989).

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent from further participation in primary and lower tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal government, and from participating in Procurement Contracts with HUD for a period of twelve months from June 19, 1992, until June 19, 1993.



ALAN W. HEIFETZ
Chief Administrative Law Judge