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

In the Matter of:

BARTON FUNDING COMPANY, INC.,

Respondent.

HUDALJ 94-002-MR
Decided: July 31, 1995

Georjan D. Overman, Esq.
For the Government

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION

Background

On January 12, 1995, the Mortgagee Review Board ("MRB") issued a three-count Complaint seeking a civil money penalty of $100,000 against Barton Funding Company, Inc. ("Respondent"), pursuant to 12 U.S.C. § 1735f-14 and the applicable regulations under 24 C.F.R. Part 30. The Complaint charged that Respondent knowingly and materially failed to have an acceptable Quality Control Plan (Count I), failed to meet the Home Mortgage Disclosure Act ("HMDA") data reporting requirement for 1993 (Count II), and failed to remit one-time mortgage insurance premiums ("MIPs") (Count III).

On February 23, 1995, the Department filed a Motion for Default Judgment based upon Respondent's failure to Answer the Complaint. On May 17, 1995, assuming the facts alleged in the Complaint to be true, I issued an Order granting in part and denying in part the Department's Motion for Default Judgment. The Order found jurisdiction to enter a Default against Respondent for failure to file an Answer to the Complaint. It also found Respondent liable on all three counts charged in the Complaint. Finally, it found that the penalties proposed of $1,000 for Count I, $1,000 for Count II, and $98,000 for Count III did not exceed the statutory maxima of $5,000, $5,000, and $500,000 for each count, respectively. However, the Motion for Default Judgment was denied because neither the Complaint nor the Motion addressed any of the statutory or regulatory factors to be considered in determining the appropriateness of the civil money penalty to be imposed on any of the counts. Nevertheless, the Government was allowed to file an amended

Motion for Default Judgment alleging those facts that were considered by the MRB in determining the amount of penalties to be proposed, or that would allow this tribunal to consider in determining the appropriate amount of penalties to be imposed on each of the three counts.

On June 14, 1995, the Government filed an Amended Motion for Default Judgment ("Amended Motion"). It attached a declaration by Andrew Zirneklis, the Secretary to the MRB, in which he described his duties and the process by which the MRB determines whether a civil money penalty is appropriate and the amount of penalty to propose. On June 22, 1995, I issued an Order denying the Government's Amended Motion for Default on all counts. The Amended Motion was denied because, with its attachments, it still did not allege those facts required by statute and regulation to be considered in the determination of an appropriate civil money penalty to be assessed. However, the Government was again allowed to file another amended Motion for Default Judgment alleging the requisite facts or show cause why the Complaint against Respondent should not be dismissed.

On July 13, 1995, the Government filed its Second Amended Motion for Default Judgment ("Second Amended Motion"). It attached a second declaration by Mr. Zirneklis in which he not only describes his duties and the MRB's civil money penalty determination process, but also alleges facts considered by the MRB in determining the amount of the penalty proposed against Respondent. Second Amended Motion, Exhibit 1. I have assumed the alleged facts to be true, as is required by 24 C.F.R. §30.900(b), and, accordingly, I grant the Government's Second Amended Motion.

Findings of Fact

Respondent failed (1) to implement a Quality Control Plan; (2) to comply with the 1993 reporting requirements of the Home Mortgage Disclosure Act ("HMDA"); and (3) to remit one-time MIPs for 100 of 129 loans reviewed by the Monitoring Division of HUD's Office of Lender Activities and Land Sales Registration. Respondent shows a net worth of $1.9 million. It has no previous history of violations, although it has been approved to be a mortgagee only since 1993, one year before the Monitoring Division's review. More than 75 percent, if not all, of the loan files reviewed by the Monitoring Division contain violations of 24 C.F.R. § 30.320. The violations are not restricted to a single individual, but represent company policy. Second Amended Motion, Exhibit 1 at 3-5.

Respondent cooperated only slightly with HUD's investigation. It admitted that it did not remit the one-time MIPS for 175 loans, rather than only for the 100 loans reviewed by the Monitoring Division. However, it took no action to correct the problem.

It continued the violations even after being notified by the Monitoring Division and the investing mortgagee that its actions were improper. Respondent retained over $200,000 in mortgagor's funds for its own use. *Id.*

Discussion

12 U.S.C. § 1735f-14(c)(3) requires that certain factors be considered in determining the amount of civil money penalty imposed:

> In determining the amount of a penalty under subsection (a) of this section, consideration shall be given to such factors as the gravity of the offense, any history of prior offenses (including those before enactment of this section), ability to pay the penalty, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate.

24 C.F.R § 30.215(b) augments this statutory specification of factors to be considered in determining the amount of penalty:

> Each panel shall establish guidelines to be used in determining the amount of the penalty to be proposed. The guidelines shall include the following factors: (1) The gravity of the offense; (2) Any history of prior offenses including those before the date of enactment of the Reform Act except as to § 30.210(c)(2) Public Law 101-235 (i.e., December 15, 1989); (3) The ability to pay the penalty; (4) The injury of the public; (5) Any benefits received by the violator; (6) The extent of potential benefit to other persons; (7) Deterrence of future violations; (8) The degree of the violator's culpability; and (9) Such other matters as justice may require.

The MRB considered these factors in determining the amount of penalty to be proposed against Respondent. The injury to the public and gravity of the offense are significant. By retaining mortgage insurance premiums for its own use, Respondent prevented the affected mortgagors from obtaining the benefits of FHA mortgage insurance. If the insurance premium is not paid, the loan is not insured by FHA. Mortgagors who default on uninsured loans lose any eligibility for FHA's assignment program to avoid foreclosure.

The MRB noted that although Respondent did not have a history of prior offenses, it had only been approved to be a mortgagee one year prior to the Monitoring Division's review. Respondent received extensive benefits by retaining over $200,000 in one-time

MIPs, without demonstrable benefits to other persons. Its culpability was exclusive and undiluted. The violations were committed as a matter of company policy, rather than as the acts of individual employees. They were continued even after Respondent had been warned by the Monitoring Division and the investing mortgagee. It cooperated only slightly with HUD's investigation.

Nonpayment of one-time MIPS also threatens the viability of the Government National Mortgage Association ("GNMA") mortgage-backed security program. The secondary market relies on the integrity of participating lenders. If an uninsured loan appears in a GNMA pool, the investing mortgagee must either pay the one-time MIP or repurchase the loan from the pool. This burden on the investing mortgagee is an unanticipated obligation. If the investing mortgagee does not have sufficient capital to absorb this obligation while still servicing its GNMA portfolio, GNMA may have to take over its portfolio and absorb these costs.

The egregiousness of the violation warrants a substantial penalty to deter future violations. Respondent shows a net worth of $1.4 million, which indicates an ability to pay the proposed penalty. The total of the statutory maxima for the three counts is $510,000. Accordingly, I find that the requested penalty of $100,000, which is at the upper end of the range recommended by the MRB staff, is not inappropriate in light of the statutory and regulatory factors required to be considered and the requisite facts that have been alleged.

ORDER

Having found that Respondent is liable under 12 U.S.C. § 1735f-14 and 24 C.F.R. Part 30 for a civil money penalty, it is

ORDERED, that on the date that this Decision becomes final, Respondent shall be liable to the United States for a civil money penalty of $100,000.

Except as is provided in 24 C.F.R. § 30.900, this initial decision shall become final 90 days after its issuance.

ALAN W. HEIFETZ
Chief Administrative Law Judge