

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

In the Matter of:

FIRST FEDERAL MORTGAGE
OF AMERICA, INC.,

Respondent.

HUDALJ 91-258-MR
Issued: September 4, 1992

Robert G. Leff, Esq.
For the Respondent

Lisa Wright, Esq.
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION AND ORDER

Respondent, First Federal Mortgage of America, Inc. ("Respondent" or "FFM") appeals the September 25, 1991, withdrawal of its HUD/FHA mortgagee approval for a three year period by the Mortgagee Review Board ("the Board" or "MRB") of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") based upon Respondent's failure to comply with the terms of the Board's probation order. Respondent appealed the Board's action on October 26, 1991. A hearing was held on April 8, 1992, in Los Angeles, California. Following the submission of post-hearing briefs and reply briefs, the record closed on June 19, 1992.

Findings of fact

1. By letter dated December 4, 1989, the Board notified FFM, a HUD/FHA approved mortgagee, that it was being placed on probation for a one year period because of its use, through a marketing arm, ("Housing Rehabilitation and Redevelopment Management Resource" or "HRRMR") of stationery which gives the appearance that Respondent is associated with the United States Government and which attempts to imply a connection with the federal government with respect to HUD's mortgage insurance activities. The probation directed that:

- 1) FFM use a disclaimer indicating that it is not in any way affiliated with the Federal government. The disclaimer must be conspicuously displayed

on all stationery used by FFM or its marketing arm in connection with its HUD-FHA insured mortgage activities;

2) FFM cease using a Washington, D.C. address on all stationery used by it or its marketing arm in connection with its HUD-FHA insured mortgage activities; and

3) The contents of all marketing letters used by FFM or its marketing arm shall not contain any reference to "low interest government loans"¹ or other misleading advertising.

2. Respondent received the probation letter on March 28, 1990.² By the terms of the letter and HUD's regulations, the probation became effective on March 28, 1990, and remained effective for a period of one year. 24 C.F.R. § 25.4 (e).

3. Respondent appealed the MRB's action on March 28, 1990. A hearing in this matter was held on September 10-11, 1990, in Los Angeles, California, and an Initial Decision and Order ("Initial Decision") affirming the Board's action was issued on February 8, 1991.³ Respondent petitioned the Secretary for review. The Secretary denied the petition and the Initial Decision became final on February 8, 1991. 24 C.F.R. § 26.24 (f).

4. On April 1, 1991, Respondent filed a complaint against HUD in the United States District Court for the Central District of California seeking review of the final order of the Secretary of HUD. The District Court granted the Government's motion for summary judgment and dismissed the complaint. *First Federal Mortgage of America v. United States Department of Housing and Urban Development*, Civil No. 91-1739-KN(Bx)(C.D. Cal. Mar. 10, 1992). Respondent filed a motion for reconsideration which was denied; and on May 24, 1992, it appealed the decision of the District Court to the United States Court of Appeals for the Ninth Circuit where the matter is pending.

5. The pertinent facts surrounding Respondent's original solicitation are set forth in the Initial Decision. The pertinent findings are summarized as follows: HRRMR's

¹ HRRMR removed its reference to "low interest loans" from its advertising following the September 1990 hearing and the Department does not include this reference among the claimed violations. Accordingly, Respondent's compliance with this requirement is not at issue.

² Respondent did not receive the letter the first time it was mailed. Respondent was sent a second copy which it clearly had received by March 28, 1990, the date of its appeal. The record does not reflect the actual date of service of the second mailing. Accordingly, I determine the date Respondent appealed the probation to be the date the probation became effective.

³ *In the Matter of First Federal Mortgage of America, Inc.*, HUDALJ 90-134-MR (February 8, 1991).

in the Initial Decision. The pertinent findings are summarized as follows: HRRMR's letters were printed on stationery with an eagle at the top of the page. Below the eagle, appeared the name, "Housing and Rehabilitation and Redevelopment Management Resource" and "Washington D.C. 20003." The letters contained the statement that "Funds are limited and will be available on a first come, first-serve basis," and were purported to have been signed by "Al Peter, Administrator," a fictional person and title. The envelopes mentioned a "special program" for a particular geographic area.⁴ No disclaimer of affiliation with the United States Government appeared on the correspondence. Letters were mailed in envelopes with the following printed in the upper left corner:

**Housing Rehabilitation and
Redevelopment Management Resource**
Washington, D.C. 20003

Return Address:
P.O. Box 90009
Worldway Postal Center
Los Angeles, CA 90009

The letter invited recipients to call a phone number belonging to First Federal Mortgage of America. HRRMR had no other apparent function than to serve as FFM's "marketing arm." Initial Decision, pp. 6, 9.

6. From March 28, 1990 through June 14, 1991, the date of the letter notifying Respondent that the Board was considering withdrawing Respondent's mortgagee approval, FFM through HRRMR continued to mail marketing letters which did not comply with the Board's December 4, 1989, letter placing Respondent on probation. Answer, ¶ 21; Govt. Exs. 10, 11; Tr. pp. 67-68.⁵ These solicitations 1) did not contain a disclaimer of affiliation with the United States Government; 2) displayed a Washington, D.C. address and eagle; 3) stated that "Funds are limited and will be available on a first come, first-serve basis"; and, 4) were signed by the fictitious Mr. Peter, as "Administrator". Govt. Exs, 10, 11.

7. After March 28, 1990, HRRMR's letters continued to supply FFM's phone number, 1-800-346-6300. They also invited the recipient to call First Federal Mortgage of America for further information. Govt. Exs. 10, 11.

⁴The term "funds" and the title "Administrator" are governmental terms. The reference to a "special program" for a community rather than individuals is also consistent with a governmental program. These three terms in combination with the appearance of the solicitations and the Washington D.C. mailing address create the impression that the sender is an instrumentality of the United States. Initial Decision, p. 11.

⁵The following reference abbreviations as used in this decision: "Govt. Ex." for Government's or Department's Exhibit; "Res. Ex." for Respondents' Exhibit; and "Tr." for transcript.

8. In the lower right hand corner of an envelope mailed by HRRMR in May 1991 the following appears:

Government Insured
Loan Program
For the
City of Los Angeles
90018

BUY U.S. SAVING BONDS

9. Following receipt of the Board's June 14, 1991, letter notifying Respondent that the Board was considering withdrawing Respondent's mortgagee approval, Respondent's counsel replied by letter dated June 26, 1991, that the lawsuit in the District Court rendered further administrative action against FFM premature. Govt. Ex. 17.

10. By letter dated July 16, 1991, Respondent's counsel offered to settle the matter. The offer states that FFM is:

now prepared to place on the stationery used by it and any affiliated company used for marketing in "8 point" type, a disclaimer. . . which reads:

This company is not in any way affiliated with the Federal Government.

11. On September 25, 1991, the Board notified FFM that its HUD/FHA approval was withdrawn for a three year period based upon its failure to comply with the terms of the probation order. Govt. Ex. 18.

12. As a condition of becoming a HUD approved mortgagee, Fred Tucker, Respondent's vice president, signed a HUD form 92001 (Application for Approval as Mortgagee) dated April 17, 1984. Block 8a. of this form states: "The undersigned agrees that it will comply with the provisions of HUD regulations and other requirements of the Secretary of HUD." Govt. Ex. 1.

13. Respondent has no prior history of misconduct in its dealings with HUD.

Discussion

HUD's regulations permit it to impose sanctions for failure to comply with the terms of a probation or for failure to comply with an order of the MRB. 24 C.F.R. §§ 25.5 (b), 25.9 (i). Its regulations also provide that a probation becomes effective when the notice of administrative action is served. 24 C.F.R. § 25.4 (e).

The record reflects beyond cavil that Respondent violated the terms of the probation which became effective on March 28, 1990. Respondent's solicitations continued to create the appearance that HRRMR is an instrumentality of the United States.⁶ Indeed, Respondent has yet to demonstrate its compliance.⁷

Respondent asserts that its refusal to comply with the terms of the probation should be excused. First, it claims that because it brought suit in District Court, it was not required to obey the Board because merely by bringing the suit, the action was stayed; and second, it maintains, as it did in the initial proceeding,⁸ that HRRMR is not under its control. Both contentions are meritless.

HUD regulations provide that a probation becomes effective on the date of service. 24 C.F.R. § 25.4 (e). Respondent has cited no authority for its claim that it

⁶The phrase "Buy U.S. Saving(sic) Bonds" on the envelopes adds to the impression, already created by the rest of the solicitation, that the sender is an instrumentality of the United States. Any direct economic benefit Respondent might receive from its use of this phrase is not readily apparent. Accordingly, I conclude that the only reason the phrase has been placed on envelopes is to perpetuate the deception that the sender is an instrumentality of the United States.

⁷Respondent alleges that after July 1991, HRRMR began using a disclaimer and ceased its references to FFM (although FFM's phone number continues to be used). Res. Post-hearing brief, pp. 11-12. Indeed, Respondent introduced a copy of an HRRMR solicitation letter dated November 20, 1991, which contains the statement that HRRMR is "not affiliated with any government agency," and contains no reference to FFM. Res. Ex. 1. However, this letter contains the same eagle, and letterhead as the prior solicitations. The letter continues to state that loans are available on a "first come, first-serve basis." Although the signature block of the fictional "Al Peter" no longer appears, his name has been replaced by the name "Greg McGee" and the title "Administrator" is retained. Because none of Respondent's officers or officials testified that FFM had ever distributed this letter and replaced the prior letter, the record does not establish that the new format is now in use and that it has replaced the old format. Even if the new format were in use, it would continue to violate the terms of the probation since only three of the conditions of the probation would be met, i.e., the addition of the disclaimer and the removal of the references to "funds" and to FFM. Finally, even had the record established that the new format complied with the probation, Respondent's compliance would have come too late to satisfy the terms of the probation.

⁸Respondent is precluded from relitigating issues decided in the Initial Decision. *Robi v. Five Platters, Inc.* 838 F.2d 318 (9th Cir. 1988); *Cutler v. Hayes*, 818 F.2d 879, 888 (D.C. Cir. 1987); Restatement (Second) of Judgments § 27 (1982). However, I have addressed Respondent's contention that its practices had changed since the issuance of the Initial Decision.

was not required to comply with the terms of the probation because of the pending suit against HUD. At no time has HUD been under an injunction or stay denying or delaying enforcement of the probation, nor is there other apparent legal impediment to HUD's enforcement or Respondent's compliance with the order of probation.

In its Post-hearing brief, Respondent claims that the conditions upon which this tribunal based its finding that HRRMR was controlled by FFM no longer exist. These purported changes include the assertion that Mr. Tucker is no longer an agent of HRRMR for service of process, and that HRRMR now has an independent existence, including a different office location, mailing address and telephone number from FFM. Res. Post-hearing Brief, p. 7.

Respondent's claim that it no longer controls HRRMR, even if it once had, relates to a matter peculiarly within its own sphere of knowledge. Accordingly, Respondent has the burden to demonstrate that HRRMR is beyond FFM's control. *Campbell v. United States*, 365 U.S. 85, 96 (1961). No corporate officer testified and no other evidence supports a conclusion that control of HRRMR by FFM ceased since the issuance of the Initial Decision. Because HRRMR's letters refer exclusively to FFM and continue to refer recipients to FFM's phone number, the record establishes that Respondent continues to control HRRMR.⁹

Finally, Respondent raises a procedural objection to the legitimacy of the Board's action in this case. It asserts that the notice lacks validity because the Department did not introduce a copy of a return receipt for certified mail showing service of the Board's Notice of September 10, 1991. Res. Post-Hearing Brief, pp. 16-18. This contention also lacks merit. HUD's regulations permit service of a notice on a party's attorney. 24 C.F.R. §§ 25.7, 26.15. Respondent's attorney acknowledges that he in fact received the notice. Res. Post-Hearing Brief, p. 17. The fact that Respondent appealed the notice proves that Respondent received actual notice of it.

The record establishes that Respondent failed to to comply with the terms of a probation or for failure to comply with an order of the MRB because, after the Board's probation order became effective, Respondent's solicitations 1) did not contain a disclaimer of affiliation with the United States Government; 2) continued to display the Washington, D.C. address and eagle; 3) continued to state that "Funds are limited and will be available on a first come, first-serve basis"; and, 4) continued to be signed by the fictitious Mr. Peter, as "Administrator." Accordingly, cause exists for the Board's imposition of an administrative sanction. 24 C.F.R. §§ 25.5 (b), 25.9 (i).

⁹Respondent's former vice president, Fred Tucker was the only witness associated with Respondent who testified. He stated that he now occupies the position of underwriter, and no longer has any control over FFM. He further stated that, because he is no longer involved in the operation of FFM, he is not aware of any steps taken by Respondent to ensure that it complied with the probation. Tr. pp. 178, 181, 186.

The existence of cause for the imposition of a sanction does not necessarily require that a sanction be imposed. However, under the circumstances of this case, the sanction of a withdrawal of mortgagee approval for a period of at least three years is appropriate.

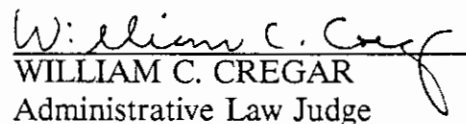
Denial of participation is a sanction which seeks to protect the public by insuring the viability of FHA insurance programs. In order to protect the FHA insurance programs, HUD must be able to supervise mortgagees and to enforce its orders. The record establishes that Respondent has flagrantly ignored HUD's clear directions in violation of HUD regulations and the terms of the agreement by which HUD granted its approval as a HUD/FHA lender. Its flagrant refusal is irresponsible conduct, renders the sanctioning process meaningless, and seriously affects the public interest by hindering HUD's ability to carry out its statutory mandate to regulate the FHA insurance program. Continued dealings with Respondent pose the risk of its failure to comply with future HUD requirements and, as a result, pose an unacceptable present risk to the public.

Respondent's acts are extremely serious. They exhibit a complete disregard for both HUD's supervisory responsibility to protect the public and Respondent's own public responsibility. Although the record reflects no evidence of other misconduct on the part of Respondent, nothing in the record mitigates Respondent's failure to comply with the terms of the probation. Accordingly, the Board's sanction is appropriate. See, 24 C.F.R. § 25.9.

CONCLUSION AND ORDER

The Department has demonstrated by a preponderance of evidence that good cause exists to withdraw Respondent's mortgagee approval for a period of three years and that this sanction is in the public interest. Accordingly, it is

ORDERED that the action is affirmed.


WILLIAM C. CREGAR
Administrative Law Judge

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