UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:	HUDOA No. 11-M-041-DB-1
JOHN ALAGHA and	OGC Case No. 11-3682-DB
ALAGHA & ASSOCIATES, CORPORATION	
Respondent.	April 3, 2013

Appearances:

For Respondent: Fred Rejali, Esq.
McLean, Virginia

For the Government: Terri Román, Esq.
U.S. Department of Housing and Urban Development
Washington, D.C.

AMENDED RECOMMENDED DETERMINATION[1]

BEFORE: H. Alexander MANUEL, Administrative Judge

This *Recommended Determination* sets forth findings of fact and recommends that a two-year period of debarment be imposed upon Respondents based upon Respondents' actions in failing to comply with departmental regulations and policy.

[1] This Amended Recommended Determination ("ARD") supersedes the Recommended Determination ("RD") issued in this case on March 21, 2013. The Court issued a Notice to Parties on March 27, 2013 informing them that on March 26, 2013, Government Counsel informed the Court that the RD incorrectly stated that Respondents had previously served a period of suspension in connection with this case. In response to the Notice to Parties, the parties timely filed: a) the Respondent's Statement Regarding the Proposed Amendment to the Court's Findings, and b) the Government's Statement Addressing the Court's March 27, 2013 Notice to Parties. Upon consideration of the Statements filed by both parties, the Court issues this ARD. This ARD remains identical in all respects to the RD with the exception of the deletion of the language on page 26 of the RD making reference to a previous period of suspension having been served by Respondents in this case. No such suspension was imposed. The recommended effective date for commencement of the debarment was also deleted.

Statement of Jurisdiction

On July 1, 2011, the Debarring Official for the U.S. Department of Housing and Urban Development ("HUD") referred this debarment proceeding to the Office of Hearings and Appeals for fact-finding in accordance with 2 C.F.R. § 180.845(c). The Referral Order was duly docketed and set for hearing in accordance with 2 C.F.R. § 180.840. The administrative judges of this Office are authorized to serve as hearing officers for the purposes of issuing findings of fact and recommended determinations for consideration by the Debarring Official. 2 C.F.R. § 2424.842. This *Recommended Determination* is issued upon consideration of the entire record in this case, including the exhibits and pleadings by the parties, as well as the sworn testimony and evidence adduced at the hearing, held on July 2, 2012.

Statement of the Case

Respondent Alagha & Associates Corporation ("the Corporation," "Respondent Corporation," or "Alagha & Associates") is a California corporation that specializes in tax preparation and accounting. Respondent John Alagha ("Respondent Alagha" or "Alagha") is president of Alagha & Associates. On December 31, 2008; and March 27, 2009, Respondents prepared two independent auditor's reports for Primary Access America Corporation ("PAAC"), an FHA-approved Non-Supervised Loan Correspondent located in California. HUD regulations require that independent audit reports for FHA-approved lenders be prepared by duly-licensed certified public accountants. John Alagha was never licensed as a CPA in California, and Alagha & Associates was never licensed as a certified public accounting firm. These facts are not in dispute.

On September 10, 2010, Respondents were notified that their participation in the PAAC audit constituted "evidence of serious irresponsibility and [was] cause for debarment under the provisions of 2 CFR § 180.800(b) and (d)." Notice of Proposed Debarment, p.1, dated September 10, 2010 ("the Notice"). Specifically, HUD contends that Respondents' conduct violated HUD HANDBOOK 2000.04 REV-2 CHG-1, HUD CONSOLIDATED AUDIT GUIDE FOR AUDITS OF HUD PROGRAMS ("Handbook 2000.04" or "the Handbook"). Those regulations require compliance with the Generally Accepted Government Auditing Standards ("GAGAS") and the Statement of Standards for Attestation Engagements No. 10, published by the American Institute of Certified Public Accountants. Handbook 2000.04, § 7-4C. HUD proposes to debar Respondents from participation in all procurement and nonprocurement transactions with the federal government for a period of three years.

Respondents requested a hearing on October 28, 2010. This Court issued a *Notice of Hearing and Order* on July 20, 2011. Respondents filed an *Answer* and *Request for Dismissal* on August 10, 2011. Respondents' *Request for Dismissal* was summarily denied in the *Pre-Hearing Ruling and Order*, dated June 12, 2012. Respondents maintain that Respondent Alagha never represented himself as a CPA, that the audit was conducted with the assistance or advice of a registered CPA, that the Government never relied on the independent audit report and so experienced no actual harm from the alleged violations, and that Respondents did not benefit from conducting the audit.

A hearing on this matter was held on July 2, 2012, pursuant to 24 C.F.R. Part 26, Subpart A. The Government filed its *Post-Hearing Brief* ("Gov't Post Br.") on August 2, 2012. Respondents filed their *Post-Hearing Brief* ("Resp'ts Post Br.") on August 27, 2012. The Government also filed a *Reply to Respondents' Post-Hearing Brief* ("Gov't Reply Br.") on September 12, 2012.[2] The factual record was closed on July 2, 2012, and this decision follows.

Findings of Fact

1. Respondent Alagha & Associates is a corporation organized under the laws of California. (Hr'g Tr. 89: 2-6, July 2, 2012.) Respondent John Alagha is the sole owner and president of Respondent Alagha & Associates. (Tr. 89: 10-18.) The Corporation has no board members or officers other than Respondent Alagha. (Tr. 89: 18-22; Tr. 90: 1.)

2. HUD notified Respondents on September 10, 2010, that it intended to debar Respondents from participation in procurement and nonprocurement transactions throughout the Executive Branch of the federal government for a period of three years. Notice, dated September 10, 2010. (Tr. Exs. 1, 2.)

3. The Notice stated that the proposed debarment was based upon Respondents' 2008 audit of the financial statements of PAAC, an FHA-approved Non-Supervised Loan Correspondent located in California. (Tr. Exs. 1, 2.)

4. The Notice further alleged that Respondents were not licensed CPAs in the state of California, where PAAC is located. (Tr. Exs. 1, 2.)

5. Respondent Corporation is in the business of tax preparation and accountancy in the state of California. (Tr. 82: 9-19.)

6. Respondent Alagha is an Enrolled Agent with the Internal Revenue Service and holds master's degrees in accounting and finance. (Tr. 82: 10-13.) He has been in the accounting business for more than 30 years. (Tr. 82: 14-17.)

7. PAAC was a longstanding client of Respondent Corporation in 2008. (Tr. 83: 10-11.)

8. PAAC has been a Title II FHA-approved lender since November 25, 2008. (Tr. Ex. 9.)

9. As an FHA-approved Title II lender, PAAC was entitled to underwrite FHA loans pursuant to contract directly with HUD. (Tr. Ex. 9.)

10. Respondent Alagha & Associates was hired by PAAC to conduct an independent audit for a HUD-related service. (Tr. Ex. 13.)

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[2] In its *Reply Brief*, the Government argues, *inter alia*, that Respondents have waived their argument, first asserted in the *Post-Hearing Brief* at p. 9-10, that Respondents were not required to comply with HUD regulations applicable to independent auditors on covered transactions. However, the Court need not decide this issue in light of the findings reached, *infra*.

11. FHA-approved lenders have the authority to underwrite mortgage loans for FHA mortgage insurance. (Tr. 22: 3-8.) In the event of borrower default, the lender may assign the loan to FHA and submit a claim to FHA for, *inter alia*, payment of the loan's remaining principal balance. (Tr. 22: 3-12.)

12. As an FHA-approved lender, PAAC was obligated to complete an annual certification that includes the submission of financial information, including an independently audited financial statement. (Tr. 24: 11-18.)

13. Respondents, at PAAC's request, performed the audit of PAAC's financial statement for the fiscal year ending 2008 ("FYE 2008"). (Tr. 95: 20-21; Tr. 96: 8-9.)

14. Neither Respondent holds a permit to practice public accountancy in the state of California, and at the time of the alleged violations the Respondent Corporation did not employ any licensed CPAs. (Tr. 90: 17-22; Tr. 91: 1-19); *Respondents' Request for Dismissal*, p. 2.

15. Respondent Alagha had never conducted an audit prior to conducting the PAAC audit on December 31, 2008. (Tr. 83: 17.)

16. On December 31, 2008, Respondents filed their Independent Auditor's Report ("December 2008 Report"), signed by Respondent Alagha and issued on Alagha & Associates letterhead. (Tr. Ex. 12.) That letterhead identifies Respondent Corporation as "An Elite Group of CPAs, EAs, & MBAs." (Tr. Exs. 8, 12, 13.)

17. At the time of the alleged violations, Respondent Corporation had only two employees, Respondent Alagha and Vickie Simon, neither of whom was a CPA. (Tr. 90: 17-22; Tr. 91: 1-14.)

18. In the letterhead of Respondents' cover letter for the December 2008 Report, Respondents make reference to "Associates" and "CPAs." However, there were no CPAs employed by either Respondent at the time of the PAAC audit. Mr. Ghalambor and Mr. Hosani, two local CPAs, "worked in" Respondents' offices but operated independently and outside of Respondents' tax and accountancy practice. (Tr. 94: 3-22; Tr. 95: 1-5.) Neither Mr. Ghalambor nor Mr. Hosani performed the PAAC FYE 2008 audit. (Tr. 97: 10-14.)

19. Respondent Alagha discussed PAAC's request to have Respondents perform the independent audit with Mr. Ghalambor. (Tr. 83: 18-22; Tr. 84: 1-2.) Mr. Ghalambor provided Respondents with a preprinted form and instructed Alagha as to how to fill out the report. (Tr. 84: 4-6; Tr. 99: 9-10.) However, Respondent Alagha performed the audit himself, based on the template that had been provided to him by Mr. Ghalambor. (Tr. 97: 13-14; Tr. 111: 1-4.) Respondent Alagha testified that he merely signed the preprinted form given to him by Mr. Ghalambor. (Tr. 99: 9-10; Tr. 101: 17-19.)

20. Mr. Ghalambor told Respondent Alagha that he had to be a CPA to perform the audit. (Tr. 85: 13-18.) Respondent Alagha stated at the hearing that "when professional people, CPA, give it to me, for sure it's true." (Tr. 99: 11-13.)

21. An audited financial statement report is comprised of four elements: a balance sheet, an income statement, a statement of net worth, and a statement of cash flow. (Tr. 25: 4-7.) The independent audit of PAAC performed by Respondents consisted of reviewing a single Wells Fargo bank statement, without reviewing any other documentation of PAAC's liabilities or any other financial information. (Tr. 106: 18-22; Tr. 107: 1-3; Tr. 115: 7-14.)

22. Respondent Alagha obtained liability figures and other financial information through conversations with PAAC officials, which he did not independently confirm or verify. (Tr. 117: 13-15.)

23. Respondent Alagha did not ask a CPA to perform, review, or sign the audit. (Tr. 85: 22; Tr. 86: 1-5; Tr. 97: 10-12.)

24. An audited financial statement is submitted to HUD by the lender, electronically, via the Lender Assessment Subsystem ("LASS"). (Tr. 28: 7-8.)

25. After inputting the financial information into the LASS system, the lender (in this case PAAC), transmits the report to the auditor (Respondents), for verification. (Tr. 29: 15-19; Tr. 75: 2-6.)

26. After verifying the financial information, the auditor transmits the report back to the lender, who then submits the final report to HUD via the LASS system. (Tr. 30: 5-15; Tr. 31: 2-6; Tr. 75: 2-6.)

27. To access the LASS system, the lender and auditor must each obtain individual, unique identification numbers. (Tr. 26: 17-22.)

28. HUD's normal business procedure is to have the lender provide HUD with the auditor's name and e-mail address, after which HUD e-mails to the auditor a unique identification number. (Tr. 27: 14-21.)

29. PAAC's LASS report for FYE 2008, which was entered into the LASS system, contains Respondents' names and contact information, including an auditor's identification number and an e-mail address used by Respondent Alagha. (Tr. Ex. 10 at 9-11; Tr. 92: 7-9.)

30. The only means by which an auditor receives a LASS password to attest to the accuracy of the audit information is by e-mail directly from HUD to the e-mail address that has been provided by the lender to HUD. (Tr. 35: 6-9; Tr. 36: 5-22; Tr. 37: 1; Tr. 76: 4-22; Tr. 77: 1-3.)

31. Respondent Alagha confirmed that the e-mail address listed on the audit report cover letter was his correct e-mail address. (Tr. 92: 7-9; Tr. Ex. 8.)

32. HUD sent the LASS password to Respondents. (Tr. 27: 19-21.)

33. The LASS report contained an attestation by the auditor under the name of John Alagha and contained his unique identification number. (Tr. 35: 1-9; Tr. 36: 18-22; Tr. 37: 1.)

34. On March 27, 2009, Respondents filed a second Independent Auditor's Report ("March 2009 Report"), also signed by Respondent Alagha and also issued on Alagha & Associates letterhead. (Tr. Ex. 8; Tr. Ex. 13 at 1.)

35. Respondent Alagha did not expressly state that he held a CPA license, nor did he include "CPA" after his signature on either report. (Tr. Exs. 8, 12; Tr. 87: 18-20.)

36. The cover letters signed by Alagha for the independent auditor's reports state that the audit was conducted "in accordance with Generally Accepted Auditing Standards and governmental auditing standards issued by the Comptroller General of the United State. [sic]" (Tr. Exs. 8, 12, 13.)

37. Note A of the December 2008 Report stated that PAAC's primary purpose was brokering residential mortgage loans, and that the company received the HUD Title II license in 2008. (Tr. Ex. 12 at 3.)

38. Note A of the March 2009 Report made no mention of the HUD Title II license but was identical in all other respects to Note A in the December 2008 Report. (Tr. Ex. 13 at 3.)

39. In a September 28, 2009, letter from Respondents to PAAC's Board of Directors, Respondents state that the audit should be changed from a "Qualified opinion" to a "Nonqualified opinion" because Respondents are not CPAs. (Tr. Ex. 14.)

DISCUSSION

This discussion provides findings of fact and conclusions of law necessary to determine the legal grounds for the proposed debarment in this case. [3]

The Government argues that Respondents violated the rules applicable to the performance of independent financial audits as they relate to HUD programs, including GAGAS, the relevant HUD Handbook, and the California Accountancy Act.[4] Notice; *Gov't Post Br.*, 2-3. In particular, the Government alleges that:

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[3] Suspension and debarment cases typically involve the determination of mixed questions of law and fact. See Canales v. Paulson, 2007 WL 2071709 at 5 (D.D.C. 2007) (providing that debarring officials must ensure that debarment proceedings are "fair and accurate," and that debarment is warranted under the circumstances. The debarring official must consider "'mitigating factors' that are relevant"). Relevance is clearly a legal determination for the deciding official, and is necessary to any quasi-judicial fact-finding process. See generally, Restatement (Third) of Torts § 8 (2012) ("[b]ecause this is a matter of the law's evaluation of the legal significance of the actor's conduct, such a question could be characterized as a question of law that should be decided by the court. More precisely, it can be characterized as a mixed question of law and fact").

[4] GAGAS; HUD Handbook 2000.04 Rev-2, CHG-1, ¶1-2; HUD Consolidated Audit Guide for Audits of HUD Programs; California Business and Professions Code Section 5050-5058.

1) Respondents were required to maintain a valid certified public accountancy license in order to participate in auditing financial statements for HUD lenders;

2) Respondents knew they did not have such licensure;

3) Respondents nevertheless engaged in performing such audit and attestation along with rendering an opinion in connection therewith.

Notice; *Government's Pre-Hearing Brief* ("*Govt's Pre Br.*") 1-2, 4, 12; *Govt's Post Br.*, 13.

Respondents deny that they violated HUD regulations and state that:

1) Respondents never held themselves out to be licensed certified public accountants. *Resp'ts Pre Br.* 6;

2) Respondents were not aware of the CPA licensing requirement. *Resp'ts Post Br.* 3;

3) Respondents were assisted by a licensed CPA in preparing the audit. *Resp'ts Pre Br.* 7-8.

4) Respondent Corporation is not a "person," within the meaning of the California Accountancy Act. *Resp'ts Pre Br.* 5, and

5) Respondents did not know that the audit was being submitted to the Government or HUD, and therefore did not need to comply with the cited laws or regulations, and that they did not benefit from conducting the audit. *Resp'ts Post Br.* 9.

Finally, Respondents argue that, even if a violation was committed, it was not "so serious as to affect an agency program." *Resp'ts Pre Br.*, 6 (citing 2 C.F.R. § 180.800(b)).

It is undisputed that neither Respondent is licensed to perform CPA services, or was licensed to perform CPA services at the time the audit was conducted. To demonstrate a violation of GAGAS and the HUD regulations sufficient to warrant debarment in this case, the Agency must show that Respondents had actual knowledge of the licensing requirement or had reason to know of the requirement, and willfully failed to comply with that requirement in a manner so serious as to affect the integrity of a HUD program. 2 C.F.R. §§ 180.800(b), (d).

A. <u>Applicable Law</u>

Respondents' certifications in conducting the 2008 independent audit are governed by GAGAS and applicable HUD regulations. A breach of those standards subjects Respondents to the sanctions imposed by HUD's debarment regulations. Respondents are required to comply

with each of the standards set forth in GAGAS by virtue of the fact that Respondents, themselves, provided written certification that their independent audit was rendered in accordance with GAGAS. In addition, the requirements contained in HUD Handbook 2000.04 REV 2, CHG-1 are found to be applicable to Respondents based on Respondents' knowledge that the audit they performed was to be submitted to the Government. Tr. 87: 2-17. This is demonstrated by Respondents' actions in registering with HUD's automated LASS system and transmitting their financial certifications to PAAC for submission to HUD. In addition, Respondents included language in Note A, incorporated into the PAAC audit, dated December 31, 2008, p. 3 that states: "Company received the HUD Title II license on November 25, 2008", signifying HUD's approval of PAAC as an FHA lender. Tr. Ex. 12 at 3.

1. HUD Debarment Regulations

Under 2 C.F.R. § 180.800, HUD may debar Respondents for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as –
>
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
>
> (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
>
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;
>
> ....
>
> (d) Any other cause of so serious or compelling a nature that it affects [Respondent's'] present responsibility.

2 C.F.R. § 180.800(a)-(d).

HUD has the burden of establishing the cause for debarment by a preponderance of the evidence. 2 C.F.R. § 180.855(a). Even if a cause for debarment is determined to exist, the debarring official need not impose a sanction, and may consider the seriousness of the Respondent's acts or omissions and the mitigating or aggravating factors set forth at 2 C.F.R. §180.860 when making a decision regarding the severity of any imposed sanction. 2 C.F.R. § 180.845(a). Once the agency has established a cause for debarment, a respondent has the burden of "demonstrating to the satisfaction of the debarring official that [he or she is] presently responsible and that debarment is not necessary." 2 C.F.R. § 180.855(b).

The federal government only conducts business with responsible persons. 2 C.F.R. § 180.125(a). Compliance with this provision serves to protect the public interest by ensuring the integrity of federal programs. The term "presently responsible," as used in the context of administrative sanctions such as Limited Denials of Participation ("LDPs"), debarments, and suspensions, is a term of art that includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. William D. Muir and Metro Cmty. Dev. Corp., 00-2 BCA ¶ 31.140, HUDBCA No. 97-A-121-D15 (Nov. 6, 1997) (citing 48 Comp. Gen. 769 (1969)). "Present responsibility" is a term of art that applies to a respondent's conduct with

respect to "covered transactions," involving HUD programs. See, e.g., 2 C.F.R. § 180.200(a)-(b) (defining procurement and nonprocurement agency transactions); 2 C.F.R. § 180.985. Determining "present responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. Benjamin J. Roscoe Geraldine M. Roscoe, HUDALJ 93-2007-DB (June 26, 1995) (citing Shane Meat Col., Inc. v. U.S. Dep't of Defense, 800 F.2d 334, 338 (3rd Cir. 1986)). Debarments, LDPs, and suspensions are serious sanctions that should only be utilized for the purposes of protecting the public interest and may not be used as punishment. 2 C.F.R. § 180.125(c). The test for determining whether a proposed sanction is warranted is "present responsibility," although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980).

2. GAGAS Standards

The Generally Accepted Government Auditing Standards ("GAGAS") (GAO-07-731G) "are for use by auditors of government entities and entities that receive government awards and audit organizations performing GAGAS audits and attestation engagements." GAGAS § 1.03. The requirements and guidance set forth in the standards "apply to audits and attestation engagements of government entities, programs, activities, and functions, and of government assistance administered by contractors, nonprofit entities, and other nongovernmental entities." GAGAS § 1.04.

GAGAS further provides that:

> Auditors performing financial audits should be knowledgeable in generally accepted accounting principles (GAAP) .... and the application of these standards. Also, if auditors use GAGAS in conjunction with any other standards, they should be knowledgeable and competent in applying those standards. Auditors engaged to perform financial audits or attestation engagements should be licensed certified public accountants or persons working for a licensed certified public accounting firm or a government auditing organization.

GAGAS § 3.44 (emphasis added).

GAGAS uses the word "should" to specify a presumptively mandatory requirement. GAGAS § 1.07. Auditors and audit organizations are required to comply with presumptively mandatory requirements, except in rare circumstances where the auditors or audit organizations document their justification for departure from such requirements and document how the alternative procedures performed in the circumstances were sufficient to achieve the objectives of the presumptively mandatory requirements. Id. GAGAS also provides that public accountants engaged to conduct audits "should be (a) licensed certified public accountants or persons working for a licensed public accounting firm," and notes that "[a]ccountants and accounting firms meeting these licensing requirements should also comply with the applicable provisions of the public accounting laws and rules of the jurisdiction(s) where the audit is being conducted." GAGAS § 3.10e(2)(a) & n.2.

3. Applicable HUD Regulations Regarding Audits

HUD regulations at 24 C.F.R. § 5.801(b) state that the requisite financial information must be "prepared in accordance with Generally Accepted Accounting Principles ("GAAP") as further defined by HUD in supplementary guidance." The relevant supplementary guidance is contained in HUD HANDBOOK 2000.04.

Handbook 2000.04 states that independent auditors must comply with the Handbook when auditing any for-profit HUD program participant. HUD Handbook 2000.04 ¶ 1-1. The Handbook also states that "audits must be performed in accordance with the standards for financial audits of the U.S. General Accounting Offices' Government Auditing Standards ("GAGAS.") Id. The Handbook requires accountants and accounting firms to "comply with the applicable provisions of the public accountancy laws and rules of the jurisdictions in which they are licensed and where the audit is being conducted." Id. at ¶¶ 1-2.

4. Applicable California Law

The California Accountancy Act ("the Act"), Cal. Bus. & Prof. Code §§ 5050-5058, states "no person shall engage in the practice of public accountancy in this state unless the person is the holder of a valid permit to practice public accountancy issued by this board." Cal. Bus. & Prof. Code § 5050(a). Under the Act, a person is engaged in the practice of public accountancy if that person "prepares or certifies for clients reports on audits ... that are to be used for filing with a court of law or with any governmental agency, or for any other purpose." Cal. Bus. & Prof. Code § 5051(d). In addition, the Act provides that "'[p]erson' includes individual, partnership, firm, association, limited liability company, or corporation, unless otherwise provided." Cal. Bus. & Prof. Code § 5035.

B. Respondents Violated HUD Regulations

The evidence of record demonstrates that Respondents clearly violated applicable HUD regulations. In reaching this determination, the Court has assessed the credibility of both the Government's witness and Respondent Alagha's testimony, and has considered the totality of the record in this case, including the hearing exhibits, the testimony of the witnesses, the pleadings, and arguments by counsel.

1. Credibility Findings

Both at the hearing and in his Pre-Hearing and Post-Hearing Briefs, Respondent Alagha equivocated on most of the central issues in the case. He repeatedly states that he "never" held himself out to be a CPA. *Resp'ts Post Br.* 4; *Resp'ts Pre Br.* 6; Tr. 85: 6-12, Tr. 87: 18-22, Tr. 88: 1-2. However, the signature page of the 2008 Audit Report, on-its-face, contains an ambiguous description of Respondent Corporation's professional qualification, to wit: "Alagha & Associates – An Elite Group of CPAs, EAs, & MBAs." Tr. Exs. 12, 13. Moreover, Respondents filed an Independent Audit Report with an agency of the U.S. Government expressly stating that it was prepared in accordance with "Generally Accepted Auditing Standards and governmental auditing standards issued by the Comptroller General of the United

State (sic)." Id. Respondents' disingenuous conduct in giving the impression that they are licensed CPAs undermines their credibility and their efforts to prove that they are presently responsible.

There are at least two other areas where Respondent Alagha's testimony proved to be less than credible. When asked salient questions such as whether or not he performed the 2008 audit and whether or not he knew of the CPA licensing requirement at the time, Respondent Alagha's testimony was often murky and self-contradictory. Respondent Alagha initially claimed that a CPA had performed the audit for PAAC, even though it was not signed by a CPA. *Resp'ts Pre Br.* 7. However, when questioned at the hearing, Alagha admitted that he did not have a CPA review or confirm the audit. Tr. 97: 10-12. When questioned about his initial claim that a CPA had performed the audit, he testified as follows:

> **Q: Is it your testimony today that you did not prepare the relevant audit report, Mr. Alagha?**
> A: I did, under his supervision.
>
> **Q: Is it your testimony that you did not prepare the audit, Mr. Alagha?**
> A: No.
>
> **Q: It is not your testimony?**
> A: No.
>
> **Q: Go back to that sentence, please.**
> A: Yeah.
>
> **Q: Would you read one more time, I'm afraid I don't understand.**
> A: He did not prepare the relevant audit report but rather the certified public accountant working for the respondent corporation analyzed and opined on the matter.
>
> **Q: Is this a true statement, Mr. Alagha?**
> A: Yes.
>
> **Q: You testified earlier, Mr. Alagha, that you prepared the audit, and now you're saying that you did not prepare the relevant audit report, but rather, a certified public accountant working for respondent analyzed and opined on the matter?**
> A: Yeah. I did it, but he told me how to do it.
>
> **Q: So you did it or the CPA did it?**
> A: I don't know what you mean, but I did the audit, but I did exactly what he told me to do.
>
> **Q: You did the audit?**

A: Yes.

Tr. 109: 18-22; Tr. 110: 1-22; Tr. 111: 1-4.

Thus, while Respondent Alagha ultimately admitted that he prepared the audit, he gave various versions about what level of supervision or instruction he received from the CPA from whom he apparently sought guidance. He further stated that Respondent Alagha & Associates had employed a CPA, although he earlier testified that the Corporation employed no CPAs at the time of the audit. Tr. 94: 3-22; Tr. 95: 1 -5.

Notwithstanding all of the evidence of record to the contrary, Respondent Alagha testified that he did not know that he was required to be a CPA when he conducted the independent audit of PAAC. He testified that after he was asked to conduct the audit for PAAC, he consulted with Mr. Ghalambor, a CPA "associated" with his firm. Tr. 85: 5-22; Tr. 86: 1-2. Mr. Ghalambor told Respondent Alagha that he was required to be a CPA in order to perform the audit. Tr. 85: 13-15. The CPA also provided Alagha with a preprinted form and gave him instructions as to how to fill out the report. Tr. 84: 4-6; Tr. 99: 9-10. Despite having been expressly told of the requirement for CPA licensing, Respondent Alagha testified that he was the one who actually prepared the audit. He further stated that he did not have a CPA review or sign the audit because he "didn't know really that it need [sic] to be signed by a CPA." Tr. 86: 2-5; Tr. 95: 20-22; Tr. 96: 1-9. He testified that he just signed the preprinted letter he received from the CPA and stated that "[w]hen professional people, CPA give [sic] it to me, for sure it's true." Tr. 99: 7-13 (emphasis added). I find that Alagha's latter statement demonstrates the extent to which Respondents placed significant reliance upon Mr. Ghalambor's statement that CPA licensure was required to perform independent audits.

The independent audit reports, issued on December 31, 2008; and March 27, 2009, contained identical language certifying that Respondents prepared the 2008 audit in compliance with GAGAS:

> We conducted our audit in accordance with Generally Accepted Auditing Standards and governmental auditing standards issued by the Comptroller General of the United State (sic). Those standards require those (sic) we plan and perform the audit to obtain reasonable assurance about whether the financial statement is free of material misstatement.

Tr. Exs. 12, 13.

The Government presented one witness at the hearing, Willie Green, who currently serves as Chief of the Lending Certification Branch in the Office of Lender Activities and Program Compliance at HUD. Tr. 20: 22; Tr. 21: 1-4. Mr. Green has an extensive background in reviewing audited financial statements in HUD lending programs. He testified that independently audited financial statements of HUD lenders and programs are required to be performed by licensed CPAs, and to be rendered in accordance with GAGAS. Tr. 37: 8-19; Tr. 38: 19-22; Tr. 39: 1-2. He also testified that auditors are required to transmit their audit reports

to HUD in conjunction with the HUD lender's (PAAC's) electronic submission, via LASS. This process requires auditors to register their respective audit organizations directly with HUD, resulting in a "unique identifier number" being issued to the auditor that is sent directly to the auditor's e-mail address. Tr. 27: 5-21.

I find the testimony of Mr. Green to be entirely credible as to the normal business operations of the LASS system. Conversely, I find Respondent Alagha's testimony on this issue to be less than credible. Alagha stated that he "did not recall" whether he received an e-mail from HUD providing him with his unique identifier number. Tr. 87: 2-17. Although Alagha testified that he did not recall applying for the LASS identification code or receiving an e-mail from HUD, his mere failure to recollect does not contravene the testimony of Mr. Green, who testified that HUD's database records show that the LASS identification code was sent to Alagha's e-mail address, as indicated on Respondents' letterhead. Respondent Alagha further testified as follows:

> **Q. Would you, please, read the first sentence of paragraph 2.**
> A. We conducted our audit in accordance with generally accepted auditing standards and governmental auditing standard issued by the comptroller general of the United States.
>
> **Q. And, again, it's your testimony that you conducted the audit according to government auditing standards issued by the comptroller general of the United States?**
> A. Yes.
>
> **Q. Even though you testified earlier that you did not know that this report was going to be submitted to the United States?**
> A. I knew, I didn't know that they want to submit it, but this was again, preprinted format he gave it to me, and I just signed it.

Tr. 101: 3-19.

There was no credible evidence adduced at the hearing to suggest that anyone at PAAC had access to Respondent Alagha's e-mail account, received Respondent's LASS password from HUD, or accessed the LASS system using Respondents' log-in information. Tr. 36: 5-22; Tr. 37: 1; Tr. 76: 4-22; Tr. 77: 1-3.

From the foregoing dialogue, it is clear that at the time Alagha prepared the audit, he knew that it was to be prepared in accordance with GAGAS, yet he claims that he both "knew," and "didn't know" that it was going to be submitted to a U.S. government agency. Respondent Alagha's testimony is replete with denials and self-contradictory statements as to his knowledge that the PAAC Audit Reports were to be submitted to HUD for review. Based on this seeming disavowal of knowledge, coupled with the evidence that Alagha caused a HUD LASS identification code to be issued to Respondents, I find Alagha's testimony that he was unaware that the audit was intended for submission to HUD not to be credible. I further find that

Respondents had actual knowledge that the audit was prepared for submission to HUD. Accordingly, the HUD audit regulations applicable to all HUD programs were applicable to Respondents' conduct in this case.

Therefore, I find Respondent Alagha's testimony not to be credible on the issues of:

a) whether he or Mr. Ghalambor "conducted" the audit;
b) whether he knew that he was required to have a CPA license to perform the public audits of PAAC;
c) whether he implied that he or his firm were licensed to perform CPA services; and
d) whether he knew that the PAAC Audit was intended for submission to HUD.

2. Knowledge of CPA Licensing Requirement

Independent audit reports prepared by auditors for FHA-approved lenders are required to be rendered in accordance with HUD regulations. See, e.g., GAGAS § 3.50(a); GAGAS § 3.44; HUD Handbook 2000.04, REV-2, CHG-1, ¶ 1-2; HUD Handbook 4060.1 REV-2, Ch. 2; HUD Consolidated Audit Guide; California Accountancy Act, Cal. Bus. & Prof. Code §§ 5050-58. These legal requirements applied to the independent audit reports prepared by Respondents for PAAC that are the subject of this proceeding. At all relevant times, Respondents knew or should have known that only licensed CPAs were permitted to prepare the PAAC Audit Reports, and that Respondents were not qualified to do so.

On December 31, 2008; and March 27, 2009, Respondents expressly represented that they conducted the PAAC Audit Reports "in accordance with Generally Accepted Auditing Standards and governmental auditing standards issued by the Comptroller General of the United State (sic) ... [and that the audit was prepared] in conformity with generally accepted accounting principles." Tr. Exs. 12, 13. Section 3.50(a) of GAGAS provides that:

> [e]ach audit organization performing audits or attestation engagements in accordance with GAGAS must:
> a. establish a system of quality control that is designed to provide the audit organization with reasonable assurance that the organization and its personnel comply with professional standards and applicable legal and regulatory requirements.

(emphasis added). Section 3.44 of GAGAS provides, in pertinent part, that:

> Auditors engaged to perform financial audits or attestation engagements *should* be licensed certified public accountants or persons working for a licensed certified public accounting firm, or a government auditing organizations.

(emphasis added).

The word "should" in this provision is mandatory in nature. Under GAGAS standards the word "should" is used to specify a presumptively mandatory requirement. GAGAS § 1.07. Where a presumptively mandatory requirement applies, auditors and audit organizations are required to comply with that provision unless the auditors "document their justification for the departure and how the alternative procedures performed in the circumstances were sufficient to achieve the objectives of the presumptively mandatory requirement." Id. In this case, Respondents have not indicated any "departure" from GAGAS, and indeed, have expressly represented that their audit was rendered in full compliance with GAGAS. Tr. Ex. 12, 13. Thus, Respondents were required to have obtained proper licensing as CPAs before they rendered the PAAC audit report.

Respondents were also required to comply with the HUD regulations and handbooks applicable to independent audits attesting to the accuracy of financial statements of FHA-approved lenders. GAGAS requires that auditors performing financial statement audits and attestation engagements must comply with all other laws and regulations applicable to the particular engagement, in this case, an audit of an FHA-approved lender. GAGAS §§ 3.44, 3.50(a).

I find that Respondents had actual knowledge of the CPA licensing requirement. First, Mr. Ghalambor told Respondent Alagha that he had to be a CPA to do the audit. In addition, upon cross examination, Alagha said he "knew" the audit reports were going to be submitted to the U.S. Government. Automated HUD procedures would not have permitted PAAC to utilize Alagha's unique identifier and password sent to him from HUD without Alagha's acknowledgment of receipt of that number from HUD and subsequent transmission to PAAC. Mr. Green's uncontroverted testimony was that HUD sent the unique identifier code by e-mail to Alagha at his e-mail address. Tr. 36: 12-17. This is the very same e-mail address listed on Respondents' letterhead, as confirmed by Alagha. Tr. Ex. 8, 12-13; Tr. 92: 7-9. Finally, Respondents certified that the audit complied with GAGAS, which requires that independent audits be conducted by CPAs. By these and other actions, it is clear that Respondent Alagha had actual knowledge of the CPA requirement. The only evidence to the contrary is Alagha's own testimony, which this Court has already found to be not credible.

I further find that Respondents are not absolved of their responsibility to maintain proper licensing credentials even if Respondents somehow "consulted" with a licensed CPA who was not employed by Respondent Corporation, as Respondents allege. This is the clear mandate of GAGAS. Respondents expressly certified that they prepared the PAAC audit reports and that the PAAC Audit Reports complied with GAGAS. Therefore, Respondents were required to have the proper licensing.

It is also inconsequential that Respondents were not paid to perform the audit. The Government is entitled to rely upon independent audit reports that are properly prepared in accordance with all applicable laws and regulations. The applicability of GAGAS standards is simply not predicated on whether or how much an auditor is paid for his services.

3. Reason to Know or Should Have Known

Even if Respondents did not have actual knowledge of the CPA licensing requirement, they certainly had reason to know of the requirement since they knew that the audit reports were to be submitted to HUD.

Respondents' denials that they violated HUD regulations in this case may be analyzed under the common-law standard of "reason to know." Indeed, the higher standard of "should have known," might well apply in this case.[5] In reviewing a HUD debarment proceeding in Feinerman v. Bernardi, 558 F. Supp. 2d 36 (D.D.C. 2008), the Court also applied the "reason to know" standard in partially granting plaintiffs/debarred housing commissioners motion for injunctive relief. The housing commissioners in that case faced debarment for authorizing financial contributions to a community credit union that later suffered financial failure. The financial contributions had been paid, at least in part, from HUD grants awarded to the housing authority.

In that case, HUD argued that the unauthorized contributions constituted knowing violations of HUD regulations that justified debarment of the housing commissioners. The Court applied the reasoning in Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991), and explained that the "reason to know" standard imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him," Feinerman at 49 (emphasis added) (quoting from Novicki, at 941). The Court reasoned that the housing commissioners did not have reason to know in that case because the commissioners, who served essentially as board members, were never informed that HUD had not approved the credit union contributions or of other alleged improprieties committed by officers of the housing authority. Feinerman at 49-50.

In the instant case, Respondent John Alagha was not a mere board member insulated from the actual activities of the business. He was the 100% owner and President of Alagha & Associates Corporation. Tr. 89: 10-18. On these facts, the Court finds that Respondent John Alagha and Respondent Alagha & Associates are "affiliates" of each other within the meaning of 2 C.F.R. § 180.905. Respondents made no factual showing, at the hearing or elsewhere, that Respondent Corporation employed any officer, agent, or employee that acted to insulate Respondents from knowledge of the CPA requirement.

Respondent Alagha also had 30 years of previous accounting experience. Tr. 82: 14-17. He admits that he was directly informed by a CPA with whom he regularly did business that he could not render the PAAC Audit Report unless he was a licensed CPA. Tr. 85: 13-15. The audit report, which Respondent Alagha signed, expressly stated that Respondents conducted the audit at issue in this case in accordance with GAGAS and GAAP. Tr. Exs. 12, 13. GAGAS specifically requires that independent financial audits be conducted by licensed CPAs. GAGAS § 3.44. Respondents do not deny that, at all relevant times, they never possessed valid CPA licensing credentials. Tr. 90: 17-22; Tr. 91: 1-19.

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[5] Since a finding of "reason to know" is adequate to establish violations of GAGAS and HUD regulations in this case it is not necessary to determine whether the higher standard of "should have known," should be applied. See Restatement (Second) of Torts § 12 cmt. a (explaining that unlike "reason to know," "'should know' implies that the actor owes another the duty of ascertaining the fact in question").

I find that Respondents, purporting to act as independent auditors for the PAAC FYE 2008 audit, should have known of the licensing requirements necessary for preparation of public audits. But drawing reasonable inferences from these overwhelming facts, Respondents certainly had reason to know that they were in violation of HUD regulations and GAGAS standards that required them to have a CPA license. Notwithstanding Respondent Alagha's turgid denials, under oath, that he did not know of the licensing requirement at the time they issued the independent audit report, the facts indicate otherwise. Respondents' duties and access to information contrasts greatly from the cases where Respondents involved in debarment proceedings did not have reason to know that they were required to take action. *Cf.* Feinerman 558 F. Supp. 2d 36 (D.D.C. 2008).

Respondent Alagha and Respondent Corporation clearly had reason to know of the CPA licensure requirement, as they were expressly informed of the requirement by Mr. Ghalambor, a licensed CPA. This would have put any reasonable person on notice of the requirement, especially Respondent Alagha, who stated that if he is provided with accounting information requirements by a CPA, he believes that "for sure, it's true." Tr. 99: 11-13. In addition, since Respondents certified in writing that their audit report was prepared in accordance with GAGAS, which also required compliance with state laws, Respondents were bound by both GAGAS and California CPA licensing requirements. Finally, since Respondents' knew that the audit report was being prepared for submission to HUD, they are therefore charged with the responsibility of knowing and applying the HUD audit regulation requirements. Feinerman at 49-50; see also HUD HANDBOOK 2000.04 REV 2, CHG-1 (2007). Those HUD regulations also required Respondents to hold CPA licensure before rendering an independent audit with respect to HUD's federal program audits. Therefore, I find that Respondents knew or should have known that their lack of proper licensure in public accountancy violated applicable state and federal laws and regulations pertaining to public accounting practice.

4. Violations were Willful

The foregoing factual findings demonstrate that Respondents' violations of HUD regulations were knowing and intentional. I therefore find that Respondents' conduct was undertaken with reckless disregard for their professional and regulatory obligations, and constitutes "willful" conduct for purposes of 2 C.F.R. § 180.800. See Feinerman, at 48, n.13.

C. Debarment is Warranted

Federal agencies may debar government contractors or others doing business with the Government in order to protect the fiscal integrity of government programs. 2 C.F.R. § 180.800, *et seq.* The evidence of record demonstrates that Respondents had actual knowledge of the licensing requirement and willfully failed to comply with that requirement in a manner so serious as to affect the integrity of an agency program. See 2 C.F.R. §180.800(b) and (d).

Debarments, LDPs, and suspensions are serious sanctions. 2 C.F.R. § 180.125(c). Such sanctions have been found to be warranted in cases where: a participant, who had previously been issued an LDP, did nothing to correct the deficiency and admitted to misusing funds to the detriment of HUD, Otis Stewart Jr., HUDALJ 98-8054-DB (Nov. 8, 2001); an executive director

of a HUD participant had a duty to discourage the participant's board members from taking actions that violated HUD regulations, but failed to do so, McKinley v. Copeland, HUDBCA No. 00-C-113-D14 (Nov. 29, 2001); a participant's false certification of a real estate appraisal was a material misrepresentation even when there was a lack of intent to mislead HUD, Gabe Brooks, HUDBCA No. 99-A-104-D3 (Sept. 15, 2000); a loan officer falsified loan documents, forged signatures on loan documents, and made false statements for the purpose of influencing loan underwriting decisions in which HUD insured the loans, Marcus Payne, HUDBCA No. 99-9014-DB (May 14, 1999); a respondent made a misrepresentation, that even if it was an "honest mistake, [was], nevertheless, a very serious mistake because HUD must rely upon the truthfulness of the representations made by those who participate in its program and who certify to the accuracy of their representations," William D. Muir and Metro Cmty. Dev. Corp., HUDBCA No. 97-A-121-D15 (Nov. 6, 1997); and, respondents were found to have "failed, repeatedly, to meet their contractual and programmatic obligations to HUD" when they entered into four sales contracts with HUD that never went to closing, M. Brett Young and Allied Hous. Grp., Ltd., HUDALJ 96-0036-DB (Sept. 13, 1996).

On the other hand, less onerous sanctions have been imposed in cases where: a respondent made good-faith efforts to remedy a difficult and disorganized situation and bring her office into compliance with HUD regulations but was unable to do so because she lacked the staff and necessary resources, Marilee Jackson, HUDBCA No. 05-K-112-D7 (Oct. 13, 2005); and, a lender's remedial measures demonstrated that they were acting as responsible contractors and in good faith as they attempted to correct the deficiencies caused by their subcontractors, First Capital Home Improvements, HUDBCA No. 99-D-108-D7 (Nov. 24, 1999).

In this case, the Government seeks to impose a three-year debarment against Respondents for conducting an independent audit without a CPA license in violation of HUD regulations and other guidelines. The Government has established that Respondents violated a number of HUD guidelines, applicable laws, and regulations, and have demonstrated a complete disregard for their responsibilities. As an experienced accountant of over 30 years, Respondent's conduct raises serious concerns that hold significant implications for the public interest. I, therefore, find that the Government has established a clear basis for the imposition of a debarment in this case.

1. Covered Transactions

The foregoing factual findings demonstrate that Respondents engaged in a nonprocurement "covered transaction" as a lower-tier participant within the meaning of 2 C.F.R. §§ 180.200 and 180.970 when they conducted an independent audit of PAAC for FYE 2008. PAAC was a primary-tier entity in that it was an approved HUD lender seeking to underwrite and issue FHA loans. Tr. 71: 2-8. See 2 C.F.R. §§ 180.200(a), 180.980. Respondents were lower-tier participants in a covered transaction in that Respondents conducted an independent public audit of PAAC's financial records for the purpose of issuing an independent audit report to HUD for approval. Tr. Ex. 13. See 2 C.F.R. §§ 180.200(a)-(b), 180.985.

I further find that Respondent Corporation was an affiliate of Respondent Alagha within the meaning of 2 C.F.R. §§ 180.905 and 180.625(b)(1)-(2) (providing that "any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring

official — (1) officially names the affiliate in the notice; and (2) gives the affiliate an opportunity to contest the action"). In this case, both Respondent Alagha and Respondent Corporation were officially named as subjects in this debarment proceeding. *The Notice.* Both Respondents were also given an opportunity to contest this action. See *Answer and Request for Dismissal*, filed on August 10, 2011. As affiliated parties, I find that Respondents engaged in a nonprocurement covered transaction when they rendered the PAAC audit.[6]

2. Present Responsibility

After establishing that a cause for debarment exists, the burden shifts to the respondent, who must demonstrate "to the satisfaction of the debarring official that [Respondent is] presently responsible and that debarment is not necessary." 2 C.F.R. § 180.855(b). In determining whether debarment is an appropriate sanction, "[t]he debarring official bases the decision on all information contained in the official record. The record includes ... [a]ny further information and argument presented in support of, or in opposition to, the proposed debarment." 2 C.F.R. § 180.845(b)-(b)(1).

Respondent Alagha has been in the accounting business for more than 30 years. Tr. 82; 14-17. He has been an Enrolled Agent with the Internal Revenue Service for approximately 15 years. He holds master's degrees in accounting and finance. Tr. 82: 10-13. No evidence has been presented that he has previously been the subject of any inquiries into violations of HUD guidelines, or that he has been subject to previous disciplinary action. Respondents also argue that debarment is an inappropriate sanction because, "[a]ll of the deficiencies identified by HUD are not serious." *Resp'ts Post Br.* 9.

I find that the preparation of an independent audit report certifying the accuracy of a FHA lender's financial statements and balance sheet are extremely serious matters, that, when not taken seriously, can result in tremendous financial loss to the public fisc. Having public audits performed by persons who are not qualified to do so could very well lead to catastrophic financial consequences for the federal government and the public, and must be prevented to the greatest extent possible. This Court holds that Respondent Alagha had actual knowledge of the CPA licensing requirement. Moreover, even if he did not have express knowledge, it is imputed to him by virtue of his own certification and attestation that the PAAC audit complied with GAGAS. Tr. Exs. 12, 13.

Respondents have not come forward with any appreciable evidence to demonstrate that they made a reasonable effort to verify applicable rules. This might have demonstrated Respondents' good faith attempts to comply with HUD guidelines. Respondents' violations in this case present an unacceptable risk to HUD and the FHA program. Although the Government did not present evidence to establish economic damage as a result of Respondents' actions, if these practices were allowed to persist, they could well result in serious economic harm to HUD programs and place the FHA program at risk.

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[6] In addition, under applicable California law, the term "person" includes a corporation. See Cal. Bus. & Prof. Code § 5035.

Further evidence of Respondents' lack of present responsibility is demonstrated by their failure to accept responsibility for this violation. A candid acceptance of responsibility could be considered a mitigating factor under 2 C.F.R. § 180.860. However, Respondents continued to deny that they violated any law or regulation. *Resp'ts Pre Br.* 5-8; *Resp'ts Post Br.* 3, 9. Respondent Alagha's denial of any violation is further evidence that he either lacks sufficient knowledge of HUD's policies with respect to conducting public audits, or does not feel he should be obligated to comply with them. Either condition renders Respondents not presently responsible and unqualified to conduct audits of HUD lenders. See Benjamin J. Roscoe, HUDALJ 93-2007-DB (June 26, 1995) ("'Present responsibility' includes not only financial responsibility but also the capacity and willingness to comply with governmental rules and regulations"). If Respondents do not appreciate why such certification of qualifications is necessary, they call into question their suitability for being entrusted with the responsibilities of doing business with the federal government.

Respondents also failed to show that the proposed debarment, based on acts that occurred in 2008 and 2009, [does not "reflect the Government's desire to protect the public interest pursuant to 24 C.F.R. § 24.115(a) or that its imposition reflects an abuse of agency discretion." William Johnson and Linear Non-Profit Hous. Corp., 06-1 BCA P 33132, HUDBCA No. 03-D-104-D5 (July 2, 2004). Although it has been held that the "passage of time diminishes the probative value of acts showing lack of present responsibility," I find that the passage of time has not improved Respondents' position with respect to being presently responsible. Gary M. Wasson, HUDALJ 04-030-DB (Aug. 5, 2004) (citing Lynne Borrell and Lynne Borrell and Assocs., HUDBCA No. 91-5907-D52 (Sept. 20, 1991)).

In Gary M. Wasson, the administrative law judge stated that, "to be sure, a respondent may be found to lack present responsibility based on past acts; but the staler the evidence, the weaker the proof," and held that "HUD's delay in bringing a case against Respondent undermined the cause for debarment to the point that he cannot now be found to lack 'present responsibility' on the basis of events that occurred from six years, 10 months to nearly eight years ago." Gary M. Wasson; see also Roberto Soto Carreras, HUDALJ-88-1234-DB(TDP) (June 22, 1988) (finding that three years was an inordinate amount of time to delay bringing charges against a respondent based on events occurring almost seven years prior to the initiation of a temporary denial of participation). However, this debarment action differs from Gary M. Wasson because, in that case, the Government knew of the respondent's violation within days of its occurrence but did not take action against the respondent for six and a half years. Id. In the present case, HUD's issuance of the Notice of Proposed Debarment was timely.

In Uzelmeier v. United States Department of Health and Human Services, the district court upheld an administrative law judge's decision to debar a participant even though the Department of Health and Human Services waited seven years before initiating debarment proceedings. 541 F. Supp. 2d 241, 247-48 (D.D.C. 2008). The court in Uzelmeier cited another district court case where "the length of time between the underlying events and the debarment ... was just one factor that the court considered, but there was no indication that it was the dispositive factor or even the primary one." 541 F. Supp. 2d at 249 (discussing Roemer v. Hoffmann, 419 F. Supp. 130 (D.D.C. 1976)). The court distinguished Uzelmeier from Roemer by noting that, "in this case plaintiff has admitted no past wrongdoing and has not demonstrated

that her present responsibility has changed or improved since the underlying incidents." Uzelmeier at 248. Like the plaintiff in Uzelmeier, Respondents have not acknowledged their failure to comply with HUD guidelines. Instead, Respondents have continued to argue that compliance was not required, or that any non-compliance was not serious because HUD was not harmed. *Resp'ts Post Br.* 9-10. I find this fact to be a compelling factor, and further find that Respondents are not presently responsible.

D. Mitigating and Aggravating Factors, and Other Considerations

In deciding the length of a debarment, the debarring official may consider mitigating or aggravating factors, pursuant to 2 C.F.R. § 180.860. A debarring official may choose not to impose a debarment even if cause for the debarment exists. 2 C.F.R. § 180.845(a). The existence or nonexistence of any single factor is not determinative. Id. However, the debarring official must consider the length of any preceding suspension. 2 C.F.R § 180.865(b).

Section 180.860 sets forth the aggravating and mitigating factors that the debarring official may take into consideration. That section is set forth in its entirety, followed by the Court's responsive analysis, below:

> In making a debarment decision, the debarring official may consider the following factors:
>
> (a) The actual or potential harm or impact that results or may result from the wrongdoing.
>
> (b) The frequency of incidents and/or duration of the wrongdoing.
>
> (c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.
>
> (d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.
>
> (e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.
>
> (f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

The Government argues that a number of aggravating factors exist in this case. First, the Government contends that, under subsection (a), there was potential for harm to the FHA program because HUD relies on annual audits to determine whether the FHA-approved lenders

continue to maintain the conditions of their approval, including compliance with minimum net worth and liquidity requirements. Respondents, however, maintain that there was no harm to HUD, or even any potential harm, because PAAC was not approved to continue its participation in the program. The Government did not present evidence at the hearing as to any actual harm suffered by the agency.

The Government appears to acknowledge that this was the only violation committed by Respondents, and also states that it is unaware of any exclusions or disqualifications by other agencies. *Gov't Post Br.* 17. The Respondent has been in the accounting business for more than 30 years with no previous record of disciplinary action or unethical conduct. Tr. 82: 14-17; Tr. 118: 13-22. Respondents also argue that this was their only violation, and that fact should be considered in mitigation of any proposed debarment. Thus, aggravating factors are not present under 2 C.F.R. § 180.860(b)-(e), and these factors militate in favor of mitigation.

The Government states that Respondents planned and carried out the wrongdoing, as Respondent Alagha performed the audit that he was not authorized to prepare, and he is the sole owner of Respondent Corporation. Thus, their active involvement in the wrongdoing is an aggravating factor under 2 C.F.R. § 180.860(f). It also urges that Respondents failure to accept responsibility for their wrongdoing or to recognize the seriousness of the wrongdoing warrants consideration as an aggravating factor under 2 C.F.R. § 180.860(g). In addition, the Government urges that the multiple failures of Respondent Corporation to implement appropriate standards of conduct, to ensure that the organization would not tolerate wrongdoing and that violations were not pervasive, to investigate the violations, to hold the principal violator accountable, or to make changes to eliminate the circumstances that led to the wrongdoing warrant consideration as aggravating factors under 2 C.F.R. § 180.860(j)-(r). *Gov't Pre Br.* 12-14. Respondents continue to maintain that they did not realize that the information was being submitted to the Government and that they were not subject to the laws and regulations that apply to public audits submitted to the Government. *Resp'ts Post Br.* 8, 10. They also continue to argue that Respondent Alagha never claimed to be a CPA, and was always honest about the fact that he was not a CPA. *Resp'ts Post Br.* 8.

As I have previously found, Respondents knowingly violated applicable GAGAS standards, HUD regulations and guidelines, and state law, by preparing and submitting a public audit of PAAC. This is a serious violation. I have taken into account that the evidence shows only a single incident of preparing an audit in violation of applicable laws and regulations, and find this to be a mitigating factor. However, Respondents' continued denials of responsibility and claims that they did not know the audit had to be prepared by a CPA, despite being told of this requirement and despite certifying that the audit complied with GAGAS standards, weigh heavily against them. These factors belie their claim of present responsibility. Respondent Alagha either does not have sufficient knowledge of GAGAS standards and HUD regulations and guidelines regarding the preparation of public audits, or he refuses to appreciate his responsibility to comply with them.

In either case, these are considerable aggravating factors. His preparation of an audit that also was clearly deficient, where he acknowledged he relied on only one bank statement and financial information provided by PAAC, that was not independently verified, amounted to

egregious and reckless conduct that is not acceptable in federal program auditing. Although he was not cited for this misconduct in the Notice of Proposed Debarment, his general conduct in preparing the audit is relevant to subsections (f) and (j). Respondent Alagha's continued denial of knowledge of the applicable standards, despite his lengthy tenure as an accountant, contributes to this aggravating factor. I therefore find that Respondents' failure to accept responsibility for their knowing, reckless, and serious violations of applicable law, regulations, and procedures, are aggravating factors under the regulation. These aggravating factors are not mitigated by claims of innocence or lack of knowledge, but are somewhat mitigated by the fact that there was only one incident of wrongdoing and no showing of serious, actual harm suffered by the Agency.

I find that consideration of 2 C.F.R. § 180.860(f), "[w]hether and to what extent [Respondent] planned, initiated, or carried out the wrongdoing," bears further discussion. Respondent Alagha's actions indicate a lack of appreciation for the importance of several of HUD's guidelines and requirements. From the evidence of record, I find that Respondent's actions were reckless in nature, and therefore amounted to willful misconduct. However, since evidence of fraud or intentional misconduct requires and generally results in more severe sanctions, as indicated in the cases cited above, I find the lack of such conduct here to be a mitigating factor in this case. Thus, while Respondent's conduct was intentional in that he knew he was required to be a CPA to conduct the PAAC audit, and he planned and carried out the performance of the audit notwithstanding, on this record, I do not find that he committed fraud against HUD. See Cal. Civ. Code § 1709.

The parties did not argue that either aggravating or mitigating factors exist under 2 C.F.R. § 180.860(s), which allows consideration of "other factors that are appropriate to the circumstances of a particular case." I therefore do not consider this factor.

All of the above factors were fully considered from both the perspective of the Government and Respondents. The decision to debar Respondents is within the discretion of the debarring official. 2 C.F.R. §180.845(a). In determining whether debarment is an appropriate sanction, "[t]he debarring official bases the decision on all information contained in the official record. The record includes ... [a]ny further information and argument presented in support of, or in opposition to, the proposed debarment...." 2 C.F.R. § 180.845.

E. Appropriate Period of Debarment

A three-year period of debarment is generally imposed in cases involving fraud. In Walter C. Johnston, the Court imposed such a debarment on the Respondent after finding that he knowingly and willfully represented to HUD that cash payments had been made by the borrowers in order to accomplish the sale of properties with mortgages insured by FHA. HUDALJ 90-1499-DB, at *14 (Sept. 26, 1990). The Court found that the respondent's "willful falsification" of terms and conditions placed public funds at risk and prevented HUD from relying on his statements in making eligibility determinations. Id. at *23, *25; see, e.g., James Myers & Tammy Myers, HUDBCA No. 96-A-105-D2 (Sept. 12, 1996); Howard Burgess, HUDALJ No. 95-5023-DB (May 10, 1995); but see John E. Signorelli, HUDBCA No. 86-1517-D8 (Sept. 30, 1986) (imposing a two-year period of debarment based on respondent's publication of false financial statements).

While the Respondent's intent to defraud HUD was clear in Johnston, a debarring official may still impose a three-year debarment period even if the Government cannot prove a respondent was complicit in fraudulent acts, as long as the respondent's conduct was so glaring and irresponsible as to create an environment conducive to fraud. See Kay Yarbrough, HUDBCA No. 92-C-7513-D33, at *37-41 (Oct. 28, 1992) (holding that even though the Government could not prove that the respondent engaged in fraud, her "absolutely appalling, lazy, and ultimately dishonest abdication of her responsibilities ... set in motion a chain of events ... where fraudulent schemes could gain a firm foothold").

In contrast, if no fraud is alleged and the respondent demonstrates an awareness of his or her errors, officials have generally imposed a debarment period of less than three years. In Renee Divins, for example, the respondent's acknowledgment of her loan processing errors led to a debarment period of 18 months, rather than the Government's proposed five-year debarment. HUDBCA No. 92-C-7511-D30 (June 4, 1992). The Court in that case found that the nature of the errors reflected "technical falsehoods" rather than fraud and that the respondent had "become more aware, more careful." The Court therefore determined that a shorter debarment period was warranted. Id. at *41, *43. Similarly, although the respondent in Mayer Co., Inc. & Carl A. Mayer, Jr. failed to obtain liability insurance on certain apartments and failed to make timely mortgage payments on properties owned, insured, or subsidized by HUD, the Court nevertheless noted that the Respondent became "cognizant of the deficiencies of his performance.... His growing awareness of what he should have done to avoid the contract performance problems ... mitigates somewhat the more troubling aspects of this case." HUDBCA No. 81-544-D1, at *3-7, *14-15 (Dec. 1, 1981). Accordingly, a one-year period of debarment was imposed. Id. at *15.

If Respondents fail to understand the seriousness of their violations, however, an official may decide to impose a two-year debarment period. For instance, the Court in Joan Galati imposed a two-year debarment on the Respondent after determining that "[s]he [was] still trying to explain away and dodge from serious irregularities in her conduct," including failure to verify information provided by borrowers. HUDBCA No. 88-3455-D64, at *11, *20 (March 9, 1989); see also Stephen J. Ferry & Beth Ann Ferry, HUDBCA No. 90-5228-D17, at *17 (Oct. 31, 1990) (noting particularly the Respondents' attitudes during the hearing, stating that "[t]hey profess ignorance of HUD rules and regulations, quibble with them, and were generally defiant").

Likewise, even if a Respondent genuinely regrets his actions, the official must be persuaded that the Respondent actually understands why his conduct was improper. See Michael E. Ipavec, HUDBCA No. 95-A-128-D19 (Feb. 21, 1996) (imposing a two-year period of debarment based on Respondent's failure to grasp the seriousness of his violation, despite expressions of regret).

On this record, I have not found conduct that could be conclusively shown to constitute fraud on the part of Respondents. Rather, I find that Respondents' deficiencies arose from Respondent Alagha's disregard of the GAGAS standards and HUD guidelines under circumstances where he either knew or should have known of the applicable requirements. Therefore, in determining the appropriate period of debarment, I have considered whether Respondent has demonstrated an awareness of his misconduct, warranting a one-year period of

debarment, or whether he continues to excuse his conduct, warranting a three-year period of debarment or more.

I find that Respondent Alagha's hearing testimony evidenced a lingering refusal to accept responsibility for his misconduct. Respondent continually sought to justify his actions in the face of clear contravening HUD requirements. Respondent does not seem to comprehend that the standard to be met as an auditor is not one of "reasonable" actions, but one of strict compliance with GAGAS and the HUD guidelines. This failure of comprehension raises very serious concerns. This is especially so because Alagha evinced these attitudes at the hearing in July 2012, well after receiving the Notice of Proposed Debarment on September 10, 2010.

Unlike the Respondents in Renee Divins and Carl A. Mayer, Respondents in this case refuse to admit, or fail to comprehend, their culpability with regard to the violations. Respondents' attitude instead parallels that of the respondent in Joan Galati, where the debarring official imposed a debarment period of two years. As this administrative body has previously stated, "[i]t is not the quantity of transactions so flawed, but the nature of the act and the recognition of them." Joan Galati, HUDBCA No. 88-3455-D64, at *20 (March 9, 1989); see also Howard Burgess, HUDALJ No. 95-5023-DB (May 10, 1995) ("Respondent's explanation demonstrates that he has yet to accept responsibility for his unlawful conduct, and, therefore, that there remains a likelihood that he will repeat such acts in the future.") Without express recognition of their errors, I have no basis to believe that Respondents will not repeat these same errors in the future or that they will not continue to pose an unacceptable risk to HUD.

I further find that Respondents' failure to acknowledge wrong-doing outweighs any mitigating impact that may be gleaned from Respondents' lack of any showing of previous misconduct or lack of any showing of specific economic damage caused by Respondents' conduct in this case. Moreover, after considering all of the factors that militated in Respondents' favor, as set forth in 2 C.F.R. §180.860, I find that these factors do not outweigh the Department's compelling interest in protecting the public fisc from potentially significant financial losses.

I find Respondents' attitude parallels that of the respondent in Howard Burgess, and that a significant debarment period is appropriate for their actions.

RECOMMENDED DETERMINATION

The Court finds that Respondents are not presently responsible and that debarment is warranted in this case. Considering the seriousness of Respondents' acts and omissions, I recommend that a period of debarment be ordered for two years beginning on July 1, 2011, the date when the Debarring Official referred this case to the Office of Hearings and Appeals for fact-finding.

H. Alexander Manuel
Administrative Judge