Board of Contract Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of: CARROLL P. KISSER, Respondent	HUDBCA No. 91-5688-D9 Activity Docket No. 91-1570-DB

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

August 28, 1991

Statement of the Case

On September 21, 1990, Arthur J. Hill, Acting Assistant Secretary for Housing - Federal Housing Commissioner, notified Carroll P. Kisser, Respondent in this case, that the U.S. Department of Housing and Urban Development ("HUD") intended to debar him indefinitely for alleged irregularities of a serious nature that occurred while he was an Executive Vice-President of DRG Funding Corporation ("DRG"). Kisser was temporarily suspended pending determination of debarment. Kisser had been suspended since March 24, 1989, as an affiliate of DRG. That affiliate suspension was based solely on Kisser's status as an officer of DRG; no wrongdoing had been imputed to him in that proceeding.

Kisser made a timely request for a hearing on this temporary suspension and proposed debarment. The notice of proposed debarment stated that DRG failed to timely pass through unscheduled recoveries of principal to security holders for twelve enumerated projects in violation of the applicable Guaranty Agreement, Government National Mortgage Association (GNMA) regulations, and the GNMA Guide. DRG was also charged by HUD with submitting false monthly statements to GNMA security holders regarding the amount due to the security holders for the twelve projects. HUD further charged DRG with submitting false monthly reports and summaries to GNMA for 34 enumerated projects and failing to timely pay project taxes, penalties and other assessments for 8 enumerated projects. Prior to the hearing in this case, HUD withdrew the charges concerning the false monthly reports and failure to pay taxes, penalties and assessments.

HUD argues that Kisser is responsible for the irregularities alleged to have been committed by DRG because, as an Executive Vice President of DRG, Kisser was responsible for properly supervising DRG employees in adhering to GNMA requirements, and that he knew or should have known that DRG was involved in the alleged irregularities. HUD cited 24 C.F.R. §§24.305(b), (d), and (f) as grounds for Kisser's indefinite debarment from his further participation in primary and lower-tier covered transactions as a participant or principal at HUD and throughout the Executive Branch of the Federal Government. Kisser contends that he did not have the authority to determine which payments would be made to security holders. He also contends that DRG did not fail to timely pass through unscheduled recoveries of principal to security holders, but that if it did so, it was because of directives from the Federal Housing Administration, and because of ambiguous Guaranty Agreement, GNMA Guide, and regulatory language. He further denies that DRG submitted false monthly statements to security holders. Kisser argues that he is, and always has been, a responsible contractor, and that the proposed debarment is both without foundation and punitive.

A hearing in this case was held on April 8-16, 1991. This Determination is based on the record established at the hearing.

FINDINGS OF FACT

I. An Overview of the GNMA MBS Program

This case arises in the context of the mortgage-backed security (MBS) co-insurance program administered by the GNMA, an entity within HUD. HUD's co-insurance lending program was administered through the FHA, which insured the mortgages on behalf of HUD. The MBS issuing and servicing aspect of the co-insurance program was administered by GNMA. As set out in the GNMA MBS Guide, Handbook No. 5500.1, the purpose of the MBS co-insurance program is to increase the overall supply of credit available for housing at reasonable rates by providing investment opportunities for the purchase of securities in "pools" of housing mortgages that are guaranteed against non-payment by the Federal Housing Administration (FHA), among other entities. See, 24 C.F.R. §255. In the MBS co-insurance program, FHA insures a certain percentage of the mortgage and the issuer insures the remainder. The issuers of GNMA mortgage-backed securities are responsible for creating pools of eligible mortgages, arranging for the marketing of securities for investment in the mortgage pools, servicing the mortgages in the pools, and making "full and timely payment of all amounts due to security holders." (Tr. I-85, 86.)

The security holders (investors) receive "pass-throughs" of the principal and interest (P&I) payments on the mortgage in the pool in which they have invested, less servicing fees. The securities generally have a 30-year projected life based on the terms of the mortgages. (Tr. III-116.) The security holders are guaranteed that they will receive the timely payment of scheduled monthly pass-throughs, as well as "certain prepayments and early recoveries of principal on the underlying mortgages." If a mortgagor fails to make a timely payment on the pooled mortgage, the security issuer must make the payment on time to the security holders, using its own financial resources. (Joint Exhibit 1.) Under HUD-FHA regulations, that obligation is limited to "the full amount of scheduled payments due under the securities." 24 C.F.R. §255.811(b) (emphasis added.)

Prospective security holders receive a Prospectus from the issuer outlining the MBS investment program, including GNMA's guaranty. The Prospectus also refers potential investors to Revenue Rulings 70-544 and 70-545 for Federal income tax aspects of the MBS program. (Joint Exh. 1, App. 25.)

Each security holder receives from the issuer a Mortgage Backed Certificate that outlines the payments the security holder will receive, when payments will be made, and the component parts of the payment. It does not incorporate by reference the Prospectus, the Revenue Rulings, the Guaranty Agreement or the GNMA MBS Guide. The Certificate contains its own guaranty by GNMA that timely payments of principal and interest will be made to security holders over the projected life of the mortgage pool. (Joint Exh. 1, App. 42.)

Issuers are to make monthly payments so that security holders receive them by the 15th day of each month. Payment is to be made by check, and a remittance advice based on HUD Form 11714 is to accompany each payment. Section 2.06 of the Guaranty Agreement between GNMA and the issuer states that all monthly payments are first to be applied to interest at the annual rate specified and then to the principal balance outstanding. The amount to be included in each monthly payment to security holders consists of interest due, scheduled principal payments, and "unscheduled recoveries of principal." (Joint Exh. 1.)

Payment of "unscheduled recoveries of principal" and payment of claim settlements from FHA are described in Section 2.05 of the Guaranty Agreement between GNMA and MBS issuers as follows:

> Regular monthly installments shall be adjusted from time to time to include unscheduled recoveries of principal, including partial payments, prepayments in full, and partial and final claim settlements of mortgage insurance benefits. The Issuer shall further adjust regular monthly installments, from its own funds, to provide the holder with any principal that remains unrecovered after the assignment of the mortgage to the Secretary of Housing and Urban Development after the withdrawal from the pool of a defective loan, or after any other liquidation or other disposition of the mortgage, such further adjustments to be made no later than in the month following the month in which a final claim settlement is received, or other final disposition of the claim is made by the insuring agency with respect to the Issuer. For purposes of this section, adjustments from the Issuer's own funds shall also be deemed to constitute unscheduled recoveries of principal. (Joint Exh. 1, Appendix 24, Emphasis supplied.)

The GNMA MBS Guide at ¶11-3(b)(3) echoes the language of Section 2.05 of the Guaranty Agreement. (Joint Exh. 1) The only documents that include further reference to "unscheduled recoveries of principal" are the Prospectus and IRS Revenue Ruling 70-545. Paragraph 2 of the "Yield" section of the Prospectus states, in pertinent part, that:

> Unscheduled payment of principal may be made to the security holder from time to time by virtue of voluntary prepayment or if foreclosure occurs. (Emphasis supplied.)

Revenue Ruling 70-545, referred to in the Prospectus, incorrectly states that the MBS Certificates provides for unscheduled recovery of principal "including foreclosure sale proceeds." The Certificate contains no reference to foreclosure sale proceeds. (Exh. G-35.) Furthermore, neither the Revenue Ruling nor the Prospectus is incorporated by reference into the Guaranty Agreement or the Mortgage Backed Certificate.

The instructions for completing the HUD Form 11710E, which is the liquidation schedule, indicate under "Miscellaneous Pool Administration Procedures" that "foreclosure claim settlements" are to be disbursed to security holders in the month following receipt of the "claim benefit" from FHA. (J.E. 1, App. 11 at 20.)

Section 4.11 of the Guaranty Agreement requires an issuer to maintain a custodial account in which all P & I collected on account of pooled mortgages is deposited upon receipt. Withdrawals of P & I to be passed through each month are to be drawn from the custodial account. The custodial account can be used for any number of pools but the pools must be accounted for separately.

Section 4.12 of the Guaranty Agreement outlines the circumstances when an issuer may make a withdrawal from the P & I custodial account to reimburse itself for advances made by it from its own funds. That Section provides in pertinent part as follows:

> In addition to withdrawals to effect timely payment on securities outstanding under this Agreement, the Issuer may make withdrawals against the foregoing custodial account under section 4.11 above, in order: to remit to GNMA a monthly guaranty fee set forth in section 1.04 above; to reimburse itself or GNMA for any advances made under section 4.03 above, to effect the timely payment on securities issued under this Agreement, provided that such reimbursement, in the case of each advance, shall be only for interest and principal, separately, advanced and paid on such securities, and only from related collections or other recoveries of interest and principal, separately, received from or on account of the mortgage pooled under this Agreement, [which collections or other recoveries were delayed in payment,] and thus made the advance necessary.

GNMA may terminate an issuer's authority to participate in the MBS program if GNMA determines that an event of default has occurred. Section 8.01 of the Guaranty Agreement provides that failure by the issuer to remit to the security holders any payments to be made under the terms and conditions set out in the Guaranty Agreement constitutes an event of default as of the due date for such a payment. An issuer is obligated to give GNMA notice of an impending default on scheduled payments in such a way that GNMA can take over the payments so that they are received on time by the investors. (Joint Exh. I, App. 24.) If an issuer fails to make the required timely payment, GNMA will assume the duty of making the timely payments. GNMA's guaranty appears on the face of each security issued. (Joint Exh. 1, App. 42.) GNMA is ultimately indemnified by FHA, which will reimburse GNMA for any amounts paid by GNMA as a result of a lender's default. 24. C.F.R. §255.824.

II. DRG in the MBS Co-insurance Program

DRG was formed in 1982 to participate in HUD's MBS co-insurance program as a lender, issuer, and servicer. In 1983, FHA approved DRG's application to act as a co-insuring lender and GNMA approved DRG's application to act as an issuer and servicer of mortgage-backed securities. In its application for approval as an MBS issuer, DRG agreed to abide by the GNMA MBS Guide, applicable regulations, and the National Housing Act. (Exhs. G-52, G-57; Tr. III-25.)

During July and August, 1986, HUD conducted its first on-site MBS program monitoring review at DRG. HUD issued a report of its review in March 1987, in which it found serious problems in DRG's operations. After that date, a series of events occurred that were intended to put DRG on a stronger financial base and to improve its operations. First, FHA became actively involved in helping DRG to project its income and expenses, and to manage itself better. Second, DRG sold part of its mortgage servicing business to Reilly Mortgage to get an infusion of cash. Third, DRG hired Carroll Kisser as Executive Vice President for Administration, to begin work in January, 1988, to improve its operations. (Tr. VI-12-16, 41.)

To help project DRG's cash-flow, Matthew Andrea, an employee in the FHA Co-insurance Division, directed the creation of a cash flow model for DRG by FHA. The cash flow model was predicated on DRG using proceeds from foreclosure sales to pay other mortgage pools, and to pass through the foreclosure sale proceeds to the security holders for that foreclosed mortgage only after insurance claim settlement and payment from FHA to DRG. (Exh. R-4.) The cash flow model, originally created as an internal FHA document, was refined and then approved by FHA officials "up the line" to the FHA Commissioner. (Tr. VI-18-29, 32-40, 113.)

This interjection of FHA into what appears to be GNMA's MBS program was not unusual. Joseph Wagner of GNMA testified that it is FHA, not GNMA, that determines the categorization of specific funds and also directs how those funds must be handled. (Tr. I-196-198.) The cash flow model was not shown to anyone at GNMA, nor did Andrea consult with GNMA about GNMA requirements. Andrea assumed he knew what GNMA required of MBS servicers. (Tr. VI-36, 45-46.) According to Andrea, there was a rather bitter rivalry between GNMA and FHA that caused each to regard the other with distrust. GNMA Vice President Louis Gasper believed that FHA regularly meddled and interfered with GNMA programs, such as the MBS Program, without regard to GNMA's interest. (Tr. IV-98-99, 107; TR. II-171-172, 177, 199-200, 228-230.)

The cash flow model was given to Donald DeFranceaux, President of DRG, by Thomas Demery, FHA Commissioner and Assistant Secretary for Housing in October, 1987. DRG was directed to file monthly reports with the FHA Co-insurance Division based on the cash flow model, which DRG did. (Tr. IV-72, VI-30, 45, 125.)

On July 1, 1985, DRG experienced its first default on a loan in the MBS co-insurance program with a project known as Harrison Village. The mortgage on Pickwick Place Apartments went into default shortly after the default on the Harrison Village mortgage. DRG foreclosed on Harrison Village on April 21, 1986, and it foreclosed on Pickwick Place on March 20, 1987. Both properties were sold, generating foreclosure sale proceeds. DRG passed through the foreclosure sale proceeds for these two projects within one month after it received the insurance settlement from FHA on its co-insurance claims for the two mortgages. It did not pass through the foreclosure sale proceeds to security holders in the month following their receipt because it was DRG's understanding from the Guaranty Agreement and the GNMA MBS Guide that it was not required to make the pass-through of foreclosure sale proceeds until it received its co-insurance claim settlement from FHA. The pass-through for Harrison Village was made by DRG in the month following October 27, 1987. The pass-through for Pickwick Place was made by DRG in the month following June 14, 1988. DRG was already in possession of the FHA cash flow model when it made the pass-throughs on both Pickwick Place and Harrison Village. DRG did not ask for separate guidance from GNMA in regard to the time when DRG should make the pass-throughs of foreclosure proceeds. (Stipulation; Exh. R-4; Tr. I-235.)

DRG had the largest inventory of mortgages in the MBS co-insurance program. (Tr. II-166.) York Associates had the second largest inventory. (Tr. I-185.) Both companies experienced the first defaults in the MBS co-insurance program at about the same time and both construed their obligations of when to pass through foreclosure sale proceeds in the same way. Neither York nor DRG were passing through foreclosure sale proceeds in the month following their receipt. Rather, both interpreted Section 2.05 of the Guaranty Agreement to require pass-through of foreclosure sale proceeds in the month following receipt of the mortgage insurance claim settlement from FHA. (Tr. I-269.)

No person or entity was really sure what to do with foreclosure sale proceeds when foreclosures first began to occur in this program. GNMA apparently was sufficiently muddled in its understanding of Section 2.05 of the Guaranty Agreement that it at least appeared to give conflicting advice on when issuers had to pass through foreclosure sale proceeds to security holders. Richard Dyas, Vice President of GNMA for the MBS program from 1982 to late 1987, believed that GNMA intended that foreclosure sale proceeds should be treated as unscheduled recoveries of principal, if foreclosures occurred, but Dyas admitted that neither the Guaranty Agreement nor the MBS GNMA Guide states this. He agreed that Section 2.05 of the Guaranty Agreement failed to clearly express GNMA's intent in that regard. Dyas intended to issue a clarification of GNMA's intent through a special notice or an addition to the GNMA Guide, but he did not do so before he left GNMA. (Tr. V-87-91.) Vicki Speights, then a Vice President of York, had called Joseph Wagner, a program specialist at GNMA, on April 1, 1988 to make sure that York was handling foreclosure deeds and pool liquidations correctly, but that conversation also included a discussion of York's pass-throughs of the foreclosure sale proceeds. To Wagner's recollection, this was the first foreclosure situation faced by GNMA or an MBS servicer. (Tr. I-267-268.) During that conversation, memorialized by Speights in a memorandum of the same date, Speights understood that Wagner approved York's pass-through of foreclosure sale proceeds after receipt of the FHA insurance settlement. (Exh. R-17, Tr. V-9-15.) Sometime around July 1, 1988, Karen Overmiller, Wagner's co-worker, called to inquire how York was handling pass-throughs of foreclosure sale proceeds. Overmiller was told how York was handling them. Wagner's advice to Speights was cited to Overmiller when Overmiller suggested that York was not handling the pass-throughs properly. When Overmiller asked Wagner about his advice to York, he denied having given York approval for its pass-through policy. (Tr. II-45-46.) He also made the same denial at the hearing. (Tr. I-183-184.) I credit Speights' recollection of what Wagner said to her in April 1988. I find that Speights' recollection, recorded in a memorandum, is more reliable than Wagner's, particularly because Wagner tended to get confused in his answers to questions at the hearing. It is possible, however, that Wagner misunderstood what Speights was telling him, and that his advice would have been different if he had understood her. Nonetheless, York did pass through foreclosure sale proceeds to security holders in the month following their receipt after GNMA made clear to York in July, 1988 that it considered such pass-throughs to be a requirement of Section 2.05 of the Guaranty Agreement. DRG was not informed of this interpretation of Section 2.05 by GNMA until sometime on or after July 1, 1988. (Tr. I-138-139, I-183-186, 232, Tr. III-177.)

In June 1988, Wagner had a discussion in the hallway at HUD with Andrea in which Andrea made reference to the increasing number of foreclosure sales in the MBS co-insurance program. Wagner asked Andrea to prepare a list of foreclosure sales by DRG because Wagner had no knowledge that DRG was holding foreclosures sales. According to GNMA, Wagner's conversation with Andrea was the first intimation that GNMA had that DRG was holding foreclosure sales because it was not passing through foreclosure sale proceeds to security holders in the month following their receipt. Inasmuch as it was GNMA's interpretation of the Guaranty Agreement and MBS Guide that such a pass-through was required in the month following receipt of foreclosure sale proceeds, it requested the Federal National Mortgage Association ("FNMA") to conduct a procedural review of DRG's administration of its MBS pools. (Tr. I-117-120, 169; Exh. R-107.)

Between June 23 and June 27, 1987, Patricia A. Wells, a security administration analyst with FNMA, conducted a procedural review of DRG's administration of pools in the MBS program. Wells found that DRG had not passed through foreclosure sale proceeds to security holders in the month following their receipt in the pools for Sherwood Oaks, Wedgewood, Westminster and Remington. For each of those sales, DRG passed through the proceeds in the month following receipt of its insurance claim settlement from FHA, in accordance with the cash flow model provided by FHA. For Sherwood Oaks, Wedgewood and Westminster, the pass-throughs took place four months after the foreclosure sale, and for Remington the pass-through was made three months after the foreclosure sale. Based on GNMA's interpretation of when such pass-throughs had to be made, GNMA concluded that DRG had failed to pass through foreclosure sale proceeds in a timely manner, as defined in the Guaranty Agreement and GNMA MBS Guide. Wells reported to Wagner by telephone that she had told DRG employee Bruce Lowery that DRG was in violation of GNMA's pass-through requirements. Lowery told Wells about the FHA cash flow model, and indicated that DRG would continue to follow it until it received other directions in writing. GNMA apparently translated Wells' description of her conversation with Lowery into a corporate refusal to comply with GNMA requirements. (Tr. II-121-128, 208-209.) (Tr. II-102-107, 130, 213; Tr. I-120-122; Exh. G-15, Stipulation.)

On July 1, 1988, GNMA declared DRG in default, based on the findings by Patricia Wells. The July 1 default letter, signed by Louis Gasper, stated:

> GNMA has been advised that DRG did not remit in a timely manner payments to holders of some mortgage-backed securities issued and outstanding under the terms and conditions of the guaranty agreements. This failure to remit such payments constitutes a breach of Section 4.01 of each guaranty agreement and an event of default under Section 8.01 as of the due date of such payments. (Exh. G-17.)

GNMA also sent a second letter to DRG dated July 1, 1988. In that letter, GNMA offered to hold a meeting with DRG on July 5, 1988 to try to work out the problem. (Exh. R-36.) Until the July 5 meeting, Kisser and other officials at DRG were not even sure why GNMA had declared it in default. (Tr. III-81-82.)

On July 5, 1988, a meeting was held in the GNMA conference room. Present at that meeting were representatives of GNMA, as well as FHA representatives and representatives from DRG, including Kisser. (Tr. III-85.) At that meeting, GNMA directed DRG to place sufficient funds in the P & I custodial account to pass through all foreclosure sale proceeds, as well as scheduled principal and interest payments, by July 15, 1988. This directive included the foreclosure sale proceeds for the projects sold between March and June, 1988. It was also agreed that FHA would make partial settlement payments to cover interest advanced by all lenders in the MBS program. As a result of the partial settlement payment, DRG was given almost $4,000,000 by FHA that it could apply to the July 15 pass-through payments. (Tr. I-87-88, Tr. III-182-183.)

DRG did not agree that GNMA's interpretation of when foreclosure sale proceeds had to be passed through was legally correct. However, GNMA would not withdraw the default against DRG unless DRG agreed to comply with GNMA's directive. (Tr. III-180.) At the meeting, which continued sporadically for a few days, the FHA cash flow model was referred to by DRG to show its good faith and to explain to GNMA why it believed that it was required to handle foreclosure sale proceeds differently than GNMA directed. The FHA representatives at the meeting did not disavow the cash flow model when it was discussed, nor did the FHA representatives indicate to DRG that they had created the cash flow model without consulting with GNMA. (Tr. III-178-179.)

GNMA's directive to DRG was based on a legal and accounting assumption that foreclosure sale proceeds were composed exclusively of principal, and that no interest or other expenses were included in those proceeds. GNMA's construction of the elements included in foreclosure sale proceeds did not represent a consensus among mortgage bankers or Government officials who dealt with mortgages in foreclosure, or even the General Counsel of HUD. However, the directive given at the July 5 meeting was unequivocal. On July 11, 1988, DRG made a formal business decision to comply with GNMA's directive. DRG passed through approximately $15,000,000 on July 15 to cover the foreclosure sale proceeds received from sales of properties between March and June as well as from the sale of another property on June 30, 1988. GNMA withdrew the July 1 default letter after DRG made the pass-throughs as directed by GNMA. (Tr. III-181; Exh. R-4.)

On July 14, 1988, DRG sold a project known as Elmwood, which meant that the foreclosure sale proceeds had to be passed through to security holders on August 15, in order to comply with GNMA's directive. The sale price negotiated for Elmwood was $5,829,878, which was paid with $4,500,000 in cash and approximately $1,300,000 in a note given to DRG by the purchaser. DRG passed through the $4,500,000 in cash that it received from the sale on August 15, 1988. However, it did not pass through the remainder represented by the unliquidated note. (Tr. III-89-92.)

DRG was suffering from under-capitalization. To solve that long-term problem, it attempted to increase its capitalization with a series of proposals, all of which required HUD approval. Its cash position was particularly imperiled by its agreement to pass through foreclosure sale proceeds in the month following receipt. Previously, DRG had used foreclosure sale proceeds to make monthly pass-throughs in other pools as well as in the pools from which the proceeds derived. After July, DRG would have to resort to corporate funds to cover both scheduled pass-throughs and the foreclosure sale proceeds payments. By September, 1988, DRG had advanced approximately $20,000,000 to pay scheduled and unscheduled pass-throughs. DRG projected that it would have to advance $45,000,000 in the next year, or about $4,000,000 a month, to comply with GNMA's directive. (Tr. III-127-128.)

DRG proposed to FHA that it receive claim payments in the form of debentures, a right it contended was provided by HUD regulation. DRG concluded that if FHA approved its debenture proposal, it could increase DRG's net worth substantially. Kisser was most involved with the debenture proposal and directed his energies to its approval. However, on August 3, 1988, DRG's debenture proposal was rejected by HUD.[1] (Tr. III 165-171; Exh. R-60.)

DRG also proposed a refinancing proposal that required FHA and GNMA approval because DRG would be given loans by San Jacinto Savings and Loan Association in exchange for San Jacinto being given a security interest in DRG's assets, including the FHA co-insurance loans in MBS pools. The San Jacinto proposal never was implemented because HUD did not give its unqualified approval within the timeframe set out in the agreement between DRG and San Jacinto. (Exh. G-31; Tr.III-175.)

On August 4, 1988, DRG requested an advance partial payment of interest on settlement claims for properties that it had sold in July so that funds would be available for the August 15 pass-through to security holders. This request was made in accordance with the partial payment plan agreed to by FHA at the July 5 meeting. DRG was told that the HUD Office of Finance and Accounting (OFA) had been directed by a "senior HUD official" not to honor DRG's August request, but neither OFA nor DRG was told why. Such partial advance payments were being made to York in August. The refusal of OFA to pay DRG monies it had counted on to make required pass-throughs placed an even greater strain on DRG's cash position. (Tr. III-198; Tr. IV-84, Stipulation.)

DeFranceaux wrote a letter dated September 12, 1988 to Carl Covitz, then Under Secretary of HUD, in which DeFranceaux raised a number of issues on behalf of DRG. Covitz had interjected himself into all issues involving DRG as of approximately April 4, 1988, when he informed both FHA and GNMA that he would

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[1] DRG filed suit against HUD in the United States District Court for the District of Columbia on the debenture matter. DRG ultimately prevailed on the issue in the U.S. Court of Appeals. _DRG Funding Corp. v. Secretary of HUD_, 898 F.2d 1205 (D.C. Cir. 1990.)

"coordinate all activity pertaining to this issue." Covitz's action followed a bitter debate between FHA and GNMA over whether DRG met the required net worth requirements to continue in the MBS program. (Exh. R-70; Tr. III-150-151.)

DeFranceaux's letter to Covitz stated that DRG believed that its practices prior to July 15, 1988 concerning the use and pass-throughs of foreclosure sale proceeds had been legally correct. He requested that Covitz overrule GNMA's directive to DRG. DeFranceaux stated that if DRG was not released from complying with GNMA's pass-through directive, DRG might not have sufficient capital to meet its pass-through obligations for September. DeFranceaux requested a response on the pass-through issue by September 15, the date on which pass-through payments had to be made to security holders. The letter also notified Covitz about the refusal of OFA to make the agreed partial settlement payment to DRG in August, and asked Covitz for a reconsideration of HUD's decision on the debenture issue. DeFranceaux's September 12, 1988 letter to Covitz was the only notice given to HUD that DRG might be in default as of September 15, 1988. (Exh. R-70.)

On September 15, 1988, J. Michael Dorsey, then HUD General Counsel, responded on behalf of HUD to DeFranceaux's letter to Covitz. Dorsey concluded that a portion of foreclosure sale proceeds was "unscheduled recoveries of principal" requiring a pass-through of those funds in the month following their receipt. Dorsey further concluded that foreclosure sale proceeds also included interest due from default through the date of sale, but that interest must be deposited in the P & I custodial account upon receipt, to be used only for future payments in the pool from which they derived. Dorsey's opinion meant that DRG could not use even the interest portion of foreclosure sale proceeds to either reimburse itself pursuant to Section 4.12 of the Guaranty Agreement for monies that it had advanced for each pool, or to make required pass-throughs for other pools. (Exh. G-16.)

DRG had sold three properties in August through foreclosure sales: Bengal Batture, Country Club, and Spring Glen. On September 15, 1988, DRG made all required scheduled monthly pass-throughs on all of its MBS pools but it did not pass through the foreclosure sale proceeds for Bengal Batture, Country Club, or Spring Glen. (Tr. III-126.) The President of GNMA called DeFranceaux in the presence of Louis Gasper to demand the pass-through, but DeFranceaux refused. (Tr. II-182.) On September 16, 1988, DRG received a default letter from GNMA for its failure to pass through foreclosure sale proceeds in the month following their receipt. (Stipulation; Exh. G-18; Tr. III-96-97.) Up to and including the date of DRG's default by GNMA on September 16, 1988, DRG never failed to pass through any scheduled (P&I) monthly payments to security holders. (Tr. III-74, 109, Tr. II-52.) DRG made a cure offer to the September default, asking that monies it overpaid to comply with GNMA's July 5 directive, determined to be overpayments by Michael Dorsey in his September 15 letter, be returned to DRG so that it could make pass-throughs with that money. The cure offer was not accepted. (Tr. III-110, Exhs. G-38, R-77.)

DRG was obligated to send a remittance advice with each monthly pass-through check to security holders. A remittance advice is a monthly report to security holders that describes, in essence, how the amount in the monthly pass-through check was computed. It also includes the outstanding balance on the MBS Certificate after the monthly distribution is subtracted. Line A of the remittance advice lists the cash distribution in the check attributable to scheduled principal. Line B lists the cash distribution in the check attributable to interest. Line C of the remittance advice is entitled "Cash Distribution of Additional Principal Collections." (Exhs. G-12 and G-14.)

The remittance advice reflects the amount actually contained in each monthly check. It is based on a HUD form. There is no block in which to list whether a property is in default, whether it was sold in foreclosure, or whether it is scheduled to be sold in foreclosure. The remittance advices for the properties sold in foreclosure by DRG prior to July, 1988 did not list the proceeds from the foreclosure sale at line C (Cash Distribution of Additional Principal Collections) until distribution of those proceeds was made to security holders in the month following receipt of the settlement claim from FHA. (Stipulation; Tr. III-56-57.) No other explanation or statement that a foreclosure sale had been held in the month previous was indicated by DRG on the remittance advices because there was no appropriate space for such information, nor was it required. (Exhs. G-12 and G-14; Tr. III-149, Tr. V-135-136.)

On July 15, 1988, DRG sent out amended remittance advices to reflect the distribution of foreclosure sale proceeds at line C of the form for the properties sold in foreclosure prior to that date, in accordance with GNMA's directive about such a distribution. (Exh. G-13.) However, the remittance advices dated August 31, 1988 did not list the foreclosure sale proceeds at line C of the form. (Exh. G-14.) Those forms were to be sent out in September with the September pass-through checks for August sales. DRG was unable to meet its financial obligations by that point, and it did not pass through any foreclosure sale proceeds in September. The August 31, 1988 remittance advices did not reflect the receipt of those funds by DRG because they were not passed through in the September distribution.

DRG sold three properties through foreclosure sales in September, prior to its default. Those properties were Desert Rose, Lodges and Quail Run. On September 16, 1988, GNMA took over DRG's operation, and initially placed York Associates in charge of servicing DRG's MBS pools. According to Kisser, DRG boxed and labeled all of the documents separately for those three pools so that pass-throughs could be made on them by GNMA or York in a timely manner. (Tr. IV-12-13.)

According to a letter dated September 29, 1988, to Michael Dorsey from Allan R. Winn, an attorney for DRG, DRG received $8,527,340 from the September foreclosure sales. From those proceeds, DRG repaid itself $1,823,668 for principal and interest that it had previously advanced to security holders from its corporate account. According to Kisser, that recoupment was taken on advice of counsel in interpreting Section 4.12 of the Guaranty Agreement, and the decision was made by DeFranceaux. (Tr. III-99; Exh. 4-82.) Winn's letter to Dorsey corroborates Kisser's testimony, in which Winn stated that this repayment was made pursuant to Section 4.12 of the Guaranty Agreements applicable to those pools. (Exh. R-82.) An audit team from Price Waterhouse, a national accounting firm, sent by GNMA to audit DRG's MBS servicing pools after the September default, could not find the proceeds from the September sales in the P & I custodial account, where they should have been deposited. (Exh. G-36; Tr. 167.) Kisser testified that he believed, but was not positive, that those proceeds, other than the portion used by DRG for repayment to itself, were used to pay the scheduled pass-throughs on other pools. (Tr. III-98.) GNMA has never requested or demanded that DRG return the money it recouped in September 1988. (Tr. III-101-102.)

Under the terms of the Guaranty Agreement and the MBS Certificate, GNMA assumes the duty to pay security holders on time in the event of a default by an MBS servicer. Neither GNMA nor York passed through most of the foreclosure sale proceeds from the projects sold in foreclosure in August and September in the month following their receipt. Although GNMA made the pass-throughs for Bengal Batture and Country Club on September 16, 1988, pass-throughs of foreclosure sale proceeds were not made to security holders for Lodges until May 15, 1989, for Desert Rose until July 15, 1989, or for Quail Run until November 15, 1989. (Stipulation, Exhs. R-90 and R-114.)

According to Joseph Wagner, whose office would normally control when pass-throughs are to be made by GNMA or a GNMA designated sub-servicer such as York, he assumed that it took so long to make the pass-throughs of foreclosure sale proceeds because it took that long to get the records together. However, Wagner was never shown the Price Waterhouse audit report, and he had no real idea why it took so long for GNMA to pass through the foreclosure sale proceeds to security holders. (Tr. I-218-222, 265.)

III. <u>Kisser's Role at DRG</u>

Kisser had been employed by the Federal National Mortgage Association ("FNMA") from 1973 to 1982, rising to the position of FNMA National Servicing Manager. After he left FNMA, Kisser worked as a real estate consultant and had been a regional vice president of First Columbia Management for three years, managing "troubled" real estate. He had an excellent reputation in the mortgage banking industry as a knowledgeable, effective and honest expert. Kisser had experience with GNMA programs during his employment with FNMA because FNMA was servicing GNMA mortgages but his experience predated the inception of the MBS co-insurance program. (Tr. I-141; Tr. III-17-20, Tr. V-71, 77-78, 104, Tr. IV-173-175.)

When Kisser was hired by DRG as Executive Vice President for Administration, it was anticipated that he would be primarily involved in the multi-family mortgage servicing phase of DRG's business. (Tr. III-20.) DRG was experiencing particular problems with defaults and foreclosures on mortgages in the "COLT" states (Colorado, Oklahoma, Louisiana and Texas). Most, if not all, of those mortgages were in GNMA investment pools. Because DRG was obligated to pass through to the security holders the monthly scheduled principal and interest payments for each mortgage even if the mortgage was in default, DRG was making large cash advances out of its own reserves to cover the required monthly pass-throughs. (Tr. III-29-31.) Kisser's focus would be recapitalization. Prior to beginning work with DRG, Kisser studied all of the relevant GNMA documents and the MBS Guide to familiarize himself with the GNMA MBS co-insurance program. At that time, Kisser was shown the FHA cash flow model by DeFranceaux, who told Kisser that DRG had been directed by Demery of FHA to handle its mortgage pool monies according to the model and to file monthly reports using the cash flow model. (Tr. IV-61-62.) Kisser saw nothing unusual or incorrect in the cash flow model, inasmuch as other FHA programs allow for the handling of cash receipts in such a manner, and Kisser was unaware that GNMA had a different understanding of how such monies should be handled. (Tr. III-35-58, 67, 73; Tr. IV-63-65.)

Kisser's superior at DRG was Donald DeFranceaux. Defranceaux was responsible to the DRG Board of Directors. Dan O'Donoghue, the head of Asset Management, worked on defaulted mortgages. Leila Anatolio was the head of Direct Mortgage Services. She reported to Kisser and had a staff of about 12 employees. Bruce Lowery was in charge of investor reporting. Lowery reported to Anatolio. Anne Denzlinger was responsible for cash flow management recordation of mortgage payments received by DRG each month. She also reported to Anatolio. Lowery was responsible for the monthly remittance advices, which were computer-produced using the standardized GNMA form, and were sent out each month to security holders with their monthly pass-through checks. Kisser's autopen or preprinted signature appears on some of the remittance advice forms, but he was unaware of that fact, and had no actual contact with the remittance advice forms. Lowery's signature appears on the amended remittance advices dated July 15, 1988. (Exhs. G-12, G-13, G-14; Tr. III-31-32, Tr. IV-48-58, 60, 73.)

All officers of DRG, including Kisser, whose signatures were to appear on GNMA program documents, agreed by corporate resolution to abide by the GNMA MBS Guide. (Exh. G-50.) However, Kisser did not have authority over how payments would be made to security holders, or what those payments would be. The DRG comptroller, Randy Pollack, and DeFranceaux made those decisions. Likewise, Kisser did not become involved in the selling of properties in foreclosure, with one partial exception in which he negotiated the sale of the Country Club project. He had no authority over the corporate account. He never even saw a check sent to security holders, although his name appears on the check by stamp or autopen, and he was unaware that his name even appeared on those checks. He did not sign them. (Tr. III-130, 204-205, Tr. IV-35, 37, 44-46, 72, 75, 132-133, 135.)

Kisser's employment with DRG up to the date of DRG's default by GNMA in September, 1988, covered a period of only 8-1/2 months. The way in which DRG handled the pass-throughs of foreclosure sale proceeds predated Kisser's arrival. Furthermore, that pass-through procedure had been specifically cited by DeFranceaux to Kisser, referring to the FHA cash flow model, as an FHA directive of how such funds should be handled. Kisser found no reason to question what appeared to have been a governmental directive. (TR. III-132-143.)

Kisser's role at DRG is best categorized as focused on broad capitalization overview issues, rather than day-to-day management. After the July 1 default of DRG by GNMA, Kisser participated in discussions at DRG that ultimately resulted in DRG's July 11 decision to comply with GNMA's July 5 directive concerning pass-throughs of foreclosure sale proceeds in the month following their receipt. He agreed that DRG should try to comply with GNMA's directive to stay in business long enough to get the debenture issue and the San Jacinto effort approved, which he believed would recapitalize DRG. (Tr. IV-77-79.) In September, he again participated in corporate discussions about what DRG could or should do with the foreclosure sale proceeds for Bengal Batture, Country Club, and Spring Glen, but that decision was made by DeFranceaux and DRG's attorney. Kisser is not sure that he saw a copy of DeFranceaux's September 12 letter to Covitz and there is no evidence that he had input into the areas included in it, although he was familiar with those areas. (Tr. IV-80-81.) Kisser did not disagree with DRG's attorney's advice to act in derogation of the September 15 Dorsey letter, but he did not advocate for or against that position because it was not a decision that he had to make. (Tr. VI-188, 191.) At the hearing, Kisser felt compelled to defend all of the actions taken by DRG even if he played little or no role in them. However, it is clear that his role was far different than initially believed by the Government.

Presently, Kisser is employed as a real estate and investment consultant with Potomac Realty Group. He also has an employment relationship with Sheridan Investment, a company engaged principally in cattle investment and air craft leasing. Kisser has had a consulting agreement with DRG since April, 1989, for the purpose of winning the lawsuit against HUD involving DRG's debenture claim, not at issue in this case. As part of that consulting agreement, Kisser is provided office space and a telephone at DRG's corporate offices in Washington, D.C. (Tr. III-21-22.)

Discussion

The Government is proposing the indefinite debarment of Carroll Kisser, based on his alleged responsibility for (1) DRG's failure to pass through foreclosure sale proceeds in the month following their receipt by DRG, and (2) DRG's alleged submission of false monthly remittance advices to security holders. The Government contends that the advices were false because they did not disclose the foreclosure sale proceeds that had been received by DRG in the month preceding issuance of the remittance advices. The Government cites 24 C.F.R. §§24.305(b), (d) and (f) as grounds for Kisser's indefinite debarment.

In order to protect the public interest, it is the policy of the Government to conduct business only with "responsible persons" and entities. 24 C.F.R. § 24.115(a). The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). Even if cause for debarment is established by a preponderance of the evidence, existence of a cause alone does not automatically require that a debarment be imposed. The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980). In deciding whether to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§24.115(d), 24.314(a) and 24.320(a). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. §24.115(b). A suspension serves a similar purpose, but it may be imposed based on adequate evidence that grounds for debarment *may* exist. 24 C.F.R. §§24.405(a)(2) and 24.410(c).

In proposing an indefinite debarment, the Government has an even greater burden of persuasion because a debarment shall generally not exceed three years and only special circumstances warrant imposing a longer period, commensurate with the seriousness of the cause for which the debarment is imposed. 24 C.F.R. §24.320(a). The Government did not amend its request for Kisser's indefinite debarment even after half of the original charges included in the proposed debarment were withdrawn.

The Government may only debar participants, principals, and their affiliates, as defined in 24 C.F.R., §24.105. There is no dispute in this case that Kisser is a "participant" and that he was a "principal" of DRG while he was its Executive Vice President for Administration from January, 1988 through April, 1989. He also may reasonably be expected to enter into covered transactions in the future, if allowed to do so. 24 C.F.R. §§ 24.105(m) and (p). I therefore find that he is subject to debarment, provided that cause for debarment is established.

This is an unusual case in that the Government is attempting, in effect, to hold Kisser responsible for interpretations of the Guaranty Agreement and the GNMA MBS Guide. Procedures relying upon these interpretations were already well in place at DRG by the time of Kisser's employment, and had been described to Kisser upon his employment by DRG as directed by the FHA Commissioner himself. The charges against Kisser are limited, and ultimately rely upon the reasonableness of his actions, not the actions of DRG, although, the actions of DRG <u>may</u> be imputed to him. <u>See</u>, 24 C.F.R. §24.325(b)(1).

It is admitted that, except for the July 15 pass-through, DRG did not pass through foreclosure sale proceeds in the month following their receipt. The first sentence of Section 2.05 of the Guaranty Agreement states that regular monthly installments (scheduled payments of principal and interest) shall be adjusted to include "unscheduled recoveries of principal," which are to be paid to security holders in the month following their receipt. "Unscheduled recoveries of principal" are described in Section 2.05 as "including partial payments, prepayments in full, and partial and final claim settlements of mortgage insurance benefits." Nowhere in the Guaranty Guide or the GNMA MBS Guide are foreclosure sale proceeds referred to either directly or indirectly as "unscheduled recoveries of principal" Remarkably, they are not referred to at all in those documents. Apparently, when the MBS program was initiated, no one in GNMA or FHA thought to specifically address foreclosures in either the binding contract between the MBS issuer and GNMA, which is the Guaranty Agreement, or the GNMA MBS Guide.

One of the threshold questions in this case is what are the components of foreclosure sale proceeds. Only if all or part of those proceeds constitute principal can the Government's case even begin to be considered. GNMA took the position that all foreclosure sale proceeds are principal. That was the underlying basis for GNMA's July 5 directive to DRG to pass through all foreclosure sale proceeds to security holders in the month following their receipt.

The foreclosure sale proceeds at issue in this case resulted from the sale by DRG of multifamily projects insured by FHA after the mortgages secured by those projects went into default. None of the foreclosure sales resulted in a retirement of the entire debt on the mortgage contracts. The sales took place many months after the initial defaults on the mortgages, and interest continued to accrue on them between default and sale. For Pickwick Place and Harrison Village, the time between the mortgage defaults and the foreclosure sales was almost two years, during which time interest continued to accrue. According to the Guaranty Agreement at Section 2.06, any net payments received by the issuer must first be applied to interest due, and then to principal. The interest due that accrued between default on the mortgages and foreclosure sale of the projects would have been sizeable because the foreclosed mortgages were only a few years old and interest comprised almost all of each month's payments due. Thus, a large component of the foreclosure sale proceeds was attributable to interest, but the proceeds certainly included principal as well. The September 15, 1988 Dorsey opinion was correct in that regard.

The next threshold question is whether the principal component of foreclosure sale proceeds was an "unscheduled recovery of principal" or something else altogether. If all payments in the MBS program must be categorized as either scheduled or unscheduled, then certainly the principal portion of foreclosure sale proceeds were unscheduled, in that they were not received through regular monthly mortgage payments. However, the Guaranty Agreement does not limit categories of sources of mortgage-related payments to that degree. Section 2.05 itself addresses another type of payment, namely "any other liquidation or other disposition of the mortgage." A foreclosure sale is unquestionably a "liquidation or other disposition of the mortgage." Under Section 2.05 of the Regulatory Agreement, "further adjustments" of regular monthly installment payments to security holders need not be made until the month following receipt of a final claim settlement from FHA to provide security holders with any principal "that remains unrecovered" after the liquidation or other disposition of the mortgage. The issuer is further obligated to use its own funds at that time, if necessary to make the security holders whole. In the co-insurance program, in which FHA only insures a portion of the mortgage, the MBS issuer must always resort to some of its own funds to cover the foreclosure sale deficiency owed to the security holders.

The Government contends that Section 2.05 of the Guaranty Agreement clearly directs MBS issuers to pass on at least that portion of foreclosure sale proceeds attributable to principal, if not all of the proceeds, in the month following receipt, and that the phrase "from its own funds" in the following sentence cannot, under any reasonable interpretation, lead an issuer to believe that it can wait until 30 days after it receives a final claim settlement from FHA to pass through previously received principal from foreclosure sales to security holders.

Despite the Government's contention, Section 2.05 of the Guaranty Agreement is anything but clear and the GNMA MBS Guide provides no clarification or guidance to MBS issuers. Indeed, the two largest issuers in the MBS Co-insurance Program, York and DRG, both construed their obligations to pass through foreclosure sale proceeds as governed by the second sentence of Section 2.05, and did not even think of foreclosure sale proceeds, in whole or in part, as "unscheduled recoveries of principal." Richard Dyas, Vice President of GNMA for the MBS program from 1982 to late 1987, admitted that Section 2.05 did not clearly express the intention of the Government drafters, which was that foreclosure sale proceeds should be treated as unscheduled recoveries of principal, despite the fact that such an obvious category as foreclosure sale proceeds was not included in the laundry list of examples of unscheduled recoveries of principal.

Carroll Kisser had some experience in GNMA programs when he was employed by FNMA, but he had little exposure to the MBS co-insurance program prior to his employment with DRG. His knowledge of program requirements was general, not specific. He tried to educate himself by reading all of the relevant documents, including the Guaranty Agreement and the GNMA MBS Guide. However, his reading and understanding were colored by the fact that the FHA Commissioner had ordered DRG to file monthly reports with FHA based on the cash flow model and that the cash flow model showed DRG not passing through foreclosure sale proceeds until the month after it received a final claim settlement from FHA. Kisser knew that FHA was the ultimate insurer of the mortgages and the MBS securities, not GNMA. He also considered FHA and GNMA bound together since the creation of the MBS program at HUD. He assumed that FHA and GNMA had coordinated on the creation of the model and that the cash flow model reflected cash flow management in compliance with Departmental requirements, not in violation of them. He saw nothing in the Guaranty Agreement or the GNMA MBS Guide to alert him that to follow the cash flow model would be a violation of GNMA policy, contracts, handbook or regulations.

It is the essence of the Government's case against Kisser that he knew or should have known that DRG's reliance on the cash flow model was falsely placed and that he should have called a halt to a process directed by the FHA Commissioner, who is also the HUD Assistant Secretary of Housing. It begs the point that certain Government witnesses testified that it was folly for DRG to have used an FHA cash flow model as a guide for its cash management procedures in a GNMA program. FHA and GNMA are both part of HUD, and they are indeed co-sponsors of the MBS program, with GNMA focusing on the issuance and servicing of securities but with FHA ultimately insuring the entire program. In the end, any Governmental financial losses within HUD in the MBS program would be borne by FHA, not GNMA. To see these two entities within HUD as mutually exclusive is a perception no doubt limited to the employees assigned to those two entities. The basic regulatory framework for the MBS co-insurance program, as set out in 24 C.F.R. §255, supports Kisser's assumptions about coordination between GNMA and FHA.

In a recent case construing "reason to know" in the context of debarment, the United States District Court for the District of Columbia applied the test of whether a reasonable person in the same position would infer the facts at issue from facts already known or would conclude that there was such a substantial chance of their existence that the individual would act upon the assumption of their possible existence. Novicki v. Cook, 743 F. Supp. 11 (D.D.C. April 17, 1991). Applying this legal test of reasonableness in the context of debarment to the totality of circumstances in this case, I find that Kisser did not know or have reason to know that DRG's failure to pass through foreclosure sale proceeds in the month following their receipt was in violation of any contractual or regulatory obligation. Indeed, it is questionable whether it was a violation at all. The contra proferentum rule of contract interpretation requires that ambiguities in a contract are to be construed against the drafter so long as the non-drafter's contract interpretation is reasonable. It is irrelevant whether the drafter's construction is also reasonable. B.B. Anderson Construction Co. v. United States, 1 Cl. Ct. 169 (1983). Nowhere is the requirement claimed by the Government clearly stated. I find Kisser's and DRG's interpretation of Section 2.05 to be reasonable, although GNMA's interpretation is not unreasonable. This is the heart of ambiguity. After July 1, 1988, Kisser knew what GNMA's policy was intended to be by GNMA, but whether that intended policy ever became a part of any contract, regulation, or handbook is not clear, nor am I obligated to resolve that issue to decide this case. The reasonableness of Kisser's conduct is at issue, not the tortured constructs of a contract provision.

Indeed, there is not a single regulation cited by the Government to bolster its construction of the GNMA MBS Program requirements alleged to have been violated in this case, nor is there any other provision of the GNMA MBS Guide or Guaranty Agreement that provides even a glimmer, let alone a bright light, to help MBS issuers derive the meaning of Section 2.05 of the Guaranty Agreement. The Government is forced to point to the MBS

Prospectus, not incorporated into the Guaranty Agreement or the GNMA MBS Guide, as the only HUD source for its construction of the phrase "unscheduled recovery of principal," and an IRS Revenue Ruling incorporated by reference only into the Prospectus. Neither of those documents states that foreclosure sale proceeds are unscheduled recoveries of principal. The Prospectus merely alerts potential investors that they could have a shorter term investment than anticipated because of foreclosure. The Revenue Ruling misdescribes the contents of the MBS Certificate. Even if those references can be broadly construed as hints about the categorization of foreclosure sale proceeds, neither the Prospectus nor the IRS Revenue Ruling rise to the level of notice necessary to invoke a debarment. Furthermore, the instructions for completing the HUD Form 11710E at Appendix 11 of the GNMA MBS Guide are more consistent with a definition of foreclosure sale proceeds as a liquidation of the mortgage to be passed through 30 days after receipt of the FHA claim settlement. I find no validity to the charge concerning the "partial" pass-through for Elmwood, which was sold for cash and a note, because no proof was offered that acceptance of a note as part of the proceeds in a foreclosure sale was forbidden.

The Government cites 24 C.F.R. §24.305(b) as the first ground for Kisser's debarment, based upon his alleged responsibility for 1) DRG's failure to pass through foreclosure sale proceeds attributable to principal in the month following their receipt and 2) DRG's provision of allegedly false monthly remittance advices to security holders. To establish that regulatory ground for debarment, the Government must prove by a preponderance of the evidence that Kisser was responsible for:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

I cannot find that Kisser willfully acted in clear violation of, or had a history of failure to perform, a public agreement so serious as to affect the integrity of an agency program, in violation of 24 C.F.R. §24.305(b). Kisser's authority at DRG was limited in the area of actual financial management. Those decisions were made by the DRG Comptroller, not Kisser, or by DRG's President, Donald DeFranceaux. Kisser did not make <u>any</u> of the final decisions at DRG that have so enraged HUD that it proposes his indefinite debarment, nor can I impute those decisions to him, whether or not he personally agreed with them. Although I am troubled by DRG's corporate refusal to comply in any respect with the Dorsey opinion of September 15, 1988, that corporate refusal was made on advice of counsel and I cannot find that Kisser was in a position at DRG to argue against that legal advice, even if he did not agree with it.

The charge concerning false remittance advices is wholly without merit because nothing in them is false. The remittance advice form simply shows security holders the components of their monthly checks. It does not reflect the mortgage history. It does not reflect default, foreclosure, or foreclosure sale. If any part of foreclosure sale proceeds are included in the monthly check as either principal or interest, those components are then listed on the advice form. Where they are listed on the form depends on whether they are categorized as principal or interest. If GNMA intends for the remittance advice to be an investment history, then it must change the form to provide appropriate spaces to include that information. It may, in fact, be a good idea to require such information because it would help investors plan their financial portfolios to anticipate impending foreclosures and acceleration of the mortgage debt. However, there is presently no such requirement. The remittance advices sent by DRG to its security holders were accurate reflections of what was included in the monthly check amount. That is what a remittance advice is supposed to be.

The Government has also cited 24 C.F.R. §§24.305(d) and (f) as grounds for Kisser's indefinite debarment. Section 24.305(d) lists as a ground for debarment:

> Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.
>
> (1) These causes include but are not limited to:
>
> (i) Failure to comply with title VIII of the Civil Rights Act of 1988 or Executive Order 11063, HUD's Affirmative Fair Housing Marketing regulations or an Affirmative Fair Housing Plan;
>
> (ii) Violation of title VI of the Civil Rights Act of 1964, section 100 of the Housing and Community Development Act of 1973, section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975;

(iii) Violation of any law, regulation, or agreement relating to conflict of interest;

(iv) Violation of any nondiscrimination provision included in any agreement or contract.

None of the charges against Kisser fall, by even the farthest stretch of any analogy, within the types of violations specifically listed at §24 C.F.R. §305(d)(1). The fact that such "causes so serious" are "not limited to" the enumerated causes at (d)(1) does not mean that they include any cause at all. The doctrine of ejusdem generis requires that the general provision of a statute or regulation will be controlled by subsequent language more specific in scope, and that general words will not be given a meaning totally unrelated to the more specific terms of the statute or regulation. Weyerhaeuser S.S. Co. v. United Stated, 372 U.S. 597, 600-601 (1963). Trinity Services, Inc. v. Marshall, 593 F.2d 1250, 1258 (D.C. Cir. 1978). Section 305(d) of 24 C.F.R. Part 24 has been specifically construed by this Board and the United States District Court for the Western District of Missouri to exclude violations not substantially similar or analogous to the specific violations set out at (d)(1) of the regulation. Sellers v. Kemp, 749 F. Supp. 1001 (W.D. Mo. 1990); In the Matter of Wayne Sellers, HUDBCA No. 89-4260-D8 (August 2, 1989). There is not a single court case that HUD can point to that construes this regulatory provision differently. Thus, I find that even if HUD had proven that Kisser was responsible for the acts of DRG underlying the charges in this case, I could not find that such acts fall within the limited and limiting examples of 24 C.F.R. §24.305 (d)(1). The Government has failed through both its pleading and proof to establish a ground for debarment pursuant to 24 C.F.R. §24.305(d).

Section 24.305(f) addresses debarment for "material violations of a statutory or regulatory provision or program requirement applicable to a public agreement." The record is devoid of evidence of violation of a statutory or regulatory provision. The remaining issue in this case is what constitutes a "program requirement applicable to a public agreement." In the absence of a regulatory or statutory requirement, it must be presumed that a "program requirement" can be found in a pertinent HUD publication such as a handbook, in this case the GNMA MBS Guide, or the public agreement itself.

As previously discussed, those two sources are imperfect sources of the "program requirements" at issue in this case because of their ambiguous, confusing, and misleading language. The issue is not that GNMA cannot require the pass-through of all or some portion of foreclosure sale proceeds in the month following their receipt. It can. But it must state that requirement in plain English in the Guaranty Agreement and the MBS Guide. It should also make sure that other requirements within those same documents do not contradict it or appear to provide an alternative requirement. Many program "requirements" were bandied about in this case that are nowhere found in the source documents, including alleged prohibitions against "cross pollinating" funds among pools, or the requirement that all pass-throughs must be made before an issuer may reimburse itself for prior advances made. These "requirements" are not the ones that DRG or Kisser is charged with violating in this case, although they touch very near the heart of the charges that are before me in this case. They were discussed at length by both sides to show the general reasonableness or unreasonableness of DRG's actions between March and September 15, 1988, and by extension, Kisser's. The September 15, 1988, Dorsey letter touches on many of them. However, the Dorsey letter does not constitute a program requirement.

The ultimate question in this case is whether Carroll Kisser is presently responsible. I find that Kisser is presently a responsible participant. He did not commit any of the alleged actions, nor was he directly or indirectly responsible for the actions by DRG, cited as grounds for Kisser's debarment. Kisser has been suspended, first as an affiliate and then incident to this proposed debarment, since March, 1989. The current suspension of Kisser was initially arguably supportable on the minimal evidentiary test that adequate evidence existed that a ground for debarment <u>may</u> have existed concerning the events of September, 1988. 24 C.F.R. §24.400(b)(1) Kisser's position description and the fact that his signature stamp was on the pass-through checks suggested that he made DRG's decisions concerning the MBS program. However, that conclusion fails under the higher evidentiary test for debarment. At this point, it is punitive to continue to sanction him because the charges in this case have not been sustained. No debarment is warranted on this record.

CONCLUSION

Based upon the record in this case, the debarment of Carroll Kisser is not warranted. Furthermore, the temporary suspension imposed on Carroll Kisser shall be terminated upon this date.

Jean S. Cooper
Administrative Judge