

the discretion of the Secretary, provide for the use of existing regulations to the extent appropriate, without rulemaking.”

§ 1735f-15. Civil money penalties against multi-family mortgagors

(a) In general

The penalties set forth in this section shall be in addition to any other available civil remedy or any available criminal penalty, and may be imposed whether or not the Secretary imposes other administrative sanctions. The Secretary may not impose penalties under this section for violations a material cause of which are the failure of the Department, an agent of the Department, or a public housing agency to comply with existing agreements.

(b) Penalty for violation of agreement as condition of transfer of physical assets, flexible subsidy loan, capital improvement loan, modification of mortgage terms, or workout agreement

(1) Authority

Whenever a mortgagor of property that includes 5 or more living units and that has a mortgage insured, co-insured, or held pursuant to this chapter, who has agreed in writing, as a condition of a transfer of physical assets, a flexible subsidy loan, a capital improvement loan, a modification of the mortgage terms, or a workout agreement, to use nonproject income to make cash contributions for payments due under the note and mortgage, for payments to the reserve for replacements, to restore the project to good physical condition, or to pay other project liabilities, knowingly and materially fails to comply with any of these commitments, the Secretary may impose a civil money penalty on that mortgagor, on a general partner of a partnership mortgagor, or on any officer or director of a corporate mortgagor in accordance with the provisions of this section.

(2) Amount of penalty

The amount of the penalty, as determined by the Secretary, for a violation of this subsection may not exceed the amount of the loss the Secretary would experience at a foreclosure sale, or a sale after foreclosure, of the property involved.

(c) Other violations

(1)(A) Liable parties

The Secretary may also impose a civil money penalty under this section on—

- (i) any mortgagor of a property that includes 5 or more living units and that has a mortgage insured, coinsured, or held pursuant to this chapter;
- (ii) any general partner of a partnership mortgagor of such property;
- (iii) any officer or director of a corporate mortgagor;
- (iv) any agent employed to manage the property that has an identity of interest with the mortgagor, with the general partner of a partnership mortgagor, or with any officer or director of a corporate mortgagor of such property; or

- (v) any member of a limited liability company that is the mortgagor of such property or is the general partner of a limited partnership mortgagor or is a partner of a general partnership mortgagor.

(B) Violations

A penalty may be imposed under this section upon any liable party under subparagraph (A) that knowingly and materially takes any of the following actions:

- (i) Conveyance, transfer, or encumbrance of any of the mortgaged property, or permitting the conveyance, transfer, or encumbrance of such property, without the prior written approval of the Secretary.

- (ii) Assignment, transfer, disposition, or encumbrance of any personal property of the project, including rents, other revenues, or contract rights, or paying out any funds, except for reasonable operating expenses and necessary repairs, without the prior written approval of the Secretary.

- (iii) Conveyance, assignment, or transfer of any beneficial interest in any trust holding title to the property, or the interest of any general partner in a partnership owning the property, or any right to manage or receive the rents and profits from the mortgaged property, without the prior written approval of the Secretary.

- (iv) Remodeling, adding to, reconstructing, or demolishing any part of the mortgaged property or subtracting from any real or personal property of the project, without the prior written approval of the Secretary.

- (v) Requiring, as a condition of the occupancy or leasing of any unit in the project, any consideration or deposit other than the prepayment of the first month's rent, plus a security deposit in an amount not in excess of 1 month's rent, to guarantee the performance of the covenants of the lease.

- (vi) Not holding any funds collected as security deposits separate and apart from all other funds of the project in a trust account, the amount of which at all times equals or exceeds the aggregate of all outstanding obligations under the account.

- (vii) Payment for services, supplies, or materials which exceeds \$500 and substantially exceeds the amount ordinarily paid for such services, supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

- (viii) Failure to maintain at any time the mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other related papers (including failure to keep copies of all written contracts or other instruments which affect the mortgaged property) in reasonable condition for proper audit and for examination and inspection at any reasonable time by the Secretary or any duly authorized agents of the Secretary.

- (ix) Failure to maintain the books and accounts of the operations of the mortgaged property and of the project in accordance with requirements prescribed by the Secretary.

(x) Failure to furnish the Secretary, by the expiration of the 90-day period beginning on the first day after the completion of each fiscal year (unless the Secretary has approved an extension of the 90-day period in writing), with a complete annual financial report, in accordance with requirements prescribed by the Secretary, including requirements that the report be—

(I) based upon an examination of the books and records of the mortgagor;

(II) prepared and certified to by an independent public accountant or a certified public accountant (unless the Secretary has waived this requirement in writing); and

(III) certified to by the mortgagor or an authorized representative of the mortgagor.

The Secretary shall approve an extension where the mortgagor demonstrates that failure to comply with this clause is due to events beyond the control of the mortgagor.

(xi) At the request of the Secretary, the agents of the Secretary, the employees of the Secretary, or the attorneys of the Secretary, failure to furnish monthly occupancy reports or failure to provide specific answers to questions upon which information is sought relative to income, assets, liabilities, contracts, the operation and condition of the property, or the status of the mortgage.

(xii) Failure to make promptly all payments due under the note and mortgage, including mortgage insurance premiums, tax and insurance escrow payments, and payments to the reserve for replacements when there is adequate project income available to make such payments.

(xiii) Failure to maintain the premises, accommodations, any living unit in the project, and the grounds and equipment appurtenant thereto in good repair and condition in accordance with regulations and requirements of the Secretary, except that nothing in this clause shall have the effect of altering the provisions of an existing regulatory agreement or federally insured mortgage on the property.

(xiv) Failure, by a mortgagor, a general partner of a partnership mortgagor, or an officer or director of a corporate mortgagor, to provide management for the project that is acceptable to the Secretary pursuant to regulations and requirements of the Secretary.

(xv) Failure to provide access to the books, records, and accounts related to the operations of the mortgaged property and of the project.

The pay out of surplus cash, as defined by and provided for in the regulatory agreement, shall not constitute a violation of this subsection.

(2) Amount of penalty

A penalty imposed for a violation under this subsection, as determined by the Secretary, may not exceed \$25,000.

(d) Agency procedures

(1) Establishment

The Secretary shall establish standards and procedures governing the imposition of civil money penalties under subsections (b) and (c). These standards and procedures—

(A) shall provide for the Secretary or other department official (such as the Assistant Secretary for Housing) to make the determination to impose a penalty;

(B) shall provide for the imposition of a penalty only after the mortgagor, general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property has been given an opportunity for a hearing on the record; and

(C) may provide for review by the Secretary of any determination or order, or interlocutory ruling, arising from a hearing.

(2) Final orders

If no hearing is requested within 15 days of receipt of the notice of opportunity for hearing, the imposition of the penalty shall constitute a final and unappealable determination. If the Secretary reviews the determination or order, the Secretary may affirm, modify, or reverse that determination or order. If the Secretary does not review the determination or order within 90 days of the issuance of the determination or order, the determination or order shall be final.

(3) Factors in determining amount of penalty

In determining the amount of a penalty under subsection (b) or (c), consideration shall be given to such factors as the gravity of the offense, any history of prior offenses (including offenses occurring before December 15, 1989), ability to pay the penalty, injury to the tenants, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate.

(4) Reviewability of imposition of penalty

The Secretary's determination or order imposing a penalty under subsection (b) or (c) shall not be subject to review, except as provided in subsection (e).

(5) Payment of penalty

No payment of a civil money penalty levied under this section shall be payable out of project income.

(e) Judicial review of agency determination

(1) In general

After exhausting all administrative remedies established by the Secretary under subsection (d)(1), an entity or person against whom the Secretary has imposed a civil money penalty under subsection (b) or (c) may obtain a review of the penalty and such ancillary issues as may be addressed in the notice of determination to impose a penalty under subsection (d)(1)(A) in the appropriate court of appeals of the United States, by filing in such court, within 20 days after the entry of such order or determination, a written petition praying that the Secretary's order or deter-

mination be modified or be set aside in whole or in part.

(2) Objections not raised in hearing

The court shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (d)(1) unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the court shall remand the matter to the Secretary for consideration of such additional evidence.

(3) Scope of review

The decisions, findings, and determinations of the Secretary shall be reviewed pursuant to section 706 of title 5.

(4) Order to pay penalty

Notwithstanding any other provision of law, in any such review, the court shall have the power to order payment of the penalty imposed by the Secretary.

(f) Civil money penalties against multifamily mortgagors, general partners of partnership mortgagors, officers and directors of corporate mortgagors, and certain managing agents

If a mortgagor, general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property fails to comply with the Secretary's determination or order imposing a civil money penalty under subsection (b) or (c), after the determination or order is no longer subject to review as provided by subsections (d)(1) and (e), the Secretary may request the Attorney General of the United States to bring an action in an appropriate United States district court to obtain a monetary judgment against the mortgagor, general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property and such other relief as may be available. The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action. In an action under this subsection, the validity and appropriateness of the Secretary's determination or order imposing the penalty shall not be subject to review.

(g) Settlement by Secretary

The Secretary may compromise, modify, or remit any civil money penalty which may be, or has been, imposed under this section.

(h) "Knowingly" defined

The term "knowingly" means having actual knowledge of or acting with deliberate ignorance or of reckless disregard for the prohibitions under this section.

(i) Regulations

The Secretary shall issue such regulations as the Secretary deems appropriate to implement this section.

(j) Deposit of penalties in insurance funds

Notwithstanding any other provision of law, all civil money penalties collected under this section shall be deposited in the fund established under section 1715z-1a(j) of this title.

(k) Identity of interest managing agent

In this section, the terms "agent employed to manage the property that has an identity of interest" and "identity of interest agent" mean an entity—

(1) that has management responsibility for a project;

(2) in which the ownership entity, including its general partner or partners (if applicable) and its officers or directors (if applicable), has an ownership interest; and

(3) over which the ownership entity exerts effective control.

(June 27, 1934, ch. 847, title V, § 537, as added Pub. L. 101-235, title I, § 108(a), Dec. 15, 1989, 103 Stat. 2003; amended Pub. L. 105-65, title V, § 561(a), Oct. 27, 1997, 111 Stat. 1414; Pub. L. 108-447, div. I, title II, § 219(b), (c), Dec. 8, 2004, 118 Stat. 3319.)

Editorial Notes

AMENDMENTS

2004—Subsec. (c)(1)(B)(ii). Pub. L. 108-447, § 219(b), inserted "other revenues, or contract rights," after "rents,".

Subsec. (c)(1)(B)(x). Pub. L. 108-447, § 219(c), amended cl. (x) generally. Prior to amendment, cl. (x) read as follows: "Failure to furnish the Secretary, by the expiration of the 60-day period beginning on the 1st day after the completion of each fiscal year, with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared and certified to by an independent public accountant or a certified public accountant and certified to by an officer of the mortgagor, unless the Secretary has approved an extension of the 60-day period in writing. The Secretary shall approve an extension where the mortgagor demonstrates that failure to comply with this subparagraph is due to events beyond the control of the mortgagor."

1997—Subsec. (b)(1). Pub. L. 105-65, § 561(a)(1), substituted "on that mortgagor, on a general partner of a partnership mortgagor, or on any officer or director of a corporate mortgagor" for "on that mortgagor".

Subsec. (c). Pub. L. 105-65, § 561(a)(2)(A), substituted "Other violations" for "Violations of regulatory agreement for which penalty may be imposed" in heading.

Subsec. (c)(1). Pub. L. 105-65, § 561(a)(2)(B)(i), (iv), substituted "violation of this subsection" for "violation of such agreement" before period at end of closing provisions and struck out heading and introductory provisions. Introductory provisions read as follows: "The Secretary may also impose a civil money penalty under this section on any mortgagor of property that includes 5 or more living units and that has a mortgage insured, co-insured, or held pursuant to this chapter for any knowing and material violation of the regulatory agreement executed by the mortgagor, as follows:".

Subsec. (c)(1)(A). Pub. L. 105-65, § 561(a)(2)(B)(i), (ii), added subpar. (A) and redesignated former subpar. (A) as cl. (i) of subpar. (B).

Subsec. (c)(1)(B) to (L). Pub. L. 105-65, § 561(a)(2)(B)(i)-(iii), inserted heading and introductory provisions of subpar. (B), redesignated former subpars. (A) to (L) as cls. (i) to (xii) of subpar. (B), respectively, and added cls. (xiii) to (xv).

Subsec. (d)(1)(B). Pub. L. 105-65, § 561(a)(3)(A), inserted "general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property" after "mortgagor".

Subsec. (d)(5). Pub. L. 105-65, § 561(a)(3)(B), added par. (5).

Subsec. (e)(1). Pub. L. 105-65, § 561(a)(4), substituted “an entity or person” for “a mortgagor”.

Subsec. (f). Pub. L. 105-65, § 561(a)(5), (6), substituted “Civil money penalties against multifamily mortgagors, general partners of partnership mortgagors, officers and directors of corporate mortgagors, and certain managing agents” for “Action to collect penalty” in heading and inserted “, general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property” after “mortgagor” in two places in text.

Subsec. (k). Pub. L. 105-65, § 561(a)(7), added subsec. (k).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105-65, title V, § 561(c), Oct. 27, 1997, 111 Stat. 1416, provided that: “The amendments made by subsection (a) [amending this section] shall apply only with respect to—

“(1) violations that occur on or after the effective date of the final regulations implementing the amendments made by this section; and

“(2) in the case of a continuing violation (as determined by the Secretary of Housing and Urban Development), any portion of a violation that occurs on or after that date.”

EFFECTIVE DATE

Pub. L. 101-235, title I, § 108(b), Dec. 15, 1989, 103 Stat. 2007, provided that: “The amendment made by subsection (a) [enacting this section] shall apply only with respect to violations referred to in the amendment that occur on or after the effective date of this section [Dec. 15, 1989].”

IMPLEMENTATION

Pub. L. 105-65, title V, § 561(b), Oct. 27, 1997, 111 Stat. 1416, provided that:

“(1) PUBLIC COMMENT.—The Secretary shall implement the amendments made by this section [amending this section and enacting provisions set out as a note under this section] by regulation issued after notice and opportunity for public comment. The notice shall seek comments primarily as to the definitions of the terms ‘ownership interest in’ and ‘effective control’, as those terms are used in the definition of the terms ‘agent employed to manage the property that has an identity of interest’ and ‘identity of interest agent’.

“(2) TIMING.—A proposed rule implementing the amendments made by this section shall be published not later than 1 year after the date of enactment of this Act [Oct. 27, 1997].”

§ 1735f-16. Annual audited financial statements

With respect to fiscal year 1989 and for every fiscal year thereafter, the Secretary shall make available to the public a financial statement of the insurance funds established under this chapter that will present their financial condition on a cash and accrual basis, consistent with generally accepted accounting principles. Each financial statement shall be audited by an independent accounting firm selected by the Secretary and the results of such audit shall be made available to the public.

(June 27, 1934, ch. 847, title V, § 538, as added Pub. L. 101-235, title I, § 131, Dec. 15, 1989, 103 Stat. 2026.)

§ 1735f-17. Examinations and sanctions for certain violations

(a) Examinations and sanctions

(1) In connection with any examination of a mortgagee approved by the Secretary pursuant to this chapter, the Secretary shall assess the performance of the mortgagee in meeting the requirements of sections 1709(t),¹ 1715n(a)(7)(B),¹ and 1735f-13 of this title. Where the Secretary determines that a mortgagee is not in compliance with these requirements, the Secretary shall refer the matter to the Mortgagee Review Board for investigation and appropriate action.

(2) Not later than 180 days after November 28, 1990, the Secretary shall by notice establish a procedure under which (A) any person may file a request that the Secretary determine whether a mortgagee is in compliance with sections 1709(t),¹ 1715n(a)(7)(B),¹ and 1735f-13 of this title, (B) the Secretary shall inform the person of the disposition of the request, and (C) the Secretary shall publish in the Federal Register the disposition of any case referred by the Secretary to the Mortgagee Review Board. Such procedures shall be established by regulation under section 553 of title 5. The Secretary shall issue regulations based on the initial notice before the expiration of the 8-month period beginning on the date of the notice.

(3) Omitted.

(b) Monitoring and review

The Secretary shall continually monitor and undertake a thorough review of the implementation of this section to assess the impact of the section on the lending practices of mortgagees and the availability of mortgages insured under this chapter. The Secretary shall monitor the availability of credit, the number and type of lenders participating in the program, whether there is any change in the composition or practices of such lenders and any other factors the Secretary considers appropriate. The Secretary shall submit to the Congress findings detailing the results of such monitoring and review not later than 18 months after November 28, 1990.

(June 27, 1934, ch. 847, title V, § 539, as added Pub. L. 101-625, title III, § 330(b), Nov. 28, 1990, 104 Stat. 4139.)

Editorial Notes

REFERENCES IN TEXT

Section 1709(t) of this title, referred to in subsec. (a)(1), (2), was redesignated section 1709(u) of this title by Pub. L. 106-377, § 1(a)(1) [title II, § 209(a)(1)], Oct. 27, 2000, 114 Stat. 1441, 1441A-25.

Section 1715n(a)(7)(B) of this title, referred to in subsec. (a)(1), (2), was redesignated section 1715n(a)(7)(A)(ii) of this title by Pub. L. 107-116, title VI, § 615(3), Jan. 10, 2002, 115 Stat. 2225.

CODIFICATION

Paragraph (3) of subsection (a), which required the Secretary to submit to Congress, not less than annually, a report on actions taken to carry out this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 103 of House Document No. 103-7.

¹ See References in Text note below.