



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

Legal Opinion: CIM-0123
Index Numbers: 4.135 and 3.124
Subject: Eligibility of Mortgage (Property Mortgagor)
and Refinancing (Sec. 223(a) (7))

April 6, 2001

The Honorable Melvin L. Watt
House of Representatives
Washington, D.C. 20515

Dear Representative Watt:

Thank you for your letter of February 13, 2001 which was forwarded to my attention, together with the following enclosures:

- 1) Your letter of November 21, 2000 to Representative Lamar Smith, formerly Chairman of the House Committee on Standards of Official Conduct ("letter to the House Committee"); and
- 2) Response dated February 5, 2001 of the current Chairman and Ranking Minority Member to your November 21, 2000 inquiry ("House Committee Response").

You are requesting our advice on the ability of Members of Congress with ownership interests in a corporation to participate in a Federal Housing Administration refinancing program. In your letter to the House Committee, you state that you are one of three shareholders and directors of East Towne Manor, Inc. ("East Towne"), a North Carolina corporation which operates a 120-bed board and care facility. You also note that you have had this ownership interest for more than ten years, since before your election to Congress. Under the refinance provisions of Section 223(a)(7) of the National Housing Act ("NHA"), East Towne now desires to refinance the existing mortgage, which was originally insured under Section 232 of the NHA.

For the reasons set forth below, it is our view that, when a Member of Congress has ownership interests in a corporation as a shareholder, director, principal, or officer, it is legally permissible for that corporation to enter into a contract with the federal government if the contract is for the general benefit of the corporation. See 18 U.S.C. § 433; 39 Op. Att'y Gen. 165 (1938).

Analysis

Relevant Federal Statutes

Several federal statutes are implicated by your inquiry. Section 431 of title 18 of the United States Code provides that any Member of Congress who "undertakes, executes, holds or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof" shall be fined. 18 U.S.C. § 431. Any government official who enters into any contract with any Member of Congress is subject to a penalty. 18 U.S.C. § 432. The public contracts code, as amended in 1994, states in pertinent part:

No Member of Congress shall be admitted to any share or part of any contract or agreement made, entered into, or accepted by or on behalf of the United States, or to any benefit to arise thereupon.¹

41 U.S.C. § 22 ("Section 22"). However, 18 U.S.C. § 433 provides that:

Sections 431 and 432 of this title shall not extend to *any contract or agreement made or entered into, or accepted by any incorporated company for the general benefit of such corporation*; nor to the purchase or sale of bills of exchange or other property where the same are ready for delivery and payment therefor is made at the time of making or entering into the contract or agreement.

18 U.S.C. § 433 (emphasis added).

In a formal opinion, the Attorney General construed the literal language of Section 433 to exclude contracts with any incorporated company made for the general benefit of such incorporation or company. 39 Op. Att'y Gen. 165 (1938) (emphasis in original). In other words, Section 433 applies to any corporate entity, irrespective of whether any of its shareholders or officers are Members of Congress. The Attorney General further opined that Section 433 would not preclude the Bureau of Engraving and Printing from accepting a bid of a corporation whose president is a Congressman and owns 30 percent of its corporate stock. Id. at 168.

In a subsequent opinion interpreting the second clause of Section 433, the Office of Legal Counsel ("OLC") for the U.S. Department of Justice opined that the General Services Administration ("GSA") was authorized to negotiate the sale of gifts from foreign governments to their original recipients, including Members of Congress, notwithstanding the general

¹ Note that the language cited in the House Committee Response was substituted with this language in 1994.

prohibition against public contracts with Members of Congress set forth at Sections 431 and 432. 5 Op. Off. Legal Counsel 158 (1981). OLC stated that the proposed negotiated sale of foreign gifts was permissible under the plain meaning of the second clause of Section 433 because the gifts would be ready for delivery at the time of sale, and payment would be made for the gifts at that time. *Id.* at 159. OLC further opined that the literal language of Section 433 is the best evidence of what the drafters intended and that the legislative deliberations concerning the Act did not shed any light on the Act's meaning or purpose. *Id.* at 159-60. It should be noted that OLC authorized GSA's actions without addressing the prohibition contained at Section 22 of the public contracts code.

In a prior opinion dated August 30, 1993, HUD took the position that there is no basis for construing Section 22 more strictly than Section 431 given the relative equality of coverage. Both statutes relate exclusively to instances in which a Member of Congress enters into a direct contractual relationship with the federal government or cases in which the member enjoys a benefit from such contract. The principal difference between the two provisions is that Section 431 violations are subject to fines and Section 22 violations carry no such penalty.

Therefore, it appears that East Towne falls within the statutory exception of Section 433, since it is a corporate entity, as indicated in your November 21, 2000 letter to the House Committee as well as the Deed of Trust Note and the HUD Regulatory Agreement.

Applicable HUD Regulations

In addition, HUD's Participation and Compliance Requirements set forth at 24 C.F.R. §§ 200.210-200.245 (2000) are applicable to projects which are already financed or proposed to be financed with a mortgage insured under the National Housing Act. 24 C.F.R. § 200.213(a). Each principal of a mortgagor entity must personally certify and sign the certificate about their individual participation record, except when the officers, directors and principal stockholders of the corporation all have the same participation record. If the participation records are the same, then an officer authorized to sign on behalf of the corporation can execute the HUD-2530 but is required to list all principals connected to the corporation who do not elect to sign.

24 C.F.R. § 200.218. Each principal who executes a HUD-2530 also must certify that said principal is not a Member of Congress or Resident Commissioner. 24 C.F.R. § 200.219(d). A principal includes all executive officers directly responsible to the Board of Directors; all the directors; and each stockholder having a 10 percent or more interest in a corporation. 24 C.F.R. § 200.215(e)(2)(iii). As one of three directors of East Towne, you are a principal within the meaning of this section.

HUD Previous Participation Handbook 4065.1 REV-1 ("Handbook"), however, provides several examples of program participants who are excepted from executing a HUD-2530. The Handbook states that existing owners and/or principals, who previously have obtained HUD-2530 approval and are applying only for refinancing pursuant to Section 223(a)(7) of the NHA, are not required to execute and file a new HUD-2530. Handbook 4065.1 REV-1, paragraph 1-4 A.6. HUD's North Carolina State Office has confirmed that, in 1988 (before your election to Congress), you executed a HUD-2530 Previous Participation Certificate in connection with the original loan. Consequently, execution and filing of a new HUD-2530, including the certification required by § 200.219(d), would not apply to the proposed refinancing of the East Towne mortgage loan that would be insured by FHA pursuant to §223(a)(7) of the NHA.

Conclusion

Based upon the analysis above, it is our view that where a Member of Congress has ownership interests in a corporation as a shareholder, director, principal, or officer, it is legally permissible under the statutory exception of Section 433 for that corporation to enter into a contract with the federal government if the contract is for the general benefit of the corporation. In addition, a new HUD-2530 need not be executed and filed due to the exception contained in Handbook 4065.1 REV-1, paragraph 1-4 A.6. This conclusion assumes that the loan refinancing transaction will not involve any change of an ownership interest in the project.

If we can be of further assistance, please let us know.

Sincerely,

George L. Weidenfeller
Deputy General Counsel
for Housing Finance and Operations

