UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: Jack Z. Yetiv & TREIMee Corporation, Respondents.	HUDALJ 02-001-CMP Decided: September 2, 2003

Jack Z. Yetiv, Esq.
For the Respondents

Stanley Fields, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

STATEMENT OF THE CASE

This proceeding arises out of action taken on June 11, 2002, pursuant to §1735f-15 of the National Housing Act (12 U.S.C. §1735f-15) and 24 C.F.R. Part 30 by the Director, Departmental Enforcement Center, U.S. Department of Housing and Urban Development ("the Department" or "HUD" or "the Government"). On that date HUD sent a prepenalty notice to Respondents Jack Z. Yetiv ("Yetiv") and TREIMee Corporation ("Corporation") stating that the Department proposed to seek the imposition of civil money penalties against them for violations of 12 U.S.C. §1735f-15 and 24 C.F.R. Part 30. After receiving a response from Respondents, the Government issued a Complaint against Respondents on July 22, 2002. The Complaint alleged that Respondent Corporation failed to file annual financial reports covering the operation of Park on Westview Apartments, a 212-unit, multi-family housing project ("Project") in Houston, Texas, with a mortgage insured by HUD.

On October 22, 2002, the Department initiated this proceeding by filing the Complaint, along with Respondents' response and request for hearing, with the Chief Docket Clerk of the Office of Administrative Law Judges. On January 2, 2003, the

Department filed a motion for summary judgment. The motion was granted in part and denied in part on April 29, 2003, for the reasons set out in the Order on Motions for Summary Judgment attached as Appendix A. The Order also denied a motion for summary judgment filed by Respondents and concluded, among other things, that Respondent Corporation had violated 12 U.S.C. §1735f-15(c) and a regulatory agreement entered into by the parties in 1997. On May 20, 2003, a hearing was held in San Francisco, California.[1]

Pursuant to court order based on an agreement between the parties reached at the close of the hearing, the parties filed post-hearing briefs on June 20, 2003. However, on June 23, 2003, without seeking permission from the court, Respondents filed what they called a "replacement" brief that included responses to the Government's brief of June 20, 2003. On the same day, the Government filed a motion to strike the Respondents' replacement brief, and Respondents filed a response to the Government's motion.

The Government's motion will be granted. At the close of the hearing the parties were given two options: they could file briefs simultaneously or they could follow a staggered briefing schedule with the Government filing its brief first, followed by a brief from Respondents, ending with a responsive brief by the Government. Respondents chose the simultaneous briefing option, and the Government agreed. When Respondents filed the second brief on June 23, 2003, they violated their agreement and the court's order. Such conduct smacks of sharp practice and will not be condoned. Respondents' so-called "replacement" brief has not been considered.

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[1]There is no merit to Respondents' complaint—first made at the hearing—that the hearing was not held within the 90-day period following the filing of the Complaint with the Chief Docket Clerk, as stipulated by 24 C.F.R. §26.44. The hearing was originally scheduled to begin on January 14, 2003, within the 90-day period, but was postponed pursuant to agreement reached with the parties during a telephone conference on January 7, 2003. During that conference Respondent Yetiv pointed out that he had a right to file a response to the Government's pending motion for summary judgment and contended that he could not do so without first attempting to complete discovery. To accommodate Respondent Yetiv's requests, the hearing was postponed until March 18, 2003, beyond the 90-day period. It was postponed again on March 5, 2003, when it became apparent that the court needed the assistance of further briefing from the Department to address a novel jurisdictional defense posed by Respondents in their opposition to the Government's motion for summary judgment.

Furthermore, Respondents have not demonstrated that they have suffered any prejudice because the hearing was held outside the 90-day period contemplated by the regulations.

FINDINGS OF FACT

1. On July 1, 1997, a representative of the Secretary and Respondent Yetiv, acting in his capacity as President of Respondent Corporation, signed a regulatory agreement. (GX. 13)[2] The regulatory agreement provides, in part, that

> In consideration of the endorsement for insurance by the Secretary of [a mortgage note of $2,625,000] . . . and in order to comply with the requirements of the National Housing Act, as amended, and the Regulations adopted by the Secretary pursuant thereto, Owners [Respondent Corporation] agree for themselves, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect . . .
>
> 7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. . . .
>
> [9](c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit and subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by the Secretary or his duly authorized agents. . . .
>
> [9](e) Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, prepared and certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.

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[2]The following abbreviations are used in this decision: "TR." refers to the hearing transcript; "GX." and "RX." refer, respectively, to the Government's and Respondents' exhibits.

> [9](f) At request of the Secretary, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answers to questions upon which information is desired from time to time relative to income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage. . . .
>
> 15. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.[3]

2. Respondent Yetiv read, discussed with others, and understood the terms of the regulatory agreement before he signed it. (TR. 229-30)

3. At all times material herein Respondent Yetiv was the President, sole shareholder, and operating officer of Respondent Corporation. (TR. 295; RX. BI)

4. The mortgagee of the Project was Prudential Huntoon Paige Associates, Ltd. ("Prudential"). (GX. 13)

5. By letter dated January 5, 2001, Respondent Yetiv replied to a letter sent to him by HUD dated December 26, 2000, addressing building deficiencies that had been observed by a HUD inspector. Respondent Yetiv wrote in part:

> Finally, I would like to request that you provide to me the SOURCE of your authority, if any, to (a) inspect my property without my being there, and without making reasonable

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[3]The duties imposed by paragraph 7 of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(xiii).

The duties imposed by paragraph 9(c) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(viii).

The duties imposed by paragraph 9(e) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(x).

The duties imposed by paragraph 9(f) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(xi) and (xv).

> arrangements to allow me to be there (b) tell me what I must or must not do on my property. Although I have not recently reviewed my closing paperwork, I sure don't remember signing away my right to run my property as I see fit. In fact, it is precisely for that reason—my refusal to have HUD tell me how to run my property—that I have chosen to not participate in the Section 8 program in the 10 years that I have owned apartments in Houston. Based on everything I have read about HUD, they can barely run their own properties, so it would be strange for HUD or its inspectors to tell me how to run mine. . . .
>
> So unless you can show me a convincing legal basis for your power to micro-manage my property, I see no reason to subject myself to that.
>
> As I noted above, I do not recall handing over the management to HUD when I signed up for this loan. If I am incorrect in this belief, please send me or fax me the document which I signed and which gives you the power to tell me how to run my property. [RX. AE; emphasis in original]

6. By letter dated February 5, 2001, HUD reminded Respondents of the annual financial report requirement in the regulatory agreement and notified them that the required reports had not been received for the years 1997, 1998, and 1999. (GX. 6; TR. 244-45)

7. Respondents were notified in 2001 that audited financial reports must be filed electronically. (TR. 284)

8. By letter dated January 15, 2002, the Director of HUD's Enforcement Center notified Respondents that the Government was considering seeking civil money penalties for their failure to file required annual financial reports. (RX. A; Exhibit 5, Government's Motion for Summary Judgment)

9. In a letter dated February 1, 2002, addressed to the Director of HUD's Enforcement Center, Respondent Yetiv stated in part:

> I was frankly amazed to receive your letter—by FedEx, no less, at government expense—threatening me with fines up to $110,000 for failing to submit financial statements for the years 1997 thru 2000.

> I find several aspects of your communication amazing:
>
> 1. Without any previous communications from HUD regarding these financial statements, all of a sudden I get a letter by FedEx, signed personally by the **DIRECTOR** of HUD in Washington, DC. I find this incredible, and I believe it is no coincidence. . . .
>
> A simple check by HUD would have revealed the following undisputed facts: (1) Park on Westview has never missed a loan payment, (2) in fact, in the past 6 months, Park on Westview has made additional PRINCIPAL REDUCTION payments of over ONE MILLION DOLLARS, ONE-HALF MILLION dollars of which were cashed by the lender. Note that these payments were *in addition* to the regular monthly payments I've made, (3) the escrow balance held by the lender on this loan is approximately $400,000—nearly $2,000 per unit, providing additional (and excessive) security, and (4) a simple inquiry of property values would reveal that the loan-to-value ratio on this property today is approximately 30%. . . .
>
> I might add that any company that can pay off $2 million in debt in less than 6 months must have pretty decent financials. . . . [RX. BB; emphasis in original]

10. In a letter dated April 30, 2002, addressed to the Director of HUD's satellite office in Forth Worth, Texas, Respondent Yetiv stated in part:

> I continue to be amazed at the kinds of letters I receive from HUD. You folks would make Franz Kafka proud, given his fame for the "Theater of the Absurd."
>
> Now, let me see here. According to your March 27 letter, I'm supposed to "terminate the current contract between Park on Westview and TREIMee Corp." Gee, folks, TREIMee Corp., of which I'm sole shareholder and officer, OWNS the Park on Westview. So, I guess you're ordering me to fire myself from running my own property, the financial performance of which—good or bad—directly affects my own **personal** income. This is a property I bought from the RTC after one of your undoubtedly "approved" management companies ran it into the ground.

> I'm supposed to fire myself despite the following facts: . . .
>
> 2. I attempted to pay off this property by sending a check for nearly $1.8 million. The check was refused by the lender.
>
> 3. I'm in the midst of replacing, down to the decking, all the roofs on the property OUT OF CASH FLOW. Including painting and other upgrades, this represents nearly $500,000 in improvements in 2001 and 2002. . . .
>
> By the way, I'm assuming that in ordering this management change, you will PERSONALLY guarantee that the amount of income that I receive from this property—ie, that is left over every month after paying all ordinary expenses, an amount which runs about $40,000 to $50,000 per month—will not decrease under the new management agent, right? Yeah, right. . . .
>
> However, I think it is not coincidental that this tremendous interest in seeing my 1997 financials (what a JOKE!) is all of a sudden occurring in 2002, just as my mutimillion dollar class-action lawsuit against the mortgagee (Prudential) is moving into high gear. Frankly, I believe there has been collusion between HUD and Prudential. Therefore, I would like to take your deposition in connection with this case. Please advise me what dates you have available for a deposition in the next several weeks. . . .[RX. BD; emphasis in original]

11. In a letter dated June 17, 2002, responding to a letter from HUD, Respondent Yetiv stated in part:

> I am in receipt of your May 21, 2002, missive demanding that I submit to you 16 documents that according to you "must" be available for the "Comprehensive Management Review" that you have unilaterally scheduled for June 18.
>
> I offer the following responses:
>
> 1. I do not recall ever signing a document with HUD stating that I was going to become its servant, and do things at the drop of a hat just because HUD demands them. Please send to me ASAP the document which I signed that says that I was

> willing to provide to you the 16 items you demand, at any time you demanded it. Apparently, you confuse my property with your subsidized HUD properties. I have never wanted to take Section 8 or have anything to do with HUD precisely because I do not wish to be subject to the sort of demands you make in your letter. Many of the items you request are confidential, and frankly none of your business (eg. employee salaries and benefits, service contracts, budget, etc). . . . [RX. I; emphasis in original]

12. Respondent Corporation failed to file with the Secretary annual financial reports covering the operation of Park on Westview Apartments for fiscal years 1997, 1998, 1999, 2000, and 2001. (*See* Appendix A)

13. Respondent Corporation sold the Project to a limited partnership owned by Respondent Yetiv on January 1, 2003, the day after paying off the loan on December 31, 2002. Respondent Corporation is no longer a functioning business. (TR. 278-81, 289-90)

14. Respondent Corporation paid off the loan from Prudential for the purpose of terminating the regulatory agreement with the Secretary and avoiding scrutiny of its operations by the Government. (TR. 232, 284)

15. Mortgagors whose mortgages are insured by HUD are required to submit annual financial reports so that the Department can discharge its regulatory duties to oversee the operation of HUD-insured projects and protect the Government's insurance fund by monitoring the financial health of mortgaged projects. (TR. 35; Appendix A; GX. 1, pp. 6-7, 90)[4]

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[4]Citing the Order on Motions for Summary Judgment, Respondents mistakenly argue that the Government failed to introduce any evidence demonstrating a material violation. The Order contains a discussion of the factors that must be considered to determine whether a violation is material. One of those factors is "Injury to the Public Interest or the Federal Government from the Respondent's Violation." The first sentence in the discussion regarding this factor reads: "The Government submitted no documentary or testimonial evidence to support this factor of the materiality analysis, and instead cited HUD handbook 4370.1 and *In re Crestwood Terrace Partnership,* HUDALJ 00-002-CMP, January 30, 2001." (Appendix A, p. 8.) The word "specific" was omitted from this sentence. It should read in pertinent part: "The Government submitted no *specific* documentary or testimonial evidence. . . ." Although HUD handbooks do not address the facts of this specific case, they constitute documentary evidence of the policies and procedures of the Department. The Government therefore submitted probative evidence in support of its motion for summary judgment. That evidence supports finding of fact 15. above, and demonstrates that the violations were material.

SUBSIDIARY FINDINGS AND DISCUSSION

The Secretary Has Jurisdiction to Impose Civil Money Penalties

Respondents have repeatedly and profoundly mischaracterized the nature of this case. Their assertions to the contrary notwithstanding, this is *not* a breach of contract action in which the Government is acting in the manner of a private party. This is a regulatory action brought by the United States Government acting in its sovereign capacity for the purpose of imposing money penalties for violations of a civil law, namely specific provisions of the National Housing Act of 1934, as amended in 1989 and 1997 (12 U.S.C. §1735f-15(c))("the Act" or "the statute"). The Secretary's jurisdiction to impose civil money penalties derives from that statute, not from the contract (the regulatory agreement) signed by Respondent Yetiv on behalf of Respondent Corporation in 1997.

As explained in the Order on Motions for Summary Judgment, the 1989 amendments to the Act conferred jurisdiction on the Secretary to impose civil money penalties on certain corporate mortgagors, and the 1997 amendments gave the Secretary explicit jurisdiction to make officers and directors of such corporate mortgagors personally liable for civil money penalties. During the course of arranging for a HUD-guaranteed mortgage, mortgagors sign a variety of documents, including a regulatory agreement. That document is a factual condition-precedent to the exercise of the Secretary's authority to impose civil money penalties because a party will not become a mortgagor subject to civil money penalties without signing a regulatory agreement; but the statute, not the regulatory agreement, is the source of the Secretary's power to impose civil money penalties. In fact, inasmuch as the regulatory agreement is silent about civil money penalties, it would be impossible for that document to confer jurisdiction on the Secretary to impose civil money penalties. All of Respondents' jurisdictional arguments ignore the statute from which the Secretary's jurisdiction derives and instead rest on interpretations of the regulatory agreement. Those arguments are therefore fallacious.

The 1997 amendments to the Act became effective on December 6, 2001. (*See* Appendix A, pp. 2-3.) Respondent Corporation failed in 2002 to file its annual financial report for 2001 as required by the Act. The failure to file an annual financial report for fiscal year 2001 was an action taken knowingly that materially violated both the regulatory agreement with the Secretary that Respondent Yetiv had entered into on behalf of the corporation in 1997 as well as the Act, specifically 12 U.S.C. §§1735f-15(c)(1)(A) and (B)(x). (Pub L. 105-65, Oct. 27, 1997)(*See* Appendix A, p. 19.) Because Respondent Yetiv was the President of Respondent Corporation in 2001 and 2002, the Secretary has jurisdiction under the 1997 amendments to the Act to impose civil money

penalties upon him as an officer of Respondent Corporation for the corporation's failure to file a financial report covering fiscal year 2001. The Government has chosen not to seek to pierce the corporate veil and impose penalties on Respondent Yetiv personally for the corporation's failure to file financial reports covering fiscal years 1997, 1998, 1999, and 2000.

Personal Liability for Civil Money Penalties Is Imposed by Statute not Contract

Respondent Yetiv complains that the regulatory agreement exempts him from personal liability for a failure to comply with its terms, citing paragraph 17 of the agreement which reads as follows:

> The following Owners: All present and future officers, directors and stockholders do not assume personal liability for payments due under the note and mortgage, or for the payments to the reserve for replacements, or for matters not under their control, provided that said Owners shall remain liable under this Agreement only with respect to the matters hereinafter stated; namely:
> (a) for funds or property of the project coming into their hands which, by the provisions hereof, they are not entitled to retain; and
> (b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

Contrary to Respondent Yetiv's argument, this language expressly exempts him from personal liability for only the following: (1) payments due under the note and mortgage; (2) payments to the reserve for replacements; and (3) matters not under his control. Paragraph 17 explicitly provides that Respondent Yetiv is liable for his "own acts and deeds . . . in violation of the provisions" of the regulatory agreement. The corporation under his direction, management, and control violated the regulatory agreement, and the statute makes him personally liable for civil money penalties based on the corporation's violation of both the regulatory agreement and the statute, as explained above. Respondent Yetiv's argument that he did not agree to become liable for civil money penalties is erroneous on its face. He is liable for civil money penalties by operation of law, not contract.

Respondent Yetiv mistakenly argues that imposing civil money penalties upon him personally would violate the *ex post facto* prohibitions in the Constitution because at the time he signed the regulatory agreement, the law did not authorize imposition of penalties on officers of corporate mortgagors. The *ex post facto* prohibitions in the

Constitution are not implicated in this proceeding because the violation for which Respondent Yetiv will be held personally accountable occurred *after* the authorizing statue became effective.

Respondent Yetiv also argues that it would be unfair to impose civil money penalties on him personally because if he had known that he was going to become personally liable for such penalties, he would not have entered into the regulatory agreement. In other words, Respondent Yetiv argues, in effect, that imposing penalties on him personally would give an unfairly retroactive impact to the statute. That argument also falls wide of the mark. The Supreme Court has repeatedly addressed this type of complaint. For example, in *Landgraf v. USI Film Products,* 511 U.S. 244, 269, n. 24 (1994), the Court stated:

> Even uncontroversially prospective statutes [such as the 1997 amendments to the National Housing Act] may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox v. Hart*, 260 U.S. 427, 435, 67 L.Ed. 332, 43 S.Ct. 154 (1922). See *Reynolds v. United States,* 292 U.S. 443, 444-449, 78 L.Ed. 1353, 54 S.Ct. 800 (1934); *Chicago & Alton R. Co. v. Tranbarger,* 238 U.S. 67, 73, 59 L.Ed. 1204, 35 S.Ct. 678 (1915).

No credit may be given to Respondent Yetiv's contention that prosecuting him personally is unfair.

Respondents' Offer to Submit Unaudited Financial Reports Did Not Satisfy the Law

Respondent Yetiv contends that in 2002 he offered HUD the financial reports that he had used to prepare tax returns over the years, but HUD refused to accept them because they were unaudited. He argues that the reports would have complied with the regulatory agreement because in the words of the regulatory agreement, they were "prepared and certified to by an officer or responsible Owner." Respondent Yetiv's argument ignores three other provisions in the regulatory agreement, which state that the

reports must be filed at "the end of each fiscal year," must be "prepared in accordance with the requirements of the Secretary . . . and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary." The Secretary required that the reports be audited. Because the reports that Respondent Yetiv offered were unaudited, they were not acceptable.

Furthermore, if the Secretary had accepted unaudited reports, the Secretary would have acted contrary to law. The statute explicitly requires submission of audited reports, as shown by the following provision that sets out the violation:

> 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 . . . .[12 U.S.C. §1735f-15(c)(1)(J) (Pub. L. 101-235, Dec. 15, 1989); 12 U.S.C. §1735f-15(c)(1)(B)(x) (Pub. L. 105-65, Oct. 27, 1997). Emphasis supplied]

There is, therefore, no merit to Respondents' contention that Respondent Yetiv's belated offer of unaudited financial reports satisfied Respondents' obligations under the regulatory agreement and the statute.

This Prosecution Is Not Arbitrary and Capricious

This court has concluded that Respondent Corporation failed to file with HUD annual financial reports covering the operation of Park on Westview Apartments for fiscal years 1997, 1998, 1999, 2000, and 2001, in violation of 12 U.S.C. §1735f-15(c). That conclusion is supported by substantial evidence of record as explained herein and in Appendix A. Respondents' argument that this prosecution is arbitrary and capricious amounts to nothing more than their argument regarding selective prosecution flying under a different banner, an argument that has no merit for the reasons explained in Appendix A.

Respondents' Request for Reconsideration Is Meritless

Respondents request reconsideration of the grant of partial summary judgment, arguing that the judgment cannot stand because, contrary to the requirements of paragraph 11 of the regulatory agreement, HUD failed to notify Respondents by certified

mail of their failure to file annual financial reports before bringing this prosecuti Paragraph 11 of the regulatory agreement reads in pertinent part:

> Upon a violation of any of the above provisions of this Agreement by Owners [including the requirement to file annual financial reports in paragraph 9(e)], the Secretary may give written notice thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice thereof to the Secretary, be designated by the Owners as their legal business address. If such violation is not corrected to the satisfaction of the Secretary within thirty (30) days after the date such notice is mailed or within such further time as the Secretary determines is necessary to correct the violation, without further notice the Secretary may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Secretary may . . . [take any of several enumerated actions to protect the Government's interests].

This language shows that the registered or certified mail requirement in the regulatory agreement applies only to default actions. The Secretary did not declare a default based on Respondents' failures to file annual financial reports, and this case is not an action based on default. The regulatory agreement therefore did not require HUD to notify Respondents by registered or certified mail of their failure to file annual reports as a condition precedent to the maintenance of this action. Although the record shows that the Department has had problems with addresses on occasion, the preponderance of the evidence demonstrates that, even if Respondents did not receive some of the other mailed notices as they claim, they did in fact receive a letter from HUD dated February 5, 2001, reiterating the annual financial report requirement and indicating that none had been received for the years 1997, 1998, and 1999. Respondents' suggestions made at various places in the record that they did not receive this notice are not credible.[5]

Determination of an Appropriate Civil Money Penalty

As shown above and in Appendix A, Respondents knowingly and materially violated the Act and a regulatory agreement. To determine the amount of appropriate civil money penalties, 12 U.S.C. §15f-(d)(3) and 24 C.F.R §30.80 require consideration of the following factors:

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[5]Respondent Yetiv also admits to having received a notice in 2001 that financial reports were to be filed electronically. (TR. 284)

1. The Gravity of the Offense

Respondent Yetiv testified that more than one HUD official told him that in the past HUD has not sought civil money penalties against a project with a HUD-insured loan for failing to submit audited financial reports if the project pays off the loan. (TR. 286-87) HUD has not disputed this testimony. The court invited the Government to address Respondent Yetiv's testimony in the context of a discussion regarding the gravity of the offense. The Government has declined to do so. Nothing can be made of that declination because, as a general proposition, the Government need not explain why one case is prosecuted and another is not. The Supreme Court has "ruled that an agency's decision not to undertake enforcement action 'is a decision generally committed to an agency's absolute discretion,' and is therefore presumptively unreviewable." *Kisser v. Cisneros,* 14 F.3d. 615, 620 (D.C. Cir. 1994) *quoting Heckler v. Chaney*, 470 U.S. 821 at 831 (1985). The presumption of unreviewability may be rebutted under four circumstances: (1) where Congress has provided meaningful standards for the agency to follow in the exercise of its discretion (470 U.S. at 833); (2) where the agency has refused to act in the mistaken belief that it lacks jurisdiction (*Id.* at 833 n. 2); (3) where the agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" (*Id.* at 833 n. 2); and (4) where "a colorable claim is made . . . that the agency's refusal to institute proceedings violated [a plaintiff's] constitutional rights" (*Id.* at 838). Because none of these circumstances applies to the case at bar, the Secretary's decision to prosecute Respondents for civil money penalties while apparently not prosecuting other similar cases is not reviewable.

The violations found in this case are sufficiently grave to merit the imposition of civil money penalties for the reasons explained below, particularly factors 4, 5, 7, and 8.

2. Any History of Prior Offenses

The record contains no evidence that Respondents have previously violated the Act.

3. The Ability to Pay the Penalty

Respondents introduced into the record letters written by Respondent Yetiv and addressed to HUD officials that estop Respondents from denying that they are able to pay the civil penalty imposed by this case. For example, according to Respondent Yetiv, Park on Westview Apartments provided him with personal income of $40,000 to $50,000 per month after payment of ordinary project operating expenses. (RX. BD) Furthermore,

Respondent Yetiv asserted that the company paid off $2 million in debt in six months, paid for nearly $500,000 in repairs out of cash flow during 2001 and 2002, and had a loan-to-value ratio of approximately 30 percent on February 1, 2002. (RX. BB, BD) On that date the principal of the mortgage on the property was approximately $1,800,000. (RX. BF) Therefore, in Respondent Yetiv's estimation, the Project was worth approximately $6,000,000 in February 2002. This evidence demonstrates an ability to pay a civil money penalty.

4. The Injury to the Public

HUD insured a mortgage of $2,625,000 on Park on Westview Apartments. If Respondent Corporation had defaulted on the loan, HUD would have been required to reimburse the lender for any losses caused by the default. To protect its interests, the Department required the mortgagor to timely file annual financial reports with HUD. Because the reports were not filed over a period of five years, the Department was unable throughout that period to monitor the Project to ensure that the Department's insurance fund was not in jeopardy of suffering severe losses. Respondent Yetiv's assertions regarding the financial health of Respondent Corporation did not satisfy the obligations imposed by statute and by contract on Respondent Corporation to file audited financial statements with HUD each fiscal year. Those assertions amounted to nothing more than self-serving cries of "trust me."

That Respondent Corporation apparently made timely mortgage payments does not prove that the Project was financially viable over the long term. Absent audited financial reports, the Government could not determine whether the Project was likely to cause losses in the future. As noted in Appendix A, that the insurance fund in fact lost no money only works to limit the size of an appropriate civil penalty; the absence of a monetary loss to the fund does not make a penalty unjustified, Respondents' protests to the contrary notwithstanding.

The Government has not claimed that Respondents' violations caused a money loss to HUD's insurance fund. Therefore, Respondents' extensive, repetitious, and impassioned arguments based on HUD's alleged refusal to require the lender to accept a pay-off of the loan are irrelevant. This case is about potential, not actual, harm to the insurance fund and actual harm to HUD's regulatory enforcement program.

5. Any Benefits Received by the Violator

Respondents benefitted economically from the violations in an amount at least equal to the total costs that they would have incurred if the financial reports had been

prepared and submitted to HUD as required. To prove this amount, the Government submitted into the record a survey of the financial audit costs for fiscal years 2001 and 2002 reported by 14 Houston-area, multi-family projects with between 100 and 300 units. (GX. 8) (Park on Westview Apartments had 212 units in Houston.) The audit costs reported to HUD ranged from $6,000 to $24,631 and averaged $9,118. However, HUD's chart of accounts directs that the account number used by the projects to report their audit costs should also be used to report the cost of preparing tax returns. (GX. 2, p. 25) Because the Government did not demonstrate the average cost of preparing tax returns for these projects, the evidentiary record, standing alone, does not show what portion of the $9,118 average may be fairly attributed to the cost of preparing audited financial reports. Nevertheless, case precedent provides useful guidance. In the case of *In re Crestwood Terrace Partnership,* HUDALJ 00-002-CMP, January 30, 2001, the administrative law judge relied on hearing testimony to find that the cost of preparing an audited financial report for a 106-unit, multi-family project in Gaithersburg, Maryland (a project half the size of Respondents'), would have been between $7,500 and $10,000. *Id.* p. 7. This finding supports a conclusion in the instant case that more than half of the $9,118 average reported by the Houston-area projects may be fairly attributed to the average cost of preparing audited financial reports. At hearing, Respondent Yetiv claimed that an unidentified accountant told him that the required audited reports could be prepared for $1,000 to $1,500. (TR. 245-46) No credit can be given to that uncorroborated, hearsay claim.

Although the law requires an analysis of the benefits Respondents received as a result of their violations, Respondents attempt to turn the law on its head and argue that HUD must be analyzed to determine how much HUD benefitted by insuring the Prudential loan to Respondent Corporation. They argue that not only did HUD lose nothing as a result of Respondents' conduct, the agency gained by insuring Prudential's loan to Respondents, whereas Respondents gained nothing and lost much as a consequence of associating with HUD. Their argument tries to make much of the fact that the corporation paid insurance premiums into HUD's insurance fund and the fact that the mortgage was paid off early. Those facts are wholly irrelevant to a determination of an appropriate civil money penalty. The issue is what benefits Respondents received by violating the statute, not what benefits Respondents believe the Government received from Respondents.

Because Respondents failed to submit the required financial reports and the loan has now been paid off, it is impossible to determine objectively what the risks of loss were to the insurance fund during the life of the mortgage. As noted above, that

Respondent Corporation apparently never failed to make a mortgage payment does not mean that the insurance fund never faced a risk of loss at the hands of Respondents. A corporation can make timely debt payments right up until the day it declares bankruptcy.

6. The Extent of Potential Benefit to Other Persons

The record reveals no evidence of potential benefit to other persons as a result of Respondents' violations.

7. Deterrence of Future Violations

Mortgagors with mortgages insured by HUD must not form the belief that they can fail to comply with statutory, regulatory, and contractual obligations without suffering significant penalties. The penalties assessed must be greater than the benefits enjoyed from non-compliance with the law; otherwise mortgagors may be tempted to believe that it "pays" to violate the law, and the penalties will have no deterrent value.

Respondent Yetiv testified under oath that he read and understood the regulatory agreement before he signed it in 1997. That agreement clearly gave the Secretary, among other things, the right to inspect the property and copies of all written contracts or other instruments that affected the mortgaged property at any reasonable time (paragraph 9(c)). The agreement also required Respondents to file annual financial reports (paragraph 9(e)) and answer "questions upon which information is desired from time to time relative to income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage." (paragraph 9(f)) But when the Secretary's agents inspected the property, asked questions, and reminded Respondent Yetiv to file the required annual financial reports, he responded with cries of righteous outrage, claiming that he was not HUD's "servant," that the Government had no right to interfere with his "right to run my property as I see fit," and that HUD was asking for information that was "confidential, and frankly none of your business . . . ." To Respondent Yetiv, HUD's request that he file the financial reports that he had agreed in 1997 to file was a "JOKE!"

Given Respondent Yetiv's sworn testimony that he understood the regulatory agreement before he signed it, one conclusion is inescapable: His repeated demands for a copy of the document that he had signed that gave HUD its authority were disingenuous. He had signed the regulatory agreement. It is inconceivable that a businessman like Respondent Yetiv, with more than 10 years' experience, multiple rental properties, and two (now three) higher academic degrees, would not have retained a copy of all of the papers, including the regulatory agreement, that he signed when the Prudential loan was consummated. This court finds that Respondent Yetiv knew very well in 2001 and 2002

that HUD had authority to do what it was trying to do. His contemptuous responses and intransigence in the face of HUD's lawful requests require imposition of the severest possible penalty consistent with all of the circumstances. That portion of the penalty ordered below that is based on Respondents' failure to file annual reports during 2001 and 2002 is intended in significant part to deter others with mortgages insured by HUD from failing to cooperate with the agency when reminded of the obligations imposed upon them by statute and contract.

8. The Degree of Respondents' Culpability

As noted above, Respondent Yetiv readily concedes that he read and understood the terms of the regulatory agreement before he signed it. (TR. 229) But he claims that he was induced to sign the regulatory agreement and participate in HUD's insured mortgage program on the strength of statements made by a loan broker who was a business acquaintance of a friend of his. (TR. 227) Respondent Yetiv asserts that the loan broker told him that HUD does not regularly enforce the terms of the agreement which "are simply there in case of financial default." (Declaration in support of opposition to Government's motion for summary judgment) According to Respondent Yetiv, he did not "knowingly" violate the regulatory agreement because he did not have actual knowledge that HUD enforced it.[6] (TR. 229) This argument is fatally flawed on multiple grounds: (1) The reported statement of the loan broker is uncorroborated hearsay; (2) The loan broker was not an employee or agent of the Secretary and hence was incapable of binding the Secretary under any circumstances (TR. 241); (3) Respondents' attempt to rely on the reported statement to explain Respondent Yetiv's state of mind at the time he signed the regulatory agreement violates the parol evidence rule, a rule that Respondents cite elsewhere in argument against the Government; (4) The notion that a violation was not committed knowingly if the violator thought he would not get caught and punished has no support in law (and is also an astonishing argument for a lawyer to make in defense of his own conduct); and (5) Respondent Yetiv's argument compels the conclusion that at the time he entered into the regulatory agreement with the Government on behalf of Respondent Corporation, he did not intend to comply with it. In short, Respondent Yetiv signed a contract with the Government in bad faith.

Respondent Corporation is wholly owned and operated by Respondent Yetiv. No one other than Respondent Yetiv is responsible, in fact, for the violations found in this

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[6] The Act defines "knowingly" as follows: "The term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section." 12 U.S.C. §1735f-15(h).

case. His unmitigated culpability requires imposition of the severest possible penalties consistent with all of the relevant circumstances.

9. Any Injury to Tenants

The record contains no record of actual injury to tenants, although there is evidence that the Project suffered from several maintenance deficiencies that posed safety hazards to the tenants. (GX. 4, 5) Because Respondents failed to submit the required financial reports to HUD, the Department was deprived of an important tool that, among other things, could have been used to determine whether Respondents had spent adequate funds on maintenance to ensure tenants' health and safety, and whether sufficient reserves had been put aside to guarantee proper physical maintenance of the Project throughout the life of the mortgage.

Conclusions Regarding an Appropriate Penalty

For the reasons discussed above, Respondents will be ordered to pay civil money penalties totaling $70,000 for their failure to file audited financial reports covering the operations of Respondent Corporation for fiscal years 1997, 1998, 1999, 2000, and 2001, as follows: For fiscal years 1997, 1998, and 1999, Respondent Corporation will be ordered to pay a penalty of $10,000 for each violation, or $30,000. More than half of the amount of these penalties is intended to deprive Respondent Corporation of the economic benefits gained by failing to submit the required reports. For fiscal years 2000 and 2001, the penalty will be doubled to $20,000 for each violation in light of Respondent Yetiv's failure to cooperate with the Government. Although Respondent Yetiv is in fact solely responsible for all five of the violations found in this case, for purposes of civil money penalties he is being held personally accountable only for the last violation because the statute does not explicitly authorize the imposition of civil money penalties upon an officer of a corporate mortgagor for the earlier violations.[7]

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[7]Respondents' arguments not expressly addressed herein have been carefully considered and found meritless.

Due to the press of other court business, this Initial Decision and Order has been issued outside the period contemplated by the regulations.

ORDER

It is hereby **ORDERED** that:

1. The Government's motion to strike Respondents' replacement brief filed June 23, 2003, is granted;

2. The Chief Docket Clerk shall remove from the record Respondents' replacement brief filed June 23, 2003, and return it to Respondents;

3. Respondents' amended counterclaim and motion to reconsider the Order on Motions for Summary Judgment of April 29, 2003, are denied;

4. Within 10 days of the date on which this Initial Decision and Order become final, Respondent TREIMee Corporation shall pay a civil money penalty of $50,000 to the Secretary of the U.S. Department of Housing and Urban Development;

5. Within 10 days of the date on which this Initial Decision and Order become final, Respondent TREIMee Corporation and Respondent Jack Z. Yetiv shall pay, jointly and severally, a civil money penalty of $20,000 to the Secretary of the U.S. Department of Housing and Urban Development; and

6. This Initial Decision and Order shall become final within 30 days of issuance unless appealed to the Secretary within that time pursuant to 24 C.F.R. §26.50.

Done this 2nd day of September, 2003.

Thomas C. Heinz

THOMAS C. HEINZ
Administrative Law Judge

APPENDIX A

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: Jack Z. Yetiv & TREIMEee Corporation, Respondents.	HUDALJ 02-001-CMP

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Both parties have moved for summary judgment. The Government's motion will be granted in part and denied in part. Respondents' motion will be denied.

On July 26, 2002, the Government issued a complaint against Respondents Jack Z. Yetiv and TREIMee Corporation seeking to impose civil money penalties against them for failing to file annual financial reports covering the operation of Park on Westview Apartments, a 212-unit, multi-family housing project ("Project") in Houston, Texas, with a mortgage insured by HUD. The mortgagee was Prudential Huntoon Paige Associates, Ltd. ("Prudential"). At the time the complaint was issued, Respondent Corporation owned the Project. Respondent Corporation sold the Project on January 1, 2003, the day after paying off the loan on December 31, 2002, and is now apparently defunct. At all times material herein Respondent Yetiv was the president of Respondent Corporation.

The Government's motion for summary judgment was supported by a declaration signed by Sylvia J. Hamilton, an enforcement analyst employed by HUD, who states that as of January 2, 2003, HUD's records showed that Respondent Corporation had not filed financial reports covering the operations of the Project for the fiscal years 1997, 1998, 1999, 2000, and 2001. The Project's fiscal year was the same as the calendar year. The financial report for each year was due in the early part of the subsequent year.

In their answer to the complaint, Respondents denied that the Project had failed to file financial reports with HUD. However, in their response to the motion for summary judgment, Respondents do not contradict the declaration by Sylvia J. Hamilton that the financial reports had not been filed. In fact, Respondent Yetiv's declaration and Respondents' arguments in opposition to the motion implicitly concede that the reports were not filed.

Section 26.29(l) of the Rules of Practice governing this proceeding (24 C.F.R.

§26.29(l)) provides that an administrative law judge may "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact[.]" This provision embodies the concept of Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), which governs motions for summary judgment.[1] Subsection (e) of Rule 56 states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Because Respondent Yetiv's declaration does not set forth specific facts showing that there is a genuine issue as to whether Respondent Corporation failed to file annual financial reports with HUD as alleged in the complaint, I conclude that the reports were in fact not filed.

In 1989 Congress amended the National Housing Act of 1934 and gave the Secretary of HUD authority to impose civil money penalties on mortgagors with HUD-insured mortgages on multi-family projects "for any knowing and material violation of the regulatory agreement executed by the mortgagor" as specified in enumerated violations set out in the statute. (Pub. L. 101-235, Dec. 15, 1989, thereafter codified at 12 U.S.C. §1735f-15(c)(1)(A) through (L)). Subsection (J) of 12 U.S.C. §1735f-15(c)(1) described one of the violations as follows:

> (J) 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 . . . .

On July 1, 1997, Respondent Yetiv, on behalf of Respondent Corporation, signed a

[1] Although the Rules of Practice at 24 C.F.R. Part 26, not the FRCP, govern this proceeding, the FRCP are referred to for guidance as appropriate.

regulatory agreement with Prudential and with the Secretary. In paragraph 9(e) of that agreement, Respondent Yetiv committed Respondent Corporation to the following:

> (e) Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, prepared and certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.

On October 27, 1997, Congress again amended the statute. (Pub. L. 105-65) It now reads in pertinent part as follows:

> **(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 . . .
> (iii) any officer or director of a corporate 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 . . .
>
> **(x)** 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 . . . . [12 U.S.C. §§1735f-15(c)(1)(A) and (B)(x)]

These provisions became effective on the effective date of HUD's final regulations implementing the 1997 amendments to the statute, December 6, 2001. (*See* Section 561(c), Pub. L. 105-65.) For purposes of this case, there is only one significant difference between the operative language of the statute before December 6, 2001, and the operative

language of the statute after that date: the earlier version did not give the Secretary explicit authority to impose a civil money penalty upon "any officer or director of a corporate mortgagor." This change in the statute raises the question whether Respondent Yetiv, as an officer of Respondent Corporation, may be held personally liable for civil money penalties arising out of violations of the statute committed by Respondent Corporation. Because the Government has not addressed this issue, I will defer ruling on it pending receipt of post-hearing briefs.[2]

Whether or not civil penalties may be imposed upon Respondent Yetiv personally, both versions of the statute authorize the imposition of civil penalties upon a corporate mortgagor that fails to file annual financial reports with HUD.

Respondents argue that the Government no longer has jurisdiction to impose civil penalties upon Respondent Corporation because the loan has been paid off and the regulatory agreement is no longer in effect. Respondents cite no statute, regulation, or pertinent case law in support of their argument. A review of the case law indicates that it is an argument of first impression.

Both the preamble and paragraph 14 of the regulatory agreement state that the terms of the agreement bind the parties "so long as the contract of mortgage insurance continues in effect." Citing this language, Respondents argue that inasmuch as the contract of insurance is no longer in effect, the Secretary no longer has jurisdiction to impose civil penalties. That argument has no merit. Because the contract of insurance has expired, Respondent Corporation is no longer bound (among other things) to submit annual financial reports regarding the operation of the Project. But the expiration of the regulatory agreement had no effect on the jurisdiction of the Secretary to impose civil penalties on Respondents. The Secretary's jurisdiction derives not from a contract between the parties (the regulatory agreement), but rather from governing statutes,

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[2]In Respondents' response to the Government's motion for summary judgment, Respondent Yetiv argues that he cannot be held personally liable for civil penalties, citing language in the regulatory agreement and the fact that the current version of the statute was not in effect at the time he signed the regulatory agreement on behalf of Respondent Corporation. Although not stated explicitly, Respondents' argument also raises the question whether the corporate veil may be pierced to reach Respondent Yetiv individually. The Government did not reply to Respondents' argument in contravention of the Order issued March 5, 2003, which reads in part, "On or before March 24, 2003, the Government will file a reply to Respondents' response to the Government's motion for summary judgment[.]"

If Respondent Yetiv cannot be held personally liable for civil money penalties, any penalties imposed in this proceeding could prove uncollectible because Respondent Corporation apparently is defunct.

specifically the National Housing Act. As shown above, in 1989 the National Housing Act conferred jurisdiction on the Secretary to impose civil penalties on mortgagors with HUD-insured mortgages on multi-family projects "for any knowing and material violation of the regulatory agreement executed by the mortgagor" as specified in enumerated violations set out in the statute. Liability for civil penalties attaches at the time a violation occurs. *See Reich v. Occupational Safety & Health Review Comm.,* 102 F.3d 1200, 1202-03 (11th Cir. 1997)(defendant's status at time of violation, not at time of trial, determines viability of civil money penalty action); *see also Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.,* 890 F.2d 690, 696 (4th Cir. 1989).

Respondents' attempts to distinguish these two cases from the case at bar are unavailing. Contrary to Respondents' assertions, neither court "held that the actions were not moot because the illegal activity, though it had ceased, could be resumed . . . ." (Respondents' Surreply to Government's Motion for Summary Judgment) The court in *Reich* specifically rejected the notion that a court's jurisdiction to impose civil penalties hinges on whether the illegal activity that gave rise to the action has ceased or is capable of resumption.

> We reject the appellee's suggestion that we use the mootness analysis for injunctive relief to decide whether a money penalty claim is moot. Unlike injunctive relief which addresses only ongoing or future violations, civil penalties address past violations; liability attaches at the time the violation occurs. *See*, e.g., *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989) (liability for civil penalties "is fixed by the happening of an event . . . that occurred in the past."). . . .
>
> In [*Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128(11th Cir. 1990)] we did not base our decision on a determination that the defendant corporation continued to operate and, therefore, presented a risk of future violations. Although injunctive relief was mooted because "the allegedly wrongful behavior could not reasonably be expected to recur," we held in *Tyson* that the claim for civil penalties was *not* moot. *Id.* at 1134. [102 F.3d at 1202]

That neither *Reich* nor *Chesapeake Bay* involved a mortgage under the National Housing Act is a distinction without a difference. *Reich* held that in actions brought by the Government, liability for civil penalties attaches at the time a violation occurs and subsequent events do not moot that liability. *Chesapeake Bay* states that proposition in

dicta. Furthermore, the National Housing Act contains no provision requiring the Secretary to complete an action for civil money penalties within the effective life of the applicable regulatory agreement. In short, the Respondent Corporation, a mortgagor with a HUD-insured mortgage on a multi-family project, was required by statute and regulatory agreement to file annual financial reports with HUD. It failed to do so. Therefore, by statute the Secretary has jurisdiction to impose a civil penalty if the violations were material and committed knowingly.

The Violations Were Committed Knowingly

Section 1735f-15 of 12 U.S.C. provides that the "term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section." Although Respondents "deny that any alleged failure to submit financials was committed knowingly," at the same time they argue that they

> had been told before getting the loan that various Regulatory Agreement provisions were enforced only in the case of financial default. So, what [they] actually "knew" was that the provision at issue here was NOT usually enforced unless there was a financial default, and since [they] never intended to default (and never did), [they were] unconcerned about that provision (nor about several other provisions). [Respondents' Response to Government's Motion for Summary Judgment]

In other words, Respondents' argument in support of their denial concedes that they knew of the provision in the regulatory agreement requiring submission of annual financial reports to HUD. Even without this concession, I would conclude that Respondents knowingly failed to comply with the provision. Respondent Yetiv, who is a lawyer, signed the regulatory agreement on behalf of Respondent Corporation. No credit can be given to a claim by any lawyer that he was unaware of the contents of a contract that he signed.

The Violations Are Material

Section 30.10 of 24 C.F.R. states that "*Material* or *materially* means in some significant respect or to some significant degree." The Secretary has ruled that "the proper standard for what is a 'material violation' warranting a civil money penalty is whether the violation is 'significant.'" [First] Order on Secretarial Review, *In the Matter of Associate Trust Financial Services,* HUDALJ 96-008-CMP, May 5, 1997. To determine whether a violation is significant, administrative law judges have been ordered by the Secretary to apply a "totality of the circumstances" standard, which is to be determined in turn by

consideration of the eight regulatory factors listed in 24 C.F.R. §30.80 that are used to determine the amount of a civil penalty. [Second] Order on Secretarial Review, *In the Matter of Associate Trust Financial Services,* HUDALJ 96-008-CMP, September 15, 1997. The Secretary also ruled in the *Associate Trust* case that there is a distinction between a "material violation" and a "material fact." In other words, the Secretary has ruled that to be considered material, a violation need not be predicated on material facts. Liability for a civil money penalty may rest on any fact, whether material or immaterial, arising out of the "totality of the circumstances" that are used to determine the amount of any civil penalty. As shown below, this analytical framework for determining materiality creates unavoidable logical and legal anomalies.

1. Gravity of the Respondent's Offense

To determine whether an offense is material by asking whether it is grave begs the question. A grave offense is necessarily a material offense.

The Government has not argued that this factor is relevant to the materiality determination in this case.

2. Any History of Prior Offenses by the Respondent

A previous offense is relevant on the liability issue only if the facts found in the previous case mirror facts alleged in the case at hand. As a general rule, when evidence of a past violation is proffered to prove the charge at hand, the evidence will not be admitted for that purpose because it is either irrelevant or prejudicial.

Citing the fact that the complaint charges Respondents with failing to submit annual financial reports on five occasions, the Government argues that Respondents have a history of prior offenses. That argument is clearly meritless. Only adjudicated offenses qualify as historical offenses. The record does not show that Respondents have a history of adjudicated offenses.

3. The Respondent's Ability to Pay the Penalty

Any decision finding that a respondent has violated the law simply because he has the ability to pay the penalty for the violation unquestionably would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as made applicable to the Federal Government through the Fifth Amendment. A wealthy respondent must be in precisely the same jeopardy as a poor one when accused of violating the law.

According to the Secretary's analytical scheme, if a respondent has the ability to pay a penalty, the violation was material. Because the Government always has the burden to prove liability, and proof of materiality is a part of that burden, the Government has the burden to prove at this juncture that Respondents have the ability to pay a civil money penalty. The Government's argument that Respondents have the burden at this point in the litigation to prove an inability to pay the penalty improperly casts the burden on Respondents to prove that they did not commit a material violation. In other words, if endorsed, the Government's argument would create a presumption of materiality which a respondent would have the burden to rebut. That argument clearly has no merit.

In the instant case, the Government speculates that because the Respondent Corporation had the ability to pay off a mortgage of approximately $1.8 million, the company must have the ability to pay a civil money penalty. Such speculation does not satisfy the Government's burden of proof. The current record does not reveal whether Respondents are able to pay a civil money penalty.[3]

4. Injury to the Public Interest or the Federal Government from the Respondent's Violation

The Government submitted no documentary or testimonial evidence to support this factor of the materiality analysis, and instead cited HUD handbook 4370.1 and *In re Crestwood Terrace Partnership,* HUDALJ 00-002-CMP, January 30, 2001. In *Crestwood Terrace* the administrative law judge concluded that a mortgagor's submission of unaudited annual financial statements was a material violation. The decision relies on hearing testimony explaining the significance of the requirement that financial reports be audited before submission. Because the instant case raises a different issue—namely, What is the significance of the requirement to submit annual reports?—*Crestwood Terrace* is not precisely on point.

Handbook 4370.1, however, is on point. Section 1-4B of the Handbook provides:

> B. Protect the FHA Insurance Fund. When projects with HUD-insured loans fail to make their payments, the mortgagee may decide to assign the mortgage to the Secretary. When this happens, HUD must use Federal funds to pay the mortgagee the balance due

[3]At the penalty phase of civil money penalty litigation, respondents have the burden to show that they are unable to pay a penalty because that information is within their knowledge and control. *See Campbell v. United States,* 365 U.S. 85, 96 (1961). If Respondents in this case do not introduce such evidence at hearing, a finding will made that they have the ability to pay a penalty.

> on the FHA-insured loan (with certain adjustments). The Asset/Loan Management staff can help protect the FHA insurance fund by monitoring the project's physical and financial status and providing solutions to current and anticipated physical and financial problems. When assignment claims cannot be avoided, the Asset/Loan Management staff can still help reduce government losses by quickly negotiating a workout or repayment plan with the project owner. A workout plan can enable the owner to pay back to HUD the amount due under the note and mortgage. The staff can also recommend timely foreclosure so that HUD can acquire and resell the project and minimize its losses in that way.

Section 4.2 of Handbook 4370.1, which explains the purpose of HUD's monitoring of projects, states:

> Monitoring provides continuous knowledge of all aspects of a project's operation, including maintenance and financial status, so that unfavorable conditions may be promptly identified and corrected. The protection of a contingent liability of the Department is important.

These Handbook provisions show that annual financial reports are required because without them HUD cannot discharge its regulatory duties to oversee the operation of HUD-insured projects and to protect the Government's insurance fund by monitoring the financial health of the projects. In other words, HUD has responsibilities to members of the public living in projects who will be injured if the projects are not managed and maintained properly, as well as responsibilities to other members of the public whose mortgage insurance premiums and tax dollars pay the costs of a project mortgagor's default on the mortgage. In short, a mortgagor's failure to submit the required financial reports undermines the integrity of HUD's regulatory and enforcement programs.

It would have been better practice for the Government to support its motion for summary judgment with an affidavit from a responsible HUD official testifying why it is significant that Respondent Corporation did not submit annual financial reports. However, the Secretary's "totality of the circumstances" standard—a standard that does not require the Government to submit specific evidence of material facts to support a finding that a violation is material—compels the conclusion that the statements cited above from Handbook 4370.1 support a finding that Respondents' violations injured or threatened to injure the public interest or the Federal Government.

There is no merit to Respondents' argument that the failure to submit annual financial reports cannot be deemed material inasmuch as it took HUD five years to start complaining about it. The Government asserts that local HUD staff repeatedly asked Respondents to submit the required reports, an assertion that Respondents deny. Even if we assume that HUD did not complain about the missing reports until 2002, that assumption does not aid Respondents' cause. Whether this case should have been brought earlier is not a matter subject to review before an administrative law judge. The timing of an enforcement action is a matter that falls solely within the discretion of responsible program officials.

Respondents also fall far short of the mark when they protest that the Project never missed a mortgage payment and was never in financial jeopardy. A project mortgagor's statutory duty to submit annual financial reports remains constant regardless of the financial condition of the project. That the insurance fund lost no money works only to limit the size of the civil money penalty that will be imposed in this case; it does not render a penalty unjustified.

Respondents do, however, correctly point out that the cost of litigating a charge cannot rationally form the basis for a finding that the violation charged is material, notwithstanding the Government's argument to the contrary. Otherwise a material violation would be found in every case because every case costs something to litigate.

5. Any Benefit, Potential or Actually Received by the Respondent or Other Persons

An immaterial violation can generate large profits to a violator while a material violation can generate an equally large loss. There is no necessary causal relationship between the materiality of a violation and the benefits reaped from it.

Respondents benefitted economically from the violations in an amount at least equal to the total costs that they would have incurred if the financial reports had been prepared and submitted to HUD as required. At this juncture the record does not reveal the amount of those costs.

The record reveals no evidence of potential benefit to persons other than Respondents.

6. The Deterrence of Future Violations from Imposing Penalties, or the Undermining of this Deterrence Interest in Not Imposing Penalties

Because imposition of a civil money penalty can deter both material and immaterial violations, an analysis of deterrence sheds no light on whether a particular violation was material or immaterial. Furthermore, because deterrence is the goal of every case seeking to impose civil money penalties, it necessarily follows that the principle of deterrence will be served by imposing a penalty in every case whether or not the violation was material. Finally, deterrence should be deemed irrelevant to any materiality determination because deterrence, by definition, looks to future conduct whereas determining the materiality of a violation looks to past conduct.

As for the case at bar, imposition of an appropriate civil penalty may deter Respondents and others similarly situated from ignoring their obligations to the Secretary as imposed by statute and by contract. Mortgagors must not form the belief that they can fail to comply with regulatory agreements with impunity.

7. The Degree of the Respondent's Culpability

The purpose of this analysis is to determine whether Respondents are responsible—that is, culpable—for material violations. It makes no sense to assess the degree of Respondents' culpability in order to determine whether the Respondents are culpable in the first place. Such reasoning is circular.

The Government has not argued that this factor is relevant to the materiality determination in this case.

8. Any other Matters Relevant to the Significance or Seriousness of the Respondent's Violation

In their opposition to the Government's motion for summary judgment and in their motion for summary judgment, Respondents reiterate contentions previously made in contests over discovery issues while launching a fusillade of attacks on the legitimacy of the Government's case. They contend that this case is a "witchhunt" brought by HUD officials who in bad faith arbitrarily, capriciously, and selectively decided to prosecute Respondents in violation of the Due Process and the Equal Protection clauses of the Constitution. These contentions rest on the following allegations of fact taken from Respondent Yetiv's declaration in opposition to the Government's motion: (1) Respondent Yetiv "was told by Matthew Morgan, the loan broker that arranged this loan,

that many parts of the closing paperwork are not regularly enforced, but are simply there in case of financial default"; (2) "That the clauses are not routinely adhered to was also confirmed by the fact that after the loan closed, HUD did not ask about the allegedly missing financial reports until 2002";[4] (3) In 2002 Respondent Corporation offered to pay off the loan but Prudential refused and HUD did not respond; (4) Respondent Yetiv brought a class action against Prudential; (5) A vice-president of Prudential spoke with HUD about the class action; and (6) Thereafter, HUD brought this case. In argument, Respondents also assert that Government counsel in this case and "the head person in the Houston HUD office" told Respondent Yetiv that HUD "does not prosecute these cases after the note has been paid off." (Respondents' Surreply to Government's Motion for Summary Judgment) To explain these alleged facts, Respondents posit a conspiracy between Prudential and HUD to selectively prosecute Respondents.

As its name suggests, the selective prosecution defense (sometimes called "selective enforcement") derives from the criminal law. It is unclear whether the defense should be available to respondents in administrative actions where HUD seeks to impose civil money penalties. No court has ruled that the defense is appropriate in this forum, and authority is divided on the wider question as to whether the defense is applicable in other civil fora.[5] For example, in *United States v. Snepp,* 595 F.2d 926 (4th Cir. 1979) (*rev'd on other grounds and remanded,* 440 U.S. 507 (1980)), the Government brought an action for an injunction and damages against a former CIA agent when he published a book about CIA activities without prior approval. The agent argued that he was the first employee to be sued for breach of an agreement requiring submission for prepublication review while other CIA employees and officials in other branches of the Government who had signed similar agreements had published books and articles without being sued. The Circuit Court stated:

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[4] Respondents deny the Government's assertion that HUD staff in Houston repeatedly requested annual financial reports from Respondents. Respondents also deny receiving a letter dated February 5, 2001, addressed to Respondent Yetiv from HUD's project manager in Houston stating that HUD had not received the required annual reports for fiscal years 1997, 1998, and 1999. Whether or not Respondents received it, the letter shows that HUD was not indifferent to the company's failure to submit required reports during the period preceding the filing of the complaint. (A copy of the letter is in the record.)

[5] Counsel for both parties have shirked their professional duties on the selective prosecution issue. Respondents failed in their arguments to cite any of the case law discussing selective prosecution, and the Government did not reply to Respondents' arguments in contravention of the Order issued March 5, 2003, which reads in part, "On or before March 24, 2003, the Government will file a reply to Respondents' response to the Government's motion for summary judgment[.]" These derelictions have delayed resolution of the parties' motions for summary judgment.

> We see no merit in the defense of selective enforcement, and we think the district court correctly rejected it. . . .
>
> Defendant has cited, and we have found, no authority suggesting that the defense of selective enforcement, normally applied in criminal cases, should be extended to civil actions. [595 F.2d at 933]

In *United States v. Fleetwood Enterprises,* 702 F. Supp. 1082 (D. Del. 1988), the Government brought an action seeking to impose civil penalties against a housing manufacturer for alleged violations of the National Manufactured Housing Construction and Safety Standards Act. The District Court rejected the defendant's selective enforcement defense, stating that:

> while "selective enforcement" is recognized in appropriate circumstances as a defense to a criminal prosecution . . . this Court is not convinced that "selective enforcement" is an equally applicable defense to a civil action to recover civil penalties by the federal government. [702 F. Supp. at 1091 (citations omitted)]

Other courts, after expressing doubts about the propriety of the selective prosecution defense in the civil context, have addressed the elements of the defense and ruled against the defendant. For example, in *Karme v. Commissioner of Internal Revenue,* 673 F.2d 1062 (9th Cir. 1982), the Circuit Court denied the taxpayer's claim of discriminatory investigation and ruled:

> The taxpayer's claim in this case is closely analogous to a claim of selective or discriminatory prosecution. Even examining the IRS's actions under the standard applied in criminal cases—a standard which is arguably too stringent for review of the initiation of a civil audit to which no criminal penalties attach—we cannot hold there was any impropriety in striking the claim. [673 F.2d at 1064]

Similarly, in *Church of Scientology of California v. Commissioner of Internal Revenue,* 823 F.2d 1310 (9th Cir. 1987), the Circuit Court affirmed IRS's revocation of the Church's tax-exempt status and assessment of tax deficiencies and penalties for late and improper filing of tax returns while rejecting the Church's claim that animus toward the Church's religious tenets and practices motivated IRS to single out the Church for prosecution:

> Even examining the IRS's actions under the selective prosecution standard—a standard which is arguably too stringent for review of a mere revocation of tax exempt status—we cannot hold that there is any impropriety in this revocation. *See Karme v. Commissioner,* 673 F.2d 1062, 1064 (9th Cir. 1982). [823 F.2d at 1320]

In another group of civil cases, the courts have entertained the selective prosecution defense without examining the propriety of doing so. For example, in *Amato v. SEC,* 18 F.3d 1281 (5th Cir. 1994), a securities salesman argued that he was singled out for sanctions by the National Association of Securities Dealers and the SEC. The Circuit Court rejected his argument, stating:

> In order to establish that he was unfairly prosecuted, Amato must establish that he was singled out for prosecution while others similarly situated were not, and that the action against him was motivated by an arbitrary or unjustifiable consideration, such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right, such as freedom of speech. *See United States v. Collins,* 972 F.2d 1385, 1397 (5th Cir. 1992), *cert. denied,* U.S. , 113 S. Ct. 1812, 123 L. Ed. 2d 444 (1993); *United States v. Huff,* 959 F.2d 731, 735 (8th Cir.*), cert. denied,* U.S. , 113 S. Ct. 162, 121 L. Ed.2d 110 (1992); *C.E. Carlson, Inc. v. SEC,* 859 F.2d 1429, 1437 (10th Cir. 1988). Amato has introduced no evidence which comes close to meeting his burden on this issue. [18 F.3d at 1285]

In *Carlson v. SEC,* 859 F.2d 1429 (10th Cir. 1988) (*reh'g denied,* 859 F.2d 1429 at 1438), a securities broker-dealer and its president argued that they were wrongly denied discovery and a hearing on their selective prosecution defense by an administrative law judge in a proceeding before the SEC. The Circuit Court affirmed the ALJ's decisions, finding that petitioners had failed to satisfy the following test:

> To move forward on their selective prosecution theory, petitioners were required to show that 1) they were singled out for enforcement while others who were similarly situated were not, and 2) their selection for enforcement was deliberately based on an unjustifiable consideration, in this case the exercise of first amendment rights to freedom of speech and association. [859 F.2d at 1437]

Other courts have characterized the prima facie elements of the defense in slightly different terms. For example, the Circuit Court in *American-Arab Anti-discrimination Committee v. Janet Reno,* 70 F.3d 1045 (9th Cir. 1995), described the elements as follows:

> (1) "others similarly situated have not been prosecuted" (disparate impact) and (2) "the prosecution is based on an impermissible motive" (discriminatory motive). *United States v. Aguilar,* 883 F.2d 662, 705 (9th Cir. 1989) (quoting *United States v. Lee,* 786 F.2d 951, 957 (9th Cir. 1986)), *cert. denied,* 498 U.S. 1046 (1991); *see also Wayte v. United States,* 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). [70 F.3d at 1062]

Even if we assume, *arguendo,* that the selective prosecution defense may be raised in this proceeding, that assumption gives no aid to Respondents' cause because, like the petitioners in *Amato* and *Carlson,* Respondents have failed to satisfy the prima facie elements of the defense.

Respondent Yetiv asserts that a loan broker told him that the regulatory agreement provisions are not regularly enforced and that HUD counsel and the "head person in the Houston HUD office" told him that HUD "does not prosecute these cases after the note has been paid off." These allegations address the first element of the defense: others similarly situated have not been prosecuted (disparate impact). However, Respondents have not shown why HUD singled them out for prosecution, that is, Respondents have not satisfied the discriminatory motive element of their prima facie case. In his declaration Respondent Yetiv states, "I believe that HUD's decision to prosecute me and [Respondent Corporation] in 2002 was prompted by a call from lender's representatives—and not by a concern for its insurance fund." Respondent Yetiv's belief that HUD decided to prosecute this case at the lender's urging is mere speculation based on *post hoc ergo propter hoc* reasoning that falls far short of making out a prima facie case of selective prosecution for unlawful reasons.

Respondents complain that they have not been allowed to conduct discovery in pursuit of their selective prosecution claim. That complaint has no merit. The Supreme Court has articulated numerous reasons why discovery cannot be allowed on the selective prosecution issue in the circumstances of this case.

In *Janet Reno v. American-Arab Anti-discrimination Committee,* 525 U.S. 471 (1999), the Supreme Court examined the applicability of the selective enforcement defense to a deportation proceeding and found that as a general rule "an alien unlawfully

in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 486. The Supreme Court justified its ruling in part as follows:

> Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive—its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce "clear evidence" displacing the presumption that a prosecutor has acted lawfully. *United States v. Armstrong,* 517 U.S. 456, 463-465, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996). We have said:
>
> "This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the court properly hesitant to examine the decision whether to prosecute. *Wayte v. United States,* 470 U.S. 598, 607-608, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985). [525 U.S. at 489-90]

Virtually all of these concerns apply with equal force to the case at bar. Furthermore, as stated by the Supreme Court in *United States v. Armstrong,* 517 U.S. 456, 468 (1996), "The justifications for a rigorous standard for the elements of a selective-prosecution claim . . . require a correspondingly rigorous standard for discovery in aid of such claim." Before a defendant is entitled to discovery, the "Courts of Appeals 'require some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* at 468 quoting *United States v. Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974).

In the *Armstrong* case, the defendants claimed that they were selectively prosecuted on the basis of race for selling crack and using a firearm in connection with drug trafficking. To support their motion for discovery, they submitted a "study" listing 24 defendants by race that indicated whether each defendant was prosecuted for dealing cocaine as well as crack. The Supreme Court ruled that the study did not constitute evidence of discriminatory effect because it failed to identify those individuals who were not black and who could have been, but were not, prosecuted for the same offenses for which defendants were prosecuted. The Court further found that this defect was not cured by submission of both a newspaper article discussing the discriminatory effect of drug sentencing laws and affidavits "which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence." 517 U.S. at 470.

In the instant case, the only evidence submitted by Respondents to support their selective prosecution claim and request for discovery is an declaration by Respondent Yetiv. That declaration recounts a statement that a loan broker made to Respondent Yetiv (which is hearsay) and reports Respondent Yetiv's personal conclusions based on anecdotal evidence and other hearsay. Even assuming that statements in Respondent Yetiv's declaration plus factual allegations made in argument qualify as evidence sufficient to satisfy the discriminatory effect element of Respondents' prima facie case, Respondents have not begun to show the discriminatory intent element of the defense. They have submitted no evidence demonstrating that HUD chose to prosecute them for unlawfully discriminatory reasons. Accordingly, discovery in pursuit of their selective prosecution claim cannot be authorized.

Respondents also argue that this proceeding must be dismissed because the Government has not revealed how HUD evaluated the factors listed in 24 C.F.R. §30.80 before bringing this case. There is no merit to Respondents' argument. Section 30.85 of 24 C.F.R. states that HUD shall evaluate the factors listed in 24 C.F.R. §30.80 as a part of the determination whether to seek a civil penalty, and the Government asserts that HUD did so. Contrary to Respondents' contentions, the Government is not required to reveal to a respondent HUD's internal deliberations leading to a decision to prosecute a case.

Finally, Respondents contend that this case must be dismissed based on principles of waiver and estoppel. The estoppel argument is based on their assertion that a HUD employee in Houston incorrectly "suggested" that HUD would not prosecute Respondents before the agency responded to their Freedom of Information Act requests. Respondents'

argument is frivolous on its face.

As for the waiver defense, Respondents have not identified the facts upon which such a defense could be based. Assuming (without deciding) that a respondent in a civil money penalty case may pose a waiver defense, Respondents have not done so here.

To summarize, Respondents' violations must be deemed material for the following reasons: the violations injured or threatened to injure the public interest or the Federal Government by undermining HUD's regulatory and enforcement programs; Respondents benefitted economically by not preparing and submitting the required annual financial reports; and the principle of deterrence will be served by imposing a penalty. The Secretary also ruled in *Associate Trust* that all of the factors listed in 24 C.F.R. §30.80 need not be satisfied to justify a finding of materiality—one will suffice. Because three of the factors listed in 24 C.F.R. §30.80 are satisfied at this juncture in the case, *a fortiori,* a finding of materiality is required.

The Government has also requested summary judgment as to the amount of penalty. That request must be denied. To permit determination of an appropriate penalty, the record needs to include evidence on the cost of preparing and submitting the required financial reports to HUD. If the civil penalty does not exceed that cost, the penalty will have no deterrent effect. It will be viewed as nothing more than the cost of doing business lawfully. Furthermore, in the event Respondent Yetiv is held personally liable for civil money penalties, he must be evaluated in person to assess what penalty will be sufficiently large to deter him from future failures to fulfill his obligations to the Federal Government.

For the reasons discussed above, it is hereby **ORDERED and ADJUDGED** that:

1. The Government's motion for summary judgment is granted in part and denied in part;

2. Respondents' motion for summary judgment is denied;

3. Between July 1, 1997, and December 31, 2002, Respondent Corporation was the mortgagor of Park on Westview Apartments, a multi-family housing project with a

mortgage insured by HUD;

4. At all times material herein, Respondent Yetiv was the President of Respondent Corporation;

5. Respondent Corporation failed to file with HUD annual financial reports covering the operation of Park on Westview Apartments for fiscal years 1997, 1998, 1999, 2000, and 2001;

6. Respondent Corporation's failures to file annual financial reports for fiscal years 1997, 1998, 1999, and 2000 were actions taken knowingly that materially violated both a regulatory agreement that Respondent Corporation had entered into with HUD in 1997 and 12 U.S.C. §1735f-15(c)(1)(J). (Pub. L. 101-235, Dec. 15, 1989);

7. Respondent Corporation's failure to file an annual financial report for fiscal year 2001 was an action taken knowingly that materially violated both a regulatory agreement that Respondent Corporation had entered into with HUD in 1997 and 12 U.S.C. §§1735f-15(c)(1)(A) and (B)(x). (Pub. L. 105-65, Oct. 27, 1997);

8. Further evidence must be entered into the record before an appropriate civil money penalty may be determined; and

9. A determination as to whether Respondent Yetiv may be held personally liable for civil money penalties in this case is deferred pending review of hearing evidence regarding the structure, ownership, and management of Respondent Corporation, and post-hearing briefs addressing the issue.

THOMAS C. HEINZ
Administrative Law Judge