

CHAPTER 8. MANAGING PERFORMANCE DEFICIENCIES

8-1 PURPOSE. HUD's statutory responsibility for enforcing program requirements and standards is met by reviewing actual performance to identify performance deficiencies and, when deficiencies are found, taking steps to ensure that effective corrective actions are taken. The purpose of this chapter is to provide guidance on making and resolving findings based on performance deficiencies. Emphasis is placed on working cooperatively with grantees to validate findings and agree upon voluntary actions to correct those deficiencies. Actions to condition, terminate, reduce or limit grant payments are usually undertaken only where voluntary efforts fail to resolve deficiencies effectively in a timely manner.

8-2 MAKING AND RESOLVING FINDINGS OF NONCOMPLIANCE

- A. HUD's statutory responsibility for ensuring compliance with Title I program requirements and standards is met by reviewing actual grantee performance, and when deficiencies are found, taking steps to ensure that effective corrective actions are taken. Emphasis is placed on working cooperatively with grantees to validate findings and to agree upon voluntary actions to correct the deficiencies.
- B. In all cases, a clear and complete record describing the deficiency and the actions taken to resolve it is essential. Such a record will help insure that grantees are treated fairly and that, if necessary, HUD's actions can be successfully supported. This requires that the basis for positive conclusions as well as deficiencies must be documented or explained.

8-3 FINDINGS - GENERAL

- A. Definition. A finding is defined in paragraph 1-6.d of the CPD Monitoring Handbook as "a deficiency in program performance based on a statutory or regulatory requirement for which sanctions or other corrective actions are authorized." If such a deficiency is identified by HUD, a finding must be made. (The one possible exception is non-compliance with the timeliness standard. Paragraph 8-5 provides guidance on this area.) Findings may be made as a result of on-site monitoring

visits, audits, or GPR reviews. An example of a finding is where there is a program requirement for appropriate documentation of low/mod benefit and that documentation

either does not exist, is incomplete, or does not support the conclusion reached; the grantee must be notified that a finding has been made and given the opportunity to contest the finding. In this example, the grantee might contest the finding by providing new information overlooked by HUD which supports the use of Title I funds for this activity.

Note: If the Field Office is not sure that there is a firm basis for the finding or does not know what remedy would be appropriate, the Regional Office or Headquarters should be consulted before the grantee is advised of the finding.

- B. Corrective Action. Whenever a finding has been made, a determination must also be made concerning corrective action. (It may be that no action is needed if HUD determines that the noncompliance was beyond the control of the grantee, the finding was a minor aberration, or the grantee has already taken appropriate corrective action.) Guidance on selecting an appropriate corrective action is provided at 8-4 C., below. Keep in mind that there may be several acceptable solutions for correcting a deficiency, and the grantee should be offered the opportunity to respond to the finding with its own solution which HUD agrees will achieve the desired results.
- C. Documentation. Findings have the potential to become the subject of HUD funding sanctions requiring an administrative hearing or litigation. Therefore, each finding must be adequately documented at the time the finding is made, through, for example, use of the checklists provided in the GPR review chapter and the monitoring handbook, a note to the file, or the monitoring letter. The conclusions reached must be supported by the facts in the case and those facts must be available in the office file for that grantee. A copy of the initial monitoring letter and the GPR substantive review letter to the grantee must be sent to the Entitlement Communities Division in Headquarters.
- D. Clearing the Finding. There also should be adequate documentation in the file about the acceptability of the grantee's response to the finding. Use the Finding

Summary Sheet (HUD 40013A - Bee Exhibit 2-2) where the initial grantee response is not acceptable, so there will be a convenient record of the paper trail of all actions HUD and the grantee have taken to resolve the finding. Make notes of informal consultations and other meetings with the grantee so the record is clear as to

what happened and when. While HUD emphasizes voluntary action and working closely with the grantee to remedy the problem, there will be instances where the Field Office must pursue corrective actions through Headquarters. There must be a record which identifies, supports, and documents all actions which have taken place.

8-4 PROCEDURES FOR RESOLVING NON-COMPLIANCE. The procedures described below are designed to foster uniformity in the processing of findings including the development of complete records in all cases and the consistent application of remedies. The following steps shall be followed in addressing violations of program requirements, with the exception of timeliness problems, identified through any form of monitoring, including performance report reviews, follow-up on citizen complaints and newspaper articles and on-site visits. The steps to take to resolve timeliness problems are covered in paragraph 8-5.

- A. Determining whether a finding should be made. Whenever apparent non-compliance is identified, take the following preliminary actions:
 - 1. Notify the grantee in writing of the identified deficiency and provide an opportunity for the grantee to contest it within a specified time period (usually not more than 30 days). Identify the specific requirement not met, including citation of the regulation provision or OMB Circular.
 - 2. If the grantee provides information that satisfies the Field Office that there is no deficiency, the grantee should be so notified in writing. No further action need be taken.
- B. Making a finding. If the grantee does not respond within the specified time period or admits the deficiency or fails to contest the deficiency to the satisfaction of the Field Office, a finding must be made and the following actions taken:

- 1. Notify the grantee in writing of the finding, with the following information included in the notification:
 - a. Identification of the requirement that has not been met including the citation of the specific provision of the regulations and, if applicable, OMB Circular;
 - b. Advice on corrective or remedial action(s),

including timeframes, the Field Office believes are appropriate for the grantee to take consistent with the objectives set forth in paragraph 8-3 B., above;

- c. An opportunity within a specified reasonable period of time to negotiate corrective or remedial actions.
 - d. A request to notify the Field Office whether there are any ongoing or planned activities that are or will be affected by the deficiency.
 - e. A warning that HUD intends to take additional action if the deficiency is not corrected immediately or is repeated.
- 2. Record the finding in the FORMS/CPD system as appropriate.
 - 3. If the grantee takes corrective action that the Field Office believes satisfies the finding, so notify the grantee and record the resolution date in the FORMS/CPD system as appropriate.
 - 4. If the grantee does not agree to take the corrective action initially recommended by the Field Office, the grantee proposes to take some other action not satisfactory to the Field Office, or the response has not been received by the due date, so notify the grantee in writing. Initiate a Finding Summary Sheet by filling in the blocks on the top half of the form, except block 5. Use this form to summarize the date and nature of all efforts to resolve the finding and to record all communications (written or oral) between HUD and the grantee. This form is not required when the grantee's initial response to the finding is acceptable. The Finding

Summary Sheet form has been designed to facilitate the process of documenting the actions the Field Office has taken to resolve each finding it makes.

- 5. Follow up. Continue to follow up with the grantee until it is clear that appropriate corrective action has been taken or that the grantee is unwilling (or unable) to resolve the matter on a voluntary basis within a reasonable period of time.
- 6. Reimbursement. When HUD determines that costs incurred by the grantee in connection with the finding should be disallowed, the grantee must be

advised, not directed, to reimburse the line of credit except where the amount of the repayment will be disbursed by the recipient within seven calendar days or the amount is less than \$10,000 and will be disbursed within thirty calendar days. Only in those exception cases may a grantee reimburse its program account in lieu of its line of credit. If the grantee wishes to have the finding resolved by a voluntary grant reduction, the information in paragraph F below must be provided to Headquarters. The following language should be used as a guide when advising grantees to repay their line of credit for costs disallowed as a result of monitoring or audit findings:

- a. "In order to resolve this issue to the satisfaction of the Department, we hereby advise you of the immediate need to reimburse your line-of-credit in the amount of \$ _____, using non-Federal funds. Failure to repay this amount by ____ (date) ____ may result in a grant reduction." OR
- b. "In order to resolve this issue to the satisfaction of the Department, we hereby advise you that it is necessary to reimburse your line-of-credit in the amount of \$ _____, using non-Federal funds. Failure to pay this amount by ____ (date) ____ may result in a grant reduction."

NOTE: Even where the grantee chooses a grant reduction rather than repayment to the letter of credit, Headquarters approval for the reduction must be sought because authority for grant reductions has not been delegated to the field.

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- C. Determining appropriate corrective actions. In determining whether the grantee's proposed actions are appropriate to resolve the finding, or when the grantee does not respond within a reasonable time period, the matter is to be referred to Headquarters following the procedures below:
 - 1. If the Field Office determines that the deficiency is affecting one or more on-going activities (taking into consideration the grantees response to the notification above), the grantee is to be advised in writing to suspend disbursement of funds for the deficient activities immediately.
 - 2. If the Field Office determines that the deficiency is likely to affect future activities (taking into

consideration the grantee's response), the grantee should be advised in writing to take corrective action prior to undertaking any activities that would be so affected in order to prevent a recurrence of the deficiency. The Field Office may identify the specific corrective action it believes should be taken or offer the grantee the opportunity to indicate the action it proposes to take to remedy the deficiency.

3. After allowing the grantee a reasonable opportunity to respond (generally not more than 60 days), if the Field Office believes that the recipient is not taking appropriate action to suspend disbursements or to prevent the deficiency from affecting ongoing or future activities, the Field Office should consider changing the method of payment for some or all of the grantee's activities, as appropriate, from a line-of-credit basis to a reimbursement basis.
 4. Any time HUD determines that a deficiency is of such nature that it will cause HUD to question a certification required under 570.303, the grantee should be notified in writing of the specific additional assurances HUD believes will need to be provided to make the certification satisfactory.
- D. Mitigating adverse effects. Notwithstanding that the deficiency is not of a continuing nature or that the grantee has taken actions to suspend affected activities and to avoid recurrence, there are situations where

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- actions should be taken to mitigate the adverse effects it has caused in the past. Where the non-compliance has clearly resulted in adversely affecting particular individuals or households in a monetary sense, the most appropriate remedy would be for the grantee to make whole the affected parties using non-Federal funds. Examples of such adverse effects would be a failure to pay prevailing wages to workers where CDBG was used to finance construction; a failure to pay relocation benefits (or payments of less than that required) to persons or businesses entitled to such benefits; recovering costs of a public facility paid for by CDBG funds through assessments of low- and moderate-income persons, or failing to pay assessments for low- and moderate-income persons when required by program rules.
- E. Considerations for Monetary Sanctions. In deciding whether to seek a monetary sanction for a particular finding, HUD should be guided by the following

considerations:

1. The extent to which the non-compliance resulted from the grantee having been improperly advised in writing by a cognizant HUD official;
 2. Whether the grantee heeded HUD's advice to suspend expending funds immediately for activities affected by the infraction;
 3. Whether the grantee was previously found by HUD to have violated the same or a similar requirement;
 4. Whether and to what extent the non-compliance resulted from negligence on the part of the grantee.
- F. Monetary Sanctions. When HUD determines that a monetary sanction is appropriate, the following factors should be considered in deciding whether to pursue recovery of all or a portion of the funds expended for the activity affected by the non-compliance:
1. Notwithstanding the non-compliant aspect of the activity, the extent to which the activity met a clear need of low- and moderate-income persons in the grantee's jurisdiction;
 2. The extent to which costs were incurred on an activity after the date the grantee was notified in

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writing that HUD considered the activity to be in non-compliance with one or more program rules;

3. Where there is evidence that the regulation that has been violated is ambiguous, the extent to which the grantee's action represented a reasonable interpretation of the regulation. In determining whether a regulatory provision is ambiguous, HUD will consider the extent to which program issuances that explained the interpretation that HUD relied on in concluding that there was non-compliance were broadly disseminated.
- G. Informing Headquarters and Regional offices. There are, of course, instances where efforts to resolve the finding with voluntary actions are unsuccessful. Please notify the Headquarters Entitlement Communities Division and the Regional Office when either of the following two actions have been taken: advising an entitlement grantee that a certification is no longer acceptable and that additional assurances will be required (section 570.910 b(3)), or changing the method of payment to the

recipient from a line of credit to a reimbursement basis (section 570.910 b(6)). While Field Offices have the authority to take these actions, we want to be informed at an early date of these cases since such actions are indications of a potential need for Headquarters' involvement in the future.

H. Referrals to Headquarters. The Field Office is to refer to Headquarters all findings that are not resolved to HUD's satisfaction by the grantee on a voluntary basis within a reasonable period of time. Specifically, a memorandum is to be sent to Headquarters containing the Field Office's recommendations for the corrective action(s) that should be taken in any of the following circumstances:

1. After providing the grantee a reasonable opportunity to respond, the Field Office determines that the recipient is not following advice provided or is otherwise failing to take satisfactory corrective action to resolve the finding; or
2. Whenever the grantee has failed to take appropriate corrective action to resolve the finding within a one year period following the date the finding was made by HUD.

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3. All such referrals are to be sent to the Field Coordination Unit in Headquarters, together with the information required under paragraph I., below.
- I. Information Required. To assist the Regional Office and Headquarters in assessing the situation, the Field Office shall submit the following information to the Regional Office:
1. A thorough description of the basis for the finding, including identification of the specific program requirement (including the citation of the regulation, and if applicable OMB Circular) that was not met;
 2. A statement of the remedy the Field Office proposes be taken;
 3. A complete chronology of actions taken by both HUD and the grantee to date to resolve the finding including copies of letters exchanged between the Field Office and the grantee, and, if an informal consultation was held, indicate when it was held, with whom, and provide a synopsis of the discussions and the conclusions reached;

4. Except in cases where the grantee agrees to a grant reduction, a statement of whether (and if so, how) the nature of the noncompliance is such that the obligation of additional funds for affected activities will likely involve continued or future failure to comply with the regulations;
 5. Where appropriate, a statement of whether the Field Office recommends FH&EO Regional Compliance activity; and
 6. The names and telephone numbers of HUD field staff who are most familiar with the details of the case.
- J. Regional Recommendation. After reviewing the information submitted by the Field Office, the Regional Office shall forward that information, together with the Regional Office's recommendation, to the Assistant Secretary for Community Planning and Development, Attention: Field Coordination Unit.

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- K. Field Office Actions Following Referral to Headquarters. If the Field Office has referred issues to Headquarters for action and subsequently receives additional information or takes significant actions which affect the status of the issues, Headquarters is to be notified immediately. (This includes closing findings. Headquarters has no authority to impose sanctions after the identified non-compliance has been officially cleared.)
- 8-5 TIMELINESS IN CARRYING OUT CDBG ACTIVITIES. The achievement of program objectives is delayed when grant funds are not used in a timely manner. Exhibit 9-1 provides guidance on calculating a grantee's performance in meeting the timeliness criteria. When the calculation shows undisbursed entitlement funds equivalent to more than 1.5 years, take the actions described in paragraph 8-6 or 8-7 below, depending on whether this is a new problem or the continuation of a problem identified in the past.
- 8-6 NEW PROBLEM. If this is the first time the grantee has failed to meet the criterion, take the following actions:
- A. Determine if a finding should be made. Notify the grantee that the performance criterion has not been met and request the grantee to provide information about the causes of the slow progress, including any extenuating circumstances or any information that might challenge the validity of the HUD financial data. Unless the grantee provides evidence that the slow progress results

from factors beyond its control, such as a lawsuit, or that the problem is temporary and is likely to be resolved within the next year, make a finding based on failure to meet the performance criterion in 24 CFR 570.902(a)(1)(i). The finding must be conveyed to the grantee in writing, together with a request for the grantee to develop and submit a work-out plan, as described in the following paragraph. If a finding is not made due to information supplied by the grantee, that information or a summary description of the information shall be maintained by the Field Office in the grantee's file.

- B. Request a work-out plan. Request the grantee to develop and submit a plan designed to resolve the timeliness problem. The plan should include such elements as:

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1. A description of any planned actions to reprogram funds from slow-moving activities to other eligible activities;
 2. For each slow-moving activity that is a significant factor in the backlog but will be continued, a schedule for completing the activity, including a description of the critical actions required to complete the activity, a timetable for taking those actions, and quarterly projections of CDBG disbursements for the activity; and
 3. A schedule showing when CDBG disbursements are expected to be made for the program as a whole that will result in the elimination of the excess amount of undisbursed funds in the backlog. The time period for eliminating the backlog may not exceed two years unless Headquarters approval of a longer time period has been received. Requests for such approval must be accompanied by a description of the factors justifying a time period beyond two years.
- C. Review work-out plan. Upon receipt of the work-out plan, review it to determine if it addresses the types of activities CPD views as contributing most to the grantee's timeliness problems and whether it is likely to bring the grantee into compliance with the performance criterion within the time period specified in the work-out plan. If not, advise the grantee of needed revisions to the plan.
- D. Check progress being made. After agreement has been reached on a work-out plan, request the grantee to prepare and submit to HUD at least quarterly, reports comparing progress with the schedules submitted. Upon

receipt, review the reports and letter of credit disbursement figures to determine the progress being made to resolve the problem. If the program lags significantly behind schedule, notify the grantee in writing and work with the grantee to identify additional steps that can be taken to correct the problem.

- E. Reassess during Next Annual Performance Review. If one year after the timeliness problem was identified, the grantee's performance continues to fail to meet the 1.5 test as measured sixty days prior to the end of the grantee's program year, treat the situation as a carry-over problem in accordance with paragraph 8-7.B., below.

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- 8-7 CARRY-OVER PROBLEM. If the grantee is operating under a specific plan to resolve the timeliness problem, but fails to meet the 1.5 test as measured sixty days prior to the end of the grantee's current program year, determine which of the following actions is appropriate:
- A. Continue work-out plan. If progress made to date in resolving the problem is satisfactory and is likely to bring the grantee into compliance with the performance criterion within the time period specified in the work-out plan, continue monitoring progress against the work-out plan.
 - B. Warning letter or contract condition. If progress is unsatisfactory, but it is nevertheless reasonable to assume that the grantee may be able to meet the performance criteria within the time period specified in the work-out plan, a letter should be sent to the grantee indicating the level of disbursements required to bring the grantee into compliance with the performance standard within the time period specified in the work-out plan. One of the two following actions should also be taken:
 - 1. Add to the letter notifying the grantee of its unsatisfactory performance a warning that if the identified level of disbursements is not achieved a grant reduction in an amount up to the amount of the shortfall may result; or,
 - 2. Recommend to headquarters that a condition be placed in the next grant. The condition should identify the level of disbursements required to bring the grantee into compliance with the regulatory timeliness standard within the time period specified in the work-out plan. It should also provide that in the event the grantee fails to achieve the required level of disbursements a grant reduction in

an amount up to the amount of the shortfall may result.

C. Recommend grant reduction. A recommendation for a grant reduction should be considered when the grantee's performance demonstrates that it will be unable to use the grant funds in a timely manner.

1. Where a grantee was provided the opportunity to undertake corrective action throughout the current

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program year, but the grantee's performance showed so little, if any, improvement that it is highly unlikely that the grantee will be able to meet the 1.5 test within the time period specified in the work-out plan, a recommendation for a grant reduction should be considered. The amount of the recommended reduction should be the amount the grantee is expected to exceed the 1.5 level when measured at the end of the time period specified in the work-out plan, taking into account the grantee's most recent performance and the likelihood of future improvements.

2. If the grantee's previous grant was conditioned and the grantee fails to meet the level of disbursements required under the condition, a recommendation for a grant reduction should be considered. The maximum amount of the reduction would be the amount of the short fall in meeting the required disbursement level.

8-8 RECENT TIMELINESS. If the grantee fails to meet the requirement in 570.902(a)(ii) to disburse at least one-half of the entitlement grant amount for its current program year by the appropriate time, the following action should be taken depending on whether the grantee met or failed the 1.5 test:

- A. Grantee met 1.5 test. The primary purpose of the 50% test is to serve as a warning that even though the grantee currently meets the 1.5 test, its recent performance makes it likely that it will fail to meet the 1.5 test in the near future, unless steps are taken to reverse this trend. A letter should be sent requesting the grantee to provide information about the causes of the current slow spending, including any extenuating circumstances or any information that might challenge the validity of the HUD financial data. That information or a summary description of that information shall be maintained by the Field Office in the grantee's file.

- B. Grantee fails 1.5. test. If the grantee fails both the 1.5 test and the 50% test, one finding should be made indicating that the grantee failed to achieve both timeliness performance standards in 570.902(a) (1). However, the steps described above for resolving the problem of backlogged funds should also resolve the

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problem of current slow spending. Therefore, no additional steps are described here for specifically handling a failure to meet the 50% test when the grantee has also failed to meet the 1.5 test.

- 8-9 MONITORING VISIT. Because of the need to maximize the effectiveness of time spent in on-site monitoring, the timeliness of disbursements should be a topic covered during the monitoring visit only if it was previously determined the 1.5 test was not met. The information in the most recent reports provided by the grantee should be verified and the progress being made to resolve the problem should be reviewed with the grantee. The status of the problem should also be covered in the exit conference and in the monitoring letter.

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