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Subject: Disclosure of Purchasers' Social Security Numbers

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MEMORANDUM TO: John J. Coonts, Director, Office of Insured
Single Family Housing, HSI

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SUBJECT: Disclosure of Purchasers' Social Security Numbers

Two issues have come to our attention recently concerning FHA requirements for disclosure of social security numbers (SSNs). The first issue, which we have discussed with members of your staff, is the legality of requiring persons purchasing single family property from FHA to disclose their SSNs even if the purchases are not financed through an FHA program. The second issue is the legality of allowing exceptions to the requirement that applicants for an FHA-insured mortgage must disclose their SSNs, particularly in light of a 1996 legislative change.

Section 7 of the Privacy Act of 1974 forbids a governmental entity from requiring persons to disclose their SSNs as a condition of receiving any right, benefit or privilege provided by law except when required by Federal statute. Two other Federal statutes are pertinent to this discussion: Section 165 of the Housing and Urban Development Act of 1987 and 31 U.S.C. 7701.

Section 165 permits HUD to require disclosure of SSNs as follows:

SECTION 165. PREVENTING FRAUD AND ABUSE IN DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT PROGRAMS.

(a) DISCLOSURE OF SOCIAL SECURITY ACCOUNT NUMBER.--As a condition of initial or continuing eligibility for participation in any program of the Department of Housing and Urban Development involving loans, grants, interest or rental assistance of any kind, or mortgage or loan insurance, and to ensure that the level of benefits provided under such programs is proper, the Secretary of Housing and Urban Development may require that an applicant or participant (including members of the household of an applicant or participant) disclose his or her social security account number or employer identification number to the Secretary.

(b) DEFINITIONS.--For purposes of this section, the terms "applicant" and "participant" shall have such meanings as

the Secretary of Housing and Urban Development by regulation shall prescribe. Such terms shall not include persons whose involvement is only in their official capacity, such as State or local officials or officers of lending institutions. [42 U.S.C. 3543]

Section 7701(b) of 31 U.S.C. requires disclosure of SSNs as follows:

The head of an agency administering an included Federal loan program shall require a person applying for a loan under a program to provide that person's taxpayer identification number [i.e., social security number of employer identification number.]

The key term "included Federal loan program" is defined by incorporating by reference the definition in Section 6109 of the Internal Revenue Code (IRC). Originally the definition required an OMB determination that a program should be included. Section 31001(y) of the Debt Collection Improvement Act of 1996 amended the IRC definition so that it now includes "any Federal program under which the United States or a Federal agency makes, guarantees, or insures loans."

Property Disposition Issue

We understand that FHA would like to be able to require purchasers of single family properties to provide their SSNs as a means of ensuring that the purchasers are going to be owner-occupants and not investors. This becomes especially important where the owner-occupants are provided an earlier opportunity than investors to purchase properties or are eligible for other sales incentives.

We have reviewed the legislative history of Section 165. The Section appears in the title labelled "Housing Assistance" relating to assistance/subsidy programs. According to Sen. Rep. 100-21, page 17, "this information would permit HUD to verify current wage and benefit information and avoid fraud and abuse." On page 35, that report states that HUD would have "the option of collection of social security numbers of program applicants or participants as a condition of initial or continuing eligibility in HUD housing programs." Similarly, H. Rep. 100-122(I), page 50, says that HUD would be able to obtain social security numbers "in order to insure that the level of benefits under each program is correct."

An argument could be made that Section 165 should be broadly read to allow the collection of SSNs in order to prevent fraud and abuse of HUD's property disposition program. One could argue that property disposition can be included under the category of programs involving "mortgage or loan insurance" under the premise that the disposal of acquired property is an integral part of the single family mortgage insurance programs as a whole. Owner-occupants may be in a position to receive special advantages under the property disposition program and HUD has the same need for SSNs as a tool when combatting fraud and abuse as it has for

the other programs covered by Section 165.

There are potential consequences that FHA should be aware of, however, before proceeding with the collection of SSNs under this authority. HUD has issued regulations to implement Section 165 but those regulations currently do not apply to property disposition that does not involve FHA mortgage insurance. Section 165 requires that an "applicant" or "participant" required to disclose an SSN be defined by regulation so that HUD would have to issue regulations in order to apply Section 165 of the HCD Act to property purchasers. If FHA creates a new system of records for Privacy Act purposes by collecting the SSNs for program enforcement purposes, FHA would have to publish notice of that fact in the Federal Register.

It is not entirely clear that Section 165 can be broadly interpreted to include the property disposition program as a "mortgage insurance or loan program." We question whether such a broad interpretation is a good reading of the law. This could lead to litigation if Housing declines to honor a contract for the purchase of an acquired property because the purchaser fails to disclose his or her SSN. Congress sought to mitigate such harsh results by its passage of the Privacy Act. The court in *Doyle v. Wilson*, 529 F. Supp. 1343, 1348 (D. Del. 1892), stated that agencies are prevented from penalizing an individual from disclosing a SSN: "Section 7 of the Privacy Act broadly prohibits a state [or Federal Government] from penalizing an individual in any way because of his failure to reveal his social security number upon request, except in certain narrowly defined circumstances." (Emphasis provided). We question whether a broad interpretation of Section 165 conflicts with the concept of narrowly defining the circumstances where collection of an SSN is authorized.

In addition to proceeding with the requirement to request the SSN, Housing may consider other options. One is to request that Section 165 be amended to allow specifically for the collection of SSNs from purchasers of properties from FHA. Another option is to make the request for a purchaser's SSN strictly voluntary rather than mandatory.

Disclosure of SSNs by Applicants for Insured Mortgages

While Section 165 of the HCD Act of 1987 provides HUD with discretionary authority to collect SSNs from participants in a broad array of HUD programs including applicants for FHA-insured single family mortgages, collection of SSNs is mandated by 31 U.S.C. 7701 for applicants for insured mortgages. An argument can be made that Section 165 of the HCD Act is controlling and that HUD has discretion to require the collection of SSNs from some but not all applicant mortgagors. This argument is based upon some general approaches to statutory interpretation, where later statutes prevail over conflicting, earlier statutes, and specific statutes prevail over more general ones.

Section 165 was enacted in early 1988 while 31 U.S.C. 7701 derives from Section 4 of the Debt Collection of 1982.

On the surface it appears that Section 165 is the later enactment. Section 4 and 31 U.S.C. 7710 incorporate 6109 of the IRC, however, which was amended in 1996. The 1996 amendment is crucial; it has the effect of removing any discretion regarding which programs are to be covered by the requirement for disclosure of social security numbers in 31 U.S.C. 7701. Formerly OMB had the discretion to determine coverage. Thus, the 1996 change could be regarded as Congress' last word on the subject and the statute incorporating it--31 U.S.C 7701--as a more recent enactment than Section 165. It is also debatable whether Section 165 or 31 U.S.C. 7701 should be regarded as the more specific statute. Section 165 is specifically directed to HUD programs, but to a variety of types of programs that may have potential for fraud and abuse but that do not necessarily involve debt. Although 31 U.S.C. 7701 is directed to all agencies, it is specifically concerned with a tool for efficient debt collection whether or not fraud or abuse is involved. FHA's interest in using social security numbers to further debt collection is present even in the absence of fraud or abuse. In any event, these general approaches to statutory interpretation are simply guidelines that never demand a result that otherwise appears inconsistent with legislative intent.

We believe that it is doubtful that Congress intended to relieve FHA of its obligation to collect SSNs for all mortgagors. There is no apparent reason why Congress would remove from OMB the discretion to exempt any mortgage or loan insurance programs from 31 U.S.C. 7701 but nevertheless intend that the Secretary of HUD retain discretion to decide whether or not SSNs are needed to aid in debt collection efforts under FHA Single Family Mortgage Insurance Programs. Congress is unlikely to be less concerned with effective debt collection measures in FHA programs than in other agencies' mortgage and loan insurance programs. If you are in concurrence with this conclusion, FHA's current regulation and handbook provision on collecting SSNs need to be re-examined for possible revision.

The regulation, 24 CFR 203.35, was adopted in connection with implementation of Section 165. It states

To be eligible for mortgage insurance under this part [203], the mortgagor must meet the requirements for the disclosure and verification of Social Security and Employer Identification Numbers, as provided by part 200, Subpart U, of this chapter.

Subpart U was simplified in 1996 as part of the Department's regulations streamlining effort. Subpart U now refers the reader to a new Subpart B of 24 CFR part 5, which is a consolidated Department-wide provision on disclosure and verification of SSNs.

The current 24 CFR 5.216(b)(1) states:

Each individual owner applicant must submit the following information to the [mortgagee] when the individual owner applicant's eligibility under the program involved is being determined: (1) (i) The

complete and accurate SSNs assigned to the individual owner applicant. . .; or (2) if an [applicant] has not been assigned an SSN, a certification executed by the individual(s) involved that meets the requirements of paragraph (j) of this section.

The current 24 CFR 5.216(j) states: "The certification referred to in paragraphs. . . (b)(2). . . of this section must be in the form and manner that HUD. . . prescribe[s] in applicable administrative instructions. . . ."

Due to the language quoted above, an individual owner applicant does not become ineligible for FHA single family mortgage insurance under the regulations simply because the individual has no SSN. An alternative is permitted: certification meeting HUD's administrative instructions may be provided. Allowing this alternative is consistent with Section 165, which is permissive, but it is not consistent with 31 U.S.C. 7701 which permits no exception. The regulation is susceptible to an application that would lead to a violation of 31 U.S.C. 7701--if the statutes are reconciled as interpreted as discussed above--through acceptance of individual applicants for FHA-insured mortgages who lack SSNs.

The handbook for FHA Single Family Mortgage Credit Analysis, 4155.1 REV-4, paragraphs 2-2B, 3-1C and 3-2C, requires a social security number for each borrower, co-borrower, or co-signer. Paragraph 3-2C, however, permits an exception for "individuals not required to obtain a social security number, such as employees of the World Bank, foreign employees of embassies, etc." The handbook presents one type of problem: FHA has expressly created an exception that is not permitted by 31 U.S.C. 7701. The regulation presents another type of problem: handbook restrictions can be waived by Field Offices, as long as regulatory and statutory provisions are not violated, and anyone who is reviewing the legality of a waiver of the handbook requirement for SSNs may conclude that a waiver is legally possible and consistent with the regulations and Section 165 without addressing the statutory issue presented by 31 U.S.C. 7701. The regulation's implication that a SSN is not an invariable statutory requirement for an applicant for single family mortgage insurance can be misleading.

Housing has the option to consider one of two approaches to correct the misleading nature of the SSN regulation. Section 203.35 could be amended so that it excludes the provisions of Part 5 that are inconsistent with 31 U.S.C. 7701, or Part 5 could be amended to make clear that the "certification" alternative is not available for individual applicants for FHA-insured mortgages.

Please contact me if you have any questions regarding this memorandum.