

Violations of Section 112 of HUD Reform Act

Legal Opinion: GHM-0013

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Subject: Violations of Section 112 of HUD Reform Act

November 26, 1991

MEMORANDUM FOR: Carole Wilson, Associate General Counsel
Equal Opportunity and Administrative Law, GM

THROUGH: John J. Daly, Associate General Counsel
Insured Housing and Finance, GH

FROM: David R. Cooper, Assistant General Counsel
Multifamily Mortgage Division, GHM

SUBJECT: Additional Civil Penalties and Administrative Sanctions
for Violations of Section 112 of the HUD Reform Act

This is in response to the memorandum of November 13, 1991, from the General Counsel, requesting that we furnish you our views on what civil remedies and administrative sanctions other than the civil money penalties prescribed in Subsection 13(d) of the Department of Housing and Urban Development Act as added by Section 112 of the HUD Reform Act of 1989 may be imposed by the Secretary on persons who violate the registration, record-keeping or reporting requirements of Section 13.

The Multifamily Mortgage Division has jurisdiction over legal matters involving FHA multifamily mortgage insurance, questions arising before and after default, and interpretations of statutes involving HUD's furnishing of various subsidies such as flexible subsidy, Interest Reduction Payments ("IRP"), and rental subsidies (Rent Supplement assistance-"RS"-and Rental Assistance Payments-"RAP"). Section 13 may impact the operations of FHA in many ways. The kinds of "persons" doing business with FHA who may be affected are sponsors, mortgagors, lenders, contractors, subcontractors, landowners, insurance companies, lawyers, lobbyists, brokers and many others. Possible sanctions available to the Department for use differ as to their focus and will tend to give the Secretary stronger control over certain classes of persons as defined in the statute rather than others. These possible civil remedies and administrative sanctions may be summarized as follows:

1) The Regulatory Agreement: Although the Regulatory Agreement does not specifically cover the keeping of records pertaining to lobbying expenditures, if the person making the expenditure to influence a decision of the Department is the mortgagor or has otherwise executed the Regulatory Agreement, and if the funds being paid to the consultant constitute project

assets then conceivably the Secretary might have an action against the person making the expenditure for breach of the Regulatory Agreement through a diversion of project assets or misappropriation. Those who administer project revenues may only utilize them to service the mortgage, pay legitimate operating expenses, or for proper expenditures from project reserves and escrows. Although our case would be weaker if the expenditure were made from surplus cash, the "owners" of a project subject to an insured or Secretary-held mortgage as defined in the Regulatory Agreement remain contractually liable to HUD "for their own acts and deeds or acts and deeds of others which they have authorized in violation of" the provisions of that contract. Similarly, the Secretary may have some right to enforce provisions of a Management Contract between the owner and a management agent by the terms of that contract or as a third party beneficiary.

2) Civil Money Penalties: Various statutes other than section 13 impose civil money penalties on persons participating in FHA projects in different capacities when they violate statutes, regulations or HUD prescribed instruments. While we do not purport to be setting forth an exhaustive list of the relevant statutes, we do direct your attention to Sections 107 (lenders) and 108 (mortgagors) of the HUD Reform Act which prescribe civil money penalties punishing various forms of behavior by important participants in the transactions overseen by our office.

3) Debarment, Suspension, Limited Denial of Participation: While we defer to the Associate General Counsel for Program Enforcement in discussing matters arising under 24 CFR Part 24, we see no reason why persons spending money to influence HUD decision making and persons receiving money for that purpose could not be sanctioned under that part. A contract to hire a lawyer or consultant to influence HUD decisions would seem to be a "covered transaction" within the meaning of 24 CFR 24.110.

4) Coinsurance Probation, Suspension or Withdrawal of Participation: If the entity making the expenditure to influence a decision of the Department is the coinsuring lender, then the Secretary may have an action against the entity making the expenditure under 24 CFR Sections 251.104, 252.104 or 255.104. These Sections give the Secretary the authority to suspend, put on probation or withdraw from participation in the coinsurance program any coinsuring lender who, among other things, submits false, fraudulent, or incomplete reports to HUD or for any other cause determined by the Commissioner or designee to be appropriate.

5) Criminal Penalties: While the incoming requests information on civil remedies, we want to bring to your attention that certain criminal statutes provide for the imposition of

monetary fines in connection with certain conduct against the

Department. If the entity or individual making the expenditure to influence a decision of the Department, and then providing a false report pursuant to Section 112 of the HUD Reform Act of 1989, can be viewed as an entity or individual attempting to obtain any loan or advance of credit with the intent that such loan or advance of credit be insured by the Department, the Secretary may be able to seek remedies against such entity or individual pursuant to 18 USC Section 1010. This Section provides that anyone who "makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document . . . knowing it to have been altered . . . shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

If the entity or individual making the expenditure to influence a decision of the Department defrauds or makes any false entry in any book of the Department or makes any false report or statement to the Department, the Secretary may seek to have penalties imposed against such entity or individual pursuant to 18 USC Section 1012. This Section provides that " w hoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department . . . s hall be fined not more than \$1000 or imprisoned not more than one year, or both."

Please address any questions you may have to Joel Robinson on 708-4167.