

Legal Opinion: CIS-0088

Index: 4.125

Subject: Maximum FHA Single Family Mortgage Amount

December 4, 1995

MEMORANDUM FOR: Nicholas P. Retsinas, Assistant Secretary for
Housing-Federal Housing Commissioner, H

FROM: Nelson A. Diaz, General Counsel, G

SUBJECT: Maximum FHA Single Family Mortgage Amount

You have requested advice on the options available to the Secretary in setting the maximum principal amount for mortgages insured under the FHA single family mortgage insurance programs. The specific issue is: When the Federal Home Loan Mortgage Corporation (Freddie Mac) raises the maximum principal amount for single family mortgages that it is willing to purchase (the Freddie Mac limit), is the Secretary required to raise the maximum principal amount for single family mortgages that FHA is willing to insure (the FHA limit)?

Statutory Language

Section 203(b)(2) of the National Housing Act (the Act) states as follows:

(b) To be eligible for insurance under this section [203 of the Act] a mortgage shall--...

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Secretary shall approve) in an amount--

(A) not to exceed the lesser of--

(i) in the case of a 1-family residence, 95 percent of the median 1-family house price in the area, as determined by the Secretary; in the case of a 2-family residence, 107 percent of such median price; in the case of a 3-family residence, 130 percent of such median price; or in the case of a 4-family residence, 150 percent of such median price; or

(ii) 75 percent of the dollar amount limitation determined under section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act for a residence of applicable size;

Section 305(a)(2) of the Federal Home Loan Mortgage

Corporation Act states in part:

...The Corporation [Freddie Mac] shall establish limitations governing the maximum principal obligation of conventional mortgages that are purchased by it....Such limitations shall not exceed [stated amounts for mortgages secured by one-, two-, three- and four-family residences], except that such maximum limitations shall be adjusted effective January 1 of each year beginning with 1981. Each such adjustment shall be made by adding to each such amount (as it may have been previously adjusted) a percentage thereof equal to the percentage increase during the twelve-month period ending with the previous October in the national average one-family house price in the monthly survey for all major lenders conducted by the Federal Housing Finance Board.

Discussion

Each year Freddie Mac determines whether the Freddie Mac limit will be adjusted based on an increase, if any in the national average one-family house price. If the Freddie Mac limit is increased, the Act automatically increases the level at which the FHA limit may be set. Does it automatically increase the level at which the FHA limit must be set or does the Act grant the Secretary discretion in this area?

The better reading of the Act is that the nationwide FHA limit automatically increases to 75 percent of the increased Freddie Mac limit. The Secretary's discretion is limited to the area's median house price (or the higher percentages applicable for two-, three- and four-family residences.) This conclusion is based on the current language of section 203(b)(2) of the Act and its recent legislative history.

We begin by noting that section 203(b)(2) previously contained language that explicitly granted discretion to the Secretary to set the FHA limit below the maximum limit possible under the statutory language. This language was added by the Housing and Community Development Act of 1980. As amended in 1980, section 203(b)(2) provided for a basic FHA loan limit of \$67,500 for a one-family residence, "except that the Secretary may increase [that amount] on an area-by-area basis to the extent the Secretary deems necessary, after taking into consideration the extent to which moderate and middle income persons have limited housing opportunities in the area due to high prevailing housing sale prices...." The Secretary was not authorized to increase the FHA limit for any area beyond a stated percentage of the basic \$67,500--originally 133%, later 150% and 185%.

Section 203(b)(2) was revised in 1992 to its current structure that links the FHA limit to the Freddie Mac limit. The current language does not expressly direct or authorize the Secretary establish an FHA limit; the language simply states a limit of 75 percent of the Freddie Mac limit. It is significant that there is no role stated for the Secretary except regarding the determination of area median house prices. This suggests a deliberate choice by Congress to make the determination of the

nationwide FHA limit dependent only on action by Freddie Mac, not the Secretary, while retaining a role for the Secretary in determining the FHA limit applicable for each area. There is a clear contrast between the earlier section 203(b)(2) that authorized the Secretary to increase the FHA limit above a statutory amount that otherwise would apply. The current language could have--but does not--expressly authorize the Secretary to set the FHA limit below the statutory amount that would otherwise apply.

The legislative history does not provide any support for an interpretation that would provide for Secretarial discretion. The Bush Administration opposed the 1992 change, which permitted the FHA limit to increase from \$124,875 to \$151,725, because "this increase moves FHA away from its traditional role as a financial resource for middle- and lower-income buyers." Statement by President George Bush Upon Signing H.R. 5679 (VA, HUD and Independent Agencies Appropriations Act, 1993) reprinted in U.S. Code Congressional and Administrative News, 102d Cong., 2d Sess., Legislative History p. 1337-6. Thus, there is no contemporary Administration view on the degree of discretion given to the Secretary when responding to increases in the Freddie Mac limit. The only Congressional report that appears to discuss the change in section 203(b)(2) is the report by the House of Representatives Banking, Finance and Urban Affairs Committee on H.R. 5334, which was enacted as the Housing and Community Development Act of 1992. That report stated:

The Committee believes that the increase in the maximum mortgage amount in the FHA single family insurance program will maintain the mandate of the FHA program to help moderate income homebuyers as well as first-time homebuyers become homeowners. In many areas, even a median price home is far beyond the means of many families under the terms of the conventional market, and because of the low loan limit, FHA has been unavailable to help such families become homeowners....The Committee also believes that increasing the loan limit will result in a more stable and more financially viable FHA fund because evidence from actual historical FHA experience indicates that higher loan amounts have lower default rates than lower loan amounts....

H. Rep. 102-760, July 30, 1992, reprinted in U.S. Code Congressional and Administrative News, 102d Cong., 2d Sess., Legislative History p. 3399.

The House clearly expected the FHA loan limit to increase above \$124,875 as a result of the revision of section 203(b)(2). Beyond this conclusion, there is little in the report that contributes to our understanding of section 203(b)(2). There is no explanation of why the FHA limit was to be linked to the Freddie Mac limit instead of continuing to be calculated as a percentage of the \$67,500 basic amount. There is no evidence that the Secretary was expected to exercise any discretion in determining the nationwide FHA limit after an increase in the

Freddie Mac limit, but there is also no specific denial of such discretion.

Of course, the Secretary need not exercise every authority provided in the Act to its full extent. The Secretary is authorized, not compelled, to insure every mortgage that is offered for insurance and meets the minimum requirements in the Act. Section 203(a) of the Act authorizes single family mortgage insurance as provided in the Act and upon such terms as the Secretary may prescribe. As a general legal proposition, we can support reasonable administrative policies that further the general purposes of the Act but that have the effect of limiting somewhat the availability of mortgage insurance that could be offered in compliance with the Act. Such policies are most appropriate when a statutory provision specifically anticipates further action by the Secretary and least appropriate when the statute states a requirement or limitation that is specific, complete and understandable without any action by the Secretary. The determination of the FHA limit on the basis of the Freddie Mac limit falls into the latter category.

An analysis of other provisions in section 203(b) of the Act is instructive. Section 203(b) sets forth the basic characteristics of an FHA-insured single family mortgage. In section 203(b)(2), as we have noted, the statute specifically calls for action by the Secretary but only in the determination of area median house prices. Section 203(b)(3) provides for a maturity "satisfactory to the Secretary" but not to exceed stated limits. Section 203(b)(4) requires amortization provisions "satisfactory to the Secretary" with payments not in excess of the mortgagor's reasonable ability to pay "as determined by the Secretary". Section 203(b)(6) requires application of payments to amortization of principal "in a manner satisfactory to the Secretary". Section 203(b)(7) calls for a mortgage to contain provisions on certain matters "as the Secretary may in his discretion prescribe". Section 203(b)(9) requires a minimum cash investment by a mortgagor of three percent of the cost of acquisition "or such larger amount as the Secretary may determine." (Section 203(b)(5) was amended in 1983 to remove Secretarial discretion to set maximum interest rates. There is no section 203(b)(8).) There is a clear difference between the tone of these provisions in section 203(b)(2) and the specific reference in section 203(b)(2) to a fixed percentage of the Freddie Mac limit.

An argument can be made that, since nothing in the Act specifically prevents the Secretary from establishing a loan limit lower than 75% of the FHLMC limit, a lower loan limit could be one of the extra "terms" to be prescribed by the Secretary under section 203(a). This is a weak argument in light of the particular statutory language involved and its background.

Conclusion

The Act supports a conclusion that an increase in the Freddie Mac limit requires a mandatory, automatic increase in the nationwide FHA limit, subject in each area to the additional

statutory limit based on area median house prices. There is little basis for any other reading of the Act.