

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.

CORRECTED COPY

HUDALJ 90-134-MR

Issued: February 8, 1991

Robert G. Leff, Esq.
For the Respondent

Dane Narode, Esq.
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

First Federal Mortgage of America, Inc. ("Respondent" or "FFM") appeals the December 4, 1989, probation action taken by the Mortgagee Review Board ("the Board" or "MRB") of the U.S. Department of Housing and Urban Development ("the Department" or "HUD"). By its own terms, the probation became effective on the date of Respondent's receipt of the letter advising it of the action. However, Respondent did not receive this letter until on or about March 26, 1990 after William M. Heyman, Director of HUD's Office of Lender Activities and Land Sales Registration, sent Respondent another copy.

The Department alleges that Respondent, through a marketing arm, utilizes stationery and names which give the appearance that Respondent is associated with the United States Government and is attempting to imply a connection with the Federal government with respect to its HUD-Federal Housing Administration ("FHA") insured mortgage activities. Govt. Ex. 2. The probation directs 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" or other misleading advertising.¹ *Id.*

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. The parties were to have filed post hearing Briefs on or before November 5, 1990. The Government timely filed its brief on that date. Respondent requested and received an extension until November 26, 1990, to submit its post hearing brief which was timely filed on that date.² To date, Respondent has not complied with the December 4, 1990, letter imposing the probation.³ Answer, p. 6.

¹Respondent agreed to remove any reference to "low interest loans" from any future advertising. Accordingly, the propriety of this part of the MRB's action is not an issue in this case. Res. Post Hearing Brief, pp. 7, 20.

²During the hearing the Department introduced copies of complaints made to HUD by persons who have had business dealings with Respondent. Govt. Exs. 13, 14. These documents were partly illegible as certain sentences had been lined-over with a colored marker. The originals are legible, were available at the hearing, and could be compared with the copies. However, since the marking made reproduction of the entire documents impossible, I ordered the Department to prepare a retyped version of the complaints, including the illegible portions, and to submit it to Respondent's counsel on or before October 22, 1990. Tr. pp. 618-619. Upon concurring in the accuracy of the transcriptions, Respondent's counsel was to submit them for inclusion in the record. The Department subsequently prepared the extracts, but, according to a handwritten notation on a facsimile machine coversheet received in this office, did not submit them to Respondent's counsel until November 5, 1990.

In its post hearing brief, Respondent, for the first time, requests that I not consider these exhibits because it never received the extracts from the Department. At a post hearing telephone conference in which Respondent's request for an extension to file its post hearing brief was discussed, Respondent's counsel agreed not to review the government's brief prior to preparing its own brief. It is possible that Respondent's counsel included these documents together the government's brief and was not aware that they had been sent on November 5, 1991. However, from the instructions given at the hearing Respondent's counsel should have noted the absence of these documents, well before the submission of its post hearing brief. Tr. pp. 617-618. Respondent was given additional time beyond the date set at the hearing to file its brief, yet no steps were taken to require the government to send these missing documents. Under these circumstances Respondent's failure to raise this issue prior to November 26, 1990, is unreasonable. In addition, there has been no demonstration of prejudice. Accordingly, the request is denied and the retyped copies have been included in the record as Government Exhibits 13A and 14A.

Respondent also attached to its post hearing brief proposed Respondent's Exhibits O, P, and Q. These exhibits were previously rejected at the hearing. However, at the hearing, I advised Respondent's counsel that he would be allowed another opportunity to offer these exhibits provided he made an appropriate motion on or before November 5, 1990. Tr. p. 621. No timely motion to admit these documents was filed. Accordingly, these proposed exhibits have not been admitted.

³The parties were requested to brief the question of what, if any, effect Respondent's failure to comply with the MRB's letter imposing the probation has on the starting date of any probationary period which might result from this decision. The parties are in agreement that there is no effect, and that any

Findings of Fact

Respondent is a mortgage lender with its principal office located at 8530 Wilshire Blvd., Beverly Hills, California. It is a HUD-approved mortgagee with "conditional direct endorsement authority", meaning that any FHA loans which it originates must be approved by the local HUD office. Tr. p. 556. Its President, Allen T. Richardson, died recently. Tr. p. 474. The company is now run by its Vice President, Fred Tucker. Tr. p. 557.

order must be limited to affirming or denying the MRB's action. Upon review of the applicable regulations I am in agreement with the parties that the beginning date of any probation has not been affected by Respondent's noncompliance.

In 1988 Respondent began sending form letters to persons in the Los Angeles metropolitan area using stationery imprinted with an eagle, the name, U.S. Housing and Urban Development Administration, Los Angeles Area Office, and its Beverly Hills address and phone number. This name is printed in bold face. The form letter advises the recipient that he/she may take advantage of low interest loans available in the particular area where the recipient resides, *e.g.*, the City of Inglewood. The letter states that loans are available for such things as home improvements, bill consolidation, and education and tax payments, but warns that "funds are limited and will be available on a first-come, first-serve basis." In addition to its appearance on the letterhead, Respondent's phone number, (213) 854-3701, and a toll free number, 1-800-346-6300, is supplied in the text of the letter. The letter is signed "Al Peters" over the title "Administrator, City of Inglewood District". Govt. Exs. 5, 31.

The words "U.S. Housing and Development Administration, Washington, D.C. 20003" are printed in bold face in the upper left-hand corner of envelopes used to mail the form letters. Printed below the name and purported location are the words "Return address, P.O. Box 90009, Worldway Postal Center, Los Angeles, California". Notification of a "special program" for the particular location where the recipient resided is stamped on the lower right-hand corner, *e.g.*, "Special Program for the City of Inglewood". Govt. Exs. 6, 30.

Three individuals testified that they had been misled by this solicitation into believing that the United States Government was offering a low interest loan program, available for a limited time only.⁴

Linda Brown, a resident of the City of Inglewood, California, received a solicitation from Respondent. The solicitation was dated February 8, 1988, and was addressed to

⁴Respondent claims that the testimony of these three witnesses and that of George Jones, discussed *infra*, is not credible. Respondent asserts that the witnesses called by the Department have their own individual motives for falsifying their testimony. The individual motives alleged to affect their testimony are discussed below. See *infra* nn. 5, 6, 8. In addition, Respondent questions the truthfulness of the written complaints made by these witnesses to the HUD Los Angeles Office insofar as the complaints include claims that the authors were misled by the stationery into believing that the solicitations were sent by the United States Government. Govt. Exs. 13, 14, 16. Respondent asserts that its solicitation was of such a nature that no one could have been misled. Respondent further asserts that the complaints resulted from a personal vendetta against Mr. Tucker by the former HUD Los Angeles Office Chief of Mortgage Credit, Shaleen Newbill. Respondent asserts that the vendetta resulted from Mr. Tucker's complaints to HUD about delays and mistakes made by Ms. Newbill's office. Tr. pp. 511-521. As support for this claim, Respondent relies on Mr. Tucker's testimony that Ms. Newbill stated to him that "she had taken down bigger fish than me." Tr. p. 513.

I have concluded that the written complaints made by the witnesses were not the result of a vendetta. There is no credible evidence that Ms. Newbill told any of the complaining parties to include statements about having been misled by the stationery and the envelopes into believing they were dealing with HUD. In addition, after having observed the demeanor of each of these witnesses I have concluded that each was testifying with candor and forthrightness. Accordingly, I am unpersuaded that Ms. Newbill, or anyone else, successfully induced the authors of the complaints to send false letters to HUD containing statements that the stationery and envelopes persuaded them that Respondent either was a government agency or was attempting to appear as a government agency.

Ms. Brown's ex-husband. The solicitation is identical to the solicitation described above, except that the name, First Federal Mortgage of America, Inc., appears at the top of the letterhead. Gov't. Ex. 15, p. 3. Ms. Brown responded to the letter thinking that she was applying for a government loan and that the letter had been sanctioned by HUD. Govt. Ex. 15; Tr. pp. 215-216, 218. She was also aware of HUD's Community Development Block Grant Program in the City of Inglewood and believed that FFM was operating the program. Tr. p. 228. In her initial interview with Mr. Tucker she was told by him that he was "with HUD". Tr. p. 215. She believed that the solicitation came from a U.S. Government agency based on use of the phrases, "low interest Government loans", "funds are available on a first-come, first-serve basis", and "City of Inglewood District".⁵ *Id.*

Thomas Newman, a resident of San Pedro, California, received the U.S. Housing and Development Administration solicitation on or about May 20, 1988, and called FFM. Following the phone call, Respondent's loan officer, Barbara Stevenson, visited Mr. Newman's home. She stated she worked for "U.S. Housing Development" and the "government". Mr. Newman believed that she was a U.S. Government employee. Tr. pp. 286, 289-290. Mr. Newman applied for a loan on May 25, 1988. On August 16, 1988, he contacted HUD to complain about delays in the processing of the loan and learned from Ms. Newbill that FFM was not a Federal agency. Govt. Ex. 13; Tr. pp. 285-286.⁶ He believed that Respondent was associated with the Federal government, at least in part due to the heading of the letter and the abbreviation "U.S." Tr. p. 295.

George Gerard, a resident of Inglewood, California, received the U.S. Housing and

⁵Respondent contends that Ms. Brown has a motive to testify falsely. The record demonstrates that, after applying for a loan, she changed her mind and did not want to pay a \$900 loan cancellation fee. Res. Post Hearing Brief, pp. 13-14; Govt. Ex. 15; Tr. pp. 244-245, 254. Respondent asserts that her desire to avoid paying the \$900 cancellation fee provides sufficient motive to testify falsely. Ms. Brown states that her reason for complaining to HUD was that, after learning of her desire to cancel the loan transaction, Mr. Tucker's conduct included "yelling at me and threatening me with the \$900" and acting "like a crazy man". Govt. Ex. 15; Tr. p. 248. She forthrightly admits that at least part of her decision to complain to HUD was financially motivated and in response to Mr. Tucker's actions. Tr. pp. 214-215, 247. However, she states that she also thought she should complain to HUD, in part, because of the contents of the solicitation. Tr. pp. 214-215. Ms. Brown's motivation to complain to HUD may have been, in part, financially motivated. However, having observed her demeanor, I find her to be a credible witness. She testified with candor, and without equivocation. In addition, her testimony that she believed Respondent to be affiliated with HUD is consistent with her letter to the HUD Los Angeles Office, dated May 20, 1988, in which she states that FFM "represented your office or the government". Govt. Ex. 16, p. 2. Finally, her testimony is also consistent with that of other witnesses in this proceeding who describe similar practices utilized by Respondent to originate loans.

⁶Respondent claims that Ms. Newbill induced Mr. Newman's complaint. As support for its claim, it asserts Ms. Newbill concealed Respondent's approval as a HUD lender. Res. Post Hearing Brief, p. 14. Although Mr. Newman received the impression from Ms. Newbill that Respondent and HUD were not connected in any way, the record evidence is insufficient to conclude that this impression was the result of affirmative misstatements made by Ms. Newbill rather than inferences drawn by Mr. Newman himself. Tr. pp. 309-310.

Development Administration solicitation in late April 1988. In response to the solicitation, he telephoned Respondent's office on May 18, 1988, and spoke to Ms. Stevenson. He visited Respondent's office on June 7, 1988. He subsequently complained in writing to HUD on June 22, 1988. Gov't. Exs. 14, 30, 31; Tr. pp. 312-314. At the hearing he testified:

I felt, based on what I had learned in the interim,⁷ that the agency or this so-called U.S. Housing and Development Administration, which had the United States eagle or at least an eagle on it and a Washington, D.C., address, was in fact a private firm which appeared to be trying to represent itself as an agency of the federal government.

⁷Mr. Gerard telephoned a number given by Ms. Stevenson as the HUD number and reached a Photomat location. He states that he then "realized that this whole thing, in [his] opinion, was a suade [sic] shoe operation. . . ." Tr. pp. 316-317.

Tr. p. 313. He also believed the periods in "U.S.", and the title, Administrator, Inglewood District, made it look official. Tr. pp. 318, 320.⁸

⁸Respondent asserts that Mr. Gerard's complaint to HUD resulted not from having been misled by the solicitation, but from a disagreement he had with Respondent's loan origination procedures and, accordingly, should be given little weight. Res. Post Hearing Brief, p. 14. The record establishes that Mr. Gerard was unhappy with Respondent's insistence that he formally apply for a loan before it would order an appraisal. His written complaint to HUD followed shortly after learning of this policy. In his complaint to HUD about this practice, he included comments about the use of what appeared to him to be imitation official stationery. Govt. Exs. 14, 14A. Contrary to Respondent's assertions, there is no reason to believe that Mr. Gerard was prompted to raise questions concerning the appearance of Respondent's stationery solely due to his dispute with Respondent's loan application procedures. Having observed his demeanor, I note that Mr. Gerard testified with both candor and precision. In addition, I note that Mr. Gerard formerly served as a City Councilman of the City of Inglewood and has initiated taxpayer suits. I have concluded that Mr. Gerard's criticism of Respondent's stationery resulted from his evident interest in responsible citizenship, and not from his dispute with Respondent's loan origination procedures. Accordingly, I have fully credited his testimony.

As a result of complaints received from recipients who believed they were dealing with HUD or an agency of the United States Government, the HUD Los Angeles Office, by letter dated May 20, 1988, directed Respondent to cease "advertising in this manner". Govt. Ex. 4. As a result, Respondent ceased using that name. However, the practice of sending out similar letters was continued under the aegis of a newly formed corporation, "Housing Rehabilitation and Redevelopment Management Resource" ("HRRMR").

HRRMR was incorporated in November 1988 in the State of California. Its agent for service of process is Fred Tucker, whose address for purposes of service of process is 8530 Wilshire Blvd., Beverly Hills, California. Res. Ex. B. In late 1988, HRRMR registered to do business in the District of Columbia. Res. Ex. G. On January 8, 1989, it filed a "Combined Registration Application" with the District of Columbia Department of Revenue. This document identifies the principal officers as Allen T. Richardson, President, Fred Tucker, Vice President, and Ida Hanson, Secretary. The mailing address for each of these officers is listed as 8530 Wilshire Blvd., Beverly Hills, California. The mailing address to which HRRMR's District tax returns are to be sent is P.O. Box 90009, Worldway Postal Center, Los Angeles, California, and its telephone number is (213) 854-3701, the same as that used by Respondent to identify its home office and phone number in the solicitation which HUD had directed it to cease using. Res. Ex. C.

HRRMR employs a company, "Sincerely Yours", to receive and forward its mail in the District of Columbia. Tr. pp. 89, 535. This company's mailing address is 325 Pennsylvania Ave., S.E., Washington, D.C. 20003. HRRMR does not maintain an office, nor does it have employees in the District of Columbia. Tr. pp. 88, 600-601.

The stationery HRRMR uses for its form letter has an eagle at the top. Below the eagle, printed in bold face, is the name "Housing Rehabilitation and Redevelopment Management Resource, Washington, D.C., 20003". The content of the form letter used by HRRMR is the same as that used by Respondent before it discontinued the use of the name "U.S. Housing and Development Administration". The HRRMR form letter requests recipients to call the same toll-free number, 1-800-346-6300, listed on the previous form letter. Govt. Exs. 26-29. Some of the form letters used by HRRMR also contain the following words at the bottom: "Los Angeles Area Office", mailing address "P.O. Box. 90009, Worldway Postal Center, Los Angeles, CA, 90009". Govt. Exs. 28, 29. The words "Los Angeles Area Office" are printed in bold face.

HRRMR's envelopes are identical to those used by Respondent before it discontinued its use of the name, U.S. Housing and Development Administration, except that the name, Housing Rehabilitation and Redevelopment Resource, is substituted for the discontinued name. Govt. Exs. 6, 12.

HRRMR form letters and envelopes are mailed in the Los Angeles metropolitan area. Respondent is the only lender to whom recipients are referred. Tr. pp. 615-616. George Jones and his wife received the HRRMR solicitation on January 23, 1989.

He thereafter placed a call to the HUD Los Angeles Office and talked to Joe Hirsch, Director of the Housing and Development Division, and was told to send a copy of the letter to HUD. Tr. pp. 258, 375. He sent a copy of the solicitation to HUD on January 31, 1989. Govt. Ex. 17. He had placed the call to assure himself that the solicitation was from a government agency. Tr. p. 259. He believed he was dealing with a "government funded organization" because the solicitation appeared to have originated from an entity located in Washington, D.C., and the form letter had an eagle at the top and referred to low interest government loans. Govt. Ex. 28; Tr. pp. 259-261.

Complaints about the HRRMR solicitation caused the HUD Los Angeles Office, on March 3, 1989, to direct Respondent to cease using the solicitations. Govt. Ex. 3. By letter dated May 5, 1989, James E. Schoenberger, the MRB's Chairman, informed Respondent that administrative action was being considered and afforded it 30 days to respond. Govt. Ex. 1. Respondent, through its counsel, responded on June 4, 1989. In that response, Respondent takes issue with the assertions that the solicitation appears to come from the United States Government and that recipients are misled by the content of the solicitation. Respondent refers to HRRMR as "HOUSING". It describes "HOUSING" as having been created by FFM as its "marketing arm". Govt. Ex. 32, p. 4.

The MRB placed Respondent on probation for one year on December 4, 1989. Minutes of the November 21, 1989, meeting in which this action was voted upon by the Board were not signed by the Board members until after the letter had issued. The Chairman of the MRB, C. Austin Fitts, was not present during a portion of this particular meeting, although she signed both the letter imposing the sanction and the minutes. An alternate Chairman, Peter Monroe, acted in her absence when the vote was taken. Res. Ex. A.

Discussion

The Department alleges that Respondent established and uses HRRMR and the solicitation mailed by HRRMR to imply a connection with the United States Government with respect to HUD-FHA insured mortgage activities. It further asserts that Respondent's conduct demonstrates irresponsibility, is contrary to industry practice, and constitutes "any other reason" for which imposition of a sanction is appropriate. Accordingly, the Department asserts that grounds exist for imposition of an administrative sanction under 24 CFR 25.9(p) and (w).⁹

Respondent contends that: 1) the procedures used by the MRB to reach its

⁹Section 25.9(p) of Title 24 of the Code of Federal Regulations authorizes the imposition of a sanction in situations where an approved lender engages in "[b]usiness practices which do not conform to generally accepted practices of prudent lenders or which demonstrate irresponsibility." Subsection (w) of Section 25.9 authorizes the imposition of a sanction for "[a]ny other reasons the Board, Secretary or Hearing Officer, as appropriate, determine to be so serious as to justify an administrative action."

decision were improper; 2) the acts of its so-called marketing arm are not attributable to it; 3) the type of advertising it has engaged in may not be prohibited without published standards;¹⁰ and 4) the names, stationery, and so-called marketing arm are not used to create the appearance that HRRMR is an instrumentality of the United States Government, nor do they create that appearance.

Respondent has Failed to Demonstrate that the Board's Action is Procedurally Defective

Respondent contends that the Board's action is procedurally defective because: 1) the minutes of the Board's meeting were not signed by its members prior to the issuance of the Notice imposing the sanction on December 4, 1989; and 2) the vote was taken in the absence of the Board's Chairperson.

Respondent's first contention assumes that the authorization to impose a sanction must follow the approval of the minutes of the meeting at which the sanction was voted upon. It furnishes no support for this contention. In addition, no such requirement can be found in 24 CFR Part 25. The minutes merely reflect what took place at the November 21st meeting; they do not constitute the action itself. Respondent's second contention is equally groundless. The Board's action was unanimous and taken with an acting Chairman present. A HUD regulation specifically authorizes the appointment of designees to act in place of the regular members. See 24 CFR 25.4(a). Accordingly, these contentions lack merit.

Respondent Can be Sanctioned for the Acts of HRRMR

It is a principle of corporate law that "[w]here one corporation is so organized and controlled and its affairs are conducted so that it is, in fact, a mere instrumentality or adjunct of the other, the fiction of the corporate entity of the 'instrumentality' may be disregarded." *Fletcher CYC Corp*, Sec. 43.10 (Perm Ed). Pursuant to this "instrumentality" or "alter ego" doctrine, the corporate veil is pierced, and the entity in control is held liable for the acts of the entity it has dominated. *Id.* Three elements determine whether one corporate entity is a "mere instrumentality" of the other. These elements are: 1) control by the principal, *i.e.*, "complete domination not only of finances but of policy and business practice in respect to the transaction attacked. . ."; 2) use of the control by the principal to, *inter alia*, perpetuate the violation of a statutory or other positive legal duty; and 3) the exercise of control by the principal proximately causing the violation alleged. *Id.* The record demonstrates that these three elements are present in this case.

¹⁰ Respondent contends that imposition of a sanction where there are no published standards expressly prohibiting the conduct for which the sanction is being imposed violates its Constitutional right to due process. It is unnecessary to reach this contention since, as discussed *infra*, there are existing published standards which prohibit the type of conduct engaged in by Respondent.

Respondent controls HRRMR's activities. The same individuals operate both entities, and the same corporate facilities are shared. According to documents filed in the District of Columbia, HRRMR's agent for service of process is Fred Tucker, Respondent's vice president; its Beverly Hills address for service of process is Respondent's address; two of HRRMR's corporate officers, its president, Mr. Richardson and its vice president, Mr. Tucker, serve in the same capacity as Respondent's officers; and its mailing address and telephone number are Respondent's mailing address and telephone number. Furthermore, Respondent has acknowledged in its correspondence with HUD that HRRMR is a "marketing arm" of Respondent. In addition, HRRMR was established by Respondent soon after it discontinued its use of the name, U.S. Housing and Urban Development Administration. This fact tends to demonstrate that HRRMR merely performed the function of supplying a Washington, D.C. address after Respondent could no longer use the name U.S. Housing and Urban Development Administration. Finally, HRRMR has no other apparent function but to supply a Washington address for Respondent's solicitations. Respondent's claim that HRRMR's business is to buy distressed property in Washington, D.C. is not credible, and it has supplied no credible evidence that HRRMR serves any other business purpose unrelated to its own business activities.¹¹

As discussed below, the evidence further establishes that Respondent's control of HRRMR violates a legal duty to engage in responsible business practices, and that its control of HRRMR proximately caused the advertising practices which are the subject of this action.

Respondent's Solicitations Constitute Grounds for Probation

In order to impose a sanction of any kind on a mortgagee, the Department must first demonstrate by a preponderance of the evidence that grounds for taking the action

¹¹Mr. Tucker's description of HRRMR's business purpose and relationship with Respondent, as well as his attempted characterization of HRRMR as an active, ongoing concern is not credible. First, his testimony fails to demonstrate any business purpose for operating in Washington, D.C. He testified that the business relationship between HRRMR and Respondent involves HRRMR mailing out solicitations to prospective borrowers. By including Respondent's phone number, HRRMR provides Respondent a referral in return for Respondent locating properties for HRRMR to purchase. He explained that interested borrowers are potential sellers. Tr. p. 585. Mr. Tucker claims that three "distressed" properties have been purchased by HRRMR using this method. Tr. p. 583. However, all of these properties are located in the Los Angeles area. Tr. pp. 493, 610. Since the mailings were limited to the Los Angeles area, Mr. Tucker's testimony does not explain why HRRMR needs a Washington, D.C. location.

Second, Mr. Tucker's testimony demonstrates that HRRMR did not actually engage in any business activities on its own behalf. Mr. Tucker was the vice president of Respondent until three or four months prior to the hearing. Yet, he cannot recall whether: 1) HRRMR ever had a meeting of its Board of Directors; and 2) Respondent paid fees to HRRMR for the service of mailing out approximately 500 solicitations per day from Los Angeles. He also could only speculate as to whether HRRMR employed anyone to locate property in Washington, D.C. Tr. pp. 585-586, 558, 611. I have concluded that Mr. Tucker's lack of recall is the direct result of the lack of significant business activities having been conducted by HRRMR.

exist under 24 CFR 25.9. Once grounds are found to exist, the Department must demonstrate that Respondent's conduct is serious enough to warrant its evaluation of Respondent's compliance with HUD regulations for a specified period. See 24 CFR 25.5(b). Therefore, the first question presented is whether Respondent's conduct constitutes grounds for a sanction under Section 25.9(p) or (w). If that burden is satisfied, the Department must then demonstrate that the nature and extent of Respondent's conduct warrants probation.

I. Respondent's Conduct Demonstrates Irresponsibility Under Section 25.9(p)

Section 25.9(p) sets forth two separate grounds for imposing a sanction. These two grounds are set forth in the disjunctive. Under subsection (p) either the alleged improper business practices "demonstrate irresponsibility", or they "do not conform to generally accepted practices of prudent lenders". The Department has established that Respondent's practices, including the sending of the HRRMR solicitations, as set forth above demonstrate irresponsibility, but not that Respondent's these practices fail to conform to generally accepted practices of prudent lenders.

Respondent argues that the MRB cannot interpret and apply to Respondent's conduct a HUD regulation which does not specifically proscribe that conduct, *i.e.*, specific prohibitions on advertising. However, a general prohibition can encompass additional, unspecified prohibitions if the general prohibition is accompanied by a listing of explicitly defined misconduct which, when read together, give meaning to the general prohibition. This interpretive rule is derived from two canons of statutory construction.

First, the maxim of *noscitur a sociis*, or "associated words", states that "[i]f the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases." 2A *Sutherland, Statutory Construction* (4th ed. C. Sands 1973) Sec. 47.16. Accordingly, "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." *Id.* A variation of this maxim is *ejusdem generis*. *Id.* at Sec. 47.17. Under the doctrine of *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*¹² Thus, "words grouped in a list should be given related meaning." See *Third Nat'l Bank v. Impact Limited, Inc.*, 432 U.S. 312, 322 (1977).¹³

¹²The general reference usually but need not always follow the enumeration. See 2A *Sutherland, Statutory Construction*, *supra* at Sec. 47.18.

¹³Indeed, in *Third Nat'l Bank*, *supra*, the Supreme Court, quoting Justice Stewart's dissenting opinion in *United States v. Feola*, 420 U.S. 671, 708 (1975), notes "[o]ne hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion." 432 U.S. at 322, n.16.

Applying this principal of interpretation to the term "irresponsibility" as used in Section 25.9(p), that general term must be interpreted in light of the other grounds set forth in Section 25.9. A reading of these other grounds reveals that sanctions may be imposed for acts which:

- 1) result in the removal of a mortgage from HUD supervision, Sec.25.9(a);
- 2) involve the improper use or segregation of funds, Sec. 25.9(b), (c);
- 3) result from the termination of mortgagee approval, Sec. 25.9(d);
- 4) demonstrate a failure to meet solvency requirements, Sec. 25.9(e), (h);
- 5) involve the payment of an improper fee or thing of value, Sec. 25.9(h);
- 6) involve a failure to meet the conditions, contractual or otherwise, of HUD approval, Sec. 25.9(g), (u);
- 7) violate a statute, regulation, handbook, etc., Sec. 25.9(j), (o), (r), (s), (t);
- 8) involve the submission of false information, or the failure to submit information to HUD or to cooperate with audits, investigations, etc., Sec. 25.9(l), (q);
- 9) result in the indictment or conviction of officers or employees under circumstances reflecting upon the responsibility, integrity or ability of the HUD approved mortgagee to participate in HUD programs, Sec. 25.9(m); and
- 10) result in the employment of persons known, or who should have been known, to have been debarred, Sec. 25.9(n).

Taken together these other grounds seek to protect the public by insuring that approved lenders: 1) are solvent; 2) are in compliance with applicable law, regulations, and specific HUD requirements; 3) permit their activities to be reviewed and supervised by HUD; and 4) are worthy of the public trust. A business practice on the part of an approved lender which is inconsistent with one or more of these general purposes can be termed "irresponsible".

Grounds exist in this proceeding for the imposition of a sanction under 25.9(p) insofar as that regulation concerns business practices which demonstrate irresponsibility. First, the stationery and envelopes give the false impression that the sender is an instrumentality of the United States Government. Second, Respondent intends to create

this impression.

The impression that Respondent is an instrumentality of the United States Government is created by the following: 1) the representation of an eagle and a Washington, D.C. address; 2) the mention of a "special program" for a whole community rather than particular individuals; 3) the use of the word "funds" to describe the source of loans; 4) the title "Administrator", followed by a phrase denoting a geographic responsibility; and 5) the overall appearance of the stationery and the envelope with the sender's name and the words "Washington D.C. 20003" printed in bold face type on both the stationery and the envelope. While one or more of these attributes, standing alone, might not be sufficient to create the impression of U.S. Government involvement, their combined effect clearly does.

The testimony of two witnesses, Mr. Jones and Ms. Brown, as well as their correspondence with HUD, further establishes that the solicitation currently used by HRRMR creates the impression that the sender is an instrumentality of the U.S. Government. An HRRMR solicitation caused Mr. Jones to form this belief. Ms. Brown, on the other hand, formed the belief that a solicitation under Respondent's *own letterhead* was from the United States Government. That Respondent's own name, First Federal Mortgage of America, Inc., could mislead a recipient provides persuasive evidence that it is not just the title of the sender, but the solicitation in its totality that causes the misimpression.¹⁴

A preponderance of the evidence demonstrates that Respondent knows that its solicitation creates the impression that HRRMR is an instrumentality of the United States Government, and that Respondent intends to create this impression.¹⁵ The name first

¹⁴ Respondent argues that substitution of the name "U.S. Housing and Urban Development Administration" with the name "Housing Rehabilitation and Redevelopment Management Resource" removed the likelihood of confusion that the entity was an instrumentality of the United States Government. In that regard, Respondent has introduced evidence that private companies which incorporate the words "Federal", "Housing", or "United States" into their names are fairly common. Res. Exs. H, I, J. Thus, Respondent contends that use of the new name in the otherwise unchanged solicitation could not have resulted in confusion that HRRMR was an instrumentality of the United States Government.

Although other companies may use words in their names similar to those used by Respondent, as demonstrated by the testimony of Mr. Jones and Ms. Brown, the "confusion" caused by the solicitations was not solely the result of the name used by Respondent, but rather, was the result of the combined effect of the solicitation's attributes.

¹⁵ Section 709 of Title 18 of the United States Code provides, in pertinent part, that:

Whoever uses as a firm or business name the words "Department of Housing and Urban Development", "Housing and Home Finance Agency", "Federal Housing Administration", . . . or any combination or variation of these words. . . alone or with other words. . . reasonably calculated to convey the false impression that such name or business has some connection with, or authorization from, the Department of Housing and Urban Development, the Housing and Home Finance Agency, the Federal Housing Administration. . . the Government of the United States, or any agency thereof, which does not in fact exist. . .

used by Respondent, "U.S. Housing and Development Administration", is very similar to "U.S. Department of Housing and Urban Development". Many government agencies use the word "Administration" in their titles, including FHA itself. The use of this title could only have been intended to mislead recipients into believing they were dealing with an "Administration" of the United States Government. Shortly thereafter, Respondent incorporated HRRMR in Washington, D.C. There appears to have been no interest in establishing HRRMR until HUD directed Respondent not to use the name "U.S. Housing and Development Administration". HRRMR has no employees. It has no office. Despite Respondent's claim that HRRMR was established for the purpose of buying and selling real estate in the Washington, D.C. area, Respondent has failed to demonstrate that HRRMR actively engaged in this pursuit in Washington, D.C. It mailed its solicitations from Los Angeles, not Washington, D.C.

Additional circumstances also provide evidence of this intent to create the impression that HRRMR is an instrumentality of the U.S. Government. The title "Administrator" is not an established position in Respondent's organization, nor is Al Peters a real person. Tr. pp. 560-562. According to Mr. Tucker, the signature of the fictitious Mr. Peters is affixed by anyone in the company who "prints them up". Tr. p. 560. Thus, Respondent went beyond use of the fictitious title of "Administrator"; it "infringed the Divine rights by creating a man."¹⁶ Moreover, use of the title "Administrator", like "Administration", is often associated with government.

Respondent has not satisfactorily explained why it needs either this title or "Al Peters" to conduct its business. The most plausible inference to be drawn from the trouble Respondent went to create and use these fictions, is that it intended to cause members of the public falsely to believe that it was an instrumentality of the United States Government. Indeed, direct evidence of Respondent's intention is supplied by the credible testimony of Ms. Brown and Mr. Newman that both Mr. Tucker and Ms. Stevenson identified themselves as HUD employees.

Such conduct is purely mendacious and demonstrates a lack of trustworthiness,

Shall be punished as follows: a corporation, partnership, business trust, association, or other business entity, by a fine of not more than \$1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section, by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

This statute was quoted in Mr. Schoenberger's letter of May 5, 1989, in which Respondent was informed that administrative action was being considered. Govt. Ex. 1. However, at the hearing the Secretary to the MRB, Mr. Zirneklis, stated that this statute was not considered by the MRB as a basis for the present action. Tr. pp. 58. 128-131. The Department's counsel also stated that this statute has nothing to do with this case. Tr. p. 129. Accordingly, I have not considered any possible relationship between this statute and Respondent's conduct.

¹⁶Balzac, Honore De, *The Rise and Fall of Cesar Birotteau*, p. 64 (E. Marriage trans. 1989).

and hence, "irresponsibility" as that term is used in Section 25.9(p). The Department, however, has failed to demonstrate, on this record, that Respondent's conduct amounts to business practices which "do not conform to generally accepted practices of prudent lenders." This ground requires that there be a basis in the record for concluding that the type of solicitation at issue does not conform to practices widely accepted in the industry. See 48 Fed. Reg. 40707 (1983). It is not a matter appropriately resolved by official notice. The record contains no requisite evidence.

The Department has also failed to demonstrate a basis for imposing a sanction under Section 25.9(w). This provision provides that a sanction may be imposed for "any other reason" which the Board, Hearing Officer, or Secretary may deem appropriate. The Department has not identified, nor has the record demonstrated "other" reasons for taking the action. Accordingly, grounds have not been demonstrated to exist under subsection (w).

II. Respondent's Conduct Warrants Probation

There being a basis for imposing a sanction, there must be a further demonstration by the Department that the sanction is appropriate. The factors to be considered in imposing the sanction include: the seriousness and extent of the infractions, the degree of mortgagee responsibility for the occurrences, and any mitigating factors. See 24 CFR 25.9. The demonstration necessary to justify the imposition of a probation is less than that required for more serious sanctions, such as suspension and withdrawal of approval. See 24 CFR 25.5.

The Department has demonstrated by a preponderance of the evidence that the sanction of probation is, at the very least, appropriate in this case. The misleading solicitations are serious. Individuals are falsely lead to believe they are being offered low interest loans by the U.S. Government rather than by a private concern. Until and unless it is explained by HUD employees that the solicitations do not originate with the government, this practice at least temporarily creates an association between Respondent's loan practices and the United States Government in the minds of responding recipients. As this record demonstrates, these loan practices do not result in total customer satisfaction. Until the government has had an opportunity to correct the misapprehension, it is cast in an unfavorable light in the eyes of those who have a disagreement with Respondent's business practices. Indeed, such corrective action by HUD requires the expenditure of government resources that could otherwise be put to better use. At the rate of approximately 500 solicitations per day, Respondent's conduct is anything but sporadic and potentially subjects the government to an continuation of this needless expenditure. Finally, the record does not disclose the existence of factors which mitigate Respondent's mendacious conduct.

CONCLUSION AND ORDER

The Department has demonstrated by a preponderance of evidence that adequate

grounds exist for Respondent's probation and that this sanction is in the public interest. Accordingly, it is

ORDERED that the action is affirmed.

/s/

William C. Cregar
Administrative Law Judge

Dated: February 8, 1991