

Byrd Amendment Certification Requirements

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Subject: Byrd Amendment Certification Requirements

February 5, 1992

MEMORANDUM FOR: Arnold Haiman, Director, Office of Ethics

FROM: Carole W. Wilson, Associate General Counsel, Office of
Equal Opportunity and Administrative Law

SUBJECT: Byrd Amendment Certification Requirements

As a result of OIG's annual audit of the Department's compliance with the Byrd Amendment, you have received and referred to us two related issues involving the events which trigger the certification requirements of the Amendment with respect to the Multi-Family Housing Coinsured and Insured Programs and the Direct Loans for the Elderly Program. Those issues are:

1. Must a certification be obtained at final closing or endorsement of a project for which the application was received prior to the enactment of the Byrd Amendment; and
2. At what stage(s) is the Byrd Amendment certification required to be submitted under these programs?

Pre-Byrd Amendment Applications

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The Byrd Amendment, 31 U.S.C. 1352, took effect with respect to Federal contracts, loans, cooperative agreements, and loan insurance and loan guarantee commitments that were entered into more than 60 days after October 23, 1989, the date of enactment of the Amendment, i.e., December 23, 1989. The Interim Final Rule issued on February 26, 1990 by OMB implementing the Byrd Amendment provides as follows, at 110(g):

For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. (emphasis added)

Therefore, Byrd Amendment certifications are required for projects in which the agency made a commitment for a loan or a commitment of loan insurance after December 23, 1989. The issue, therefore, is when a "commitment" is issued under the Section 202 Direct Loans for the Elderly Program, and when the commitment to insure a loan is issued under the Multi-Family Housing Coinsured and Insured Programs.

Section 202 Elderly Housing Program

A legal opinion dated March 9, 1990, from Robert S. Kenison, Associate General Counsel, to Albert Miller, Deputy Director, OFA (Attachment I), concluded that a notification of selection for a Section 202 fund reservation constitutes an obligation of loan funds by the agency. In our opinion, therefore, the funding reservation constitutes the operative event for purposes of ascertaining whether the Byrd Amendment certification is required. If the reservation was made prior to December 23, 1989, subject to the caveat discussed in the following paragraph, no Byrd certification is required, even though the project closed after December 23, 1989.

It should be pointed out, however, that, in a June 12, 1990 memorandum to federal agencies published in the Federal Register in a Notice dated June 15, 1990, OMB clarified the certification and disclosure requirements. OMB noted that: "... awards and commitments made before December 23, 1989 but modified, amended, extended, continued or renewed after that date do not need certifications or statements unless they are modified or amended beyond the scope of the award." Therefore, if a covered funding reservation has been modified or amended beyond the scope of the original reservation after December 23, 1989, then a Byrd certification must be submitted prior to the final closing. Program counsel advice should be sought regarding whether a modification or extension is "beyond the scope of the award."

Multi-Family Housing Coinsured and Insured Programs

In other contexts, the Office of General Counsel has taken the position that as a general proposition an obligation of the agency to insure a loan under the Multi-Family Housing Coinsured and Insured Programs arises when a firm commitment has been issued. Consequently, it is our opinion that if a firm commitment has been made to insure a covered loan prior to December 23, 1989, then the mortgagee and mortgagor need not submit a Byrd certification. If, however, as noted in Mortgagee Letter 90-13 (Attachment II), the application was submitted prior to December 23, 1989, but is not approved until after that date, a Byrd Amendment certification must be submitted prior to final endorsement.

Timing of Byrd Amendment Certifications
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All covered applications filed after December 23, 1989 for loans or loan insurance under the Section 202 and Multi-Family Housing Coinsured and Insured Programs must be accompanied by a Byrd Amendment certification. If the certification has not been submitted with the application, it must be submitted prior to the issuance of the commitment for the loan or insurance. Pursuant to the discussion above, the loan commitment is issued under the Section 202 program when the funding reservation is made. The commitment to insure a loan under the Multi-Family Housing Coinsured and Insured Programs is issued when the firm commitment is issued.

It should be noted that Mortgagee Letter 90-13 specified three submissions that must be accompanied by a Byrd Amendment certification in multi-family mortgage insurance programs. These are the mortgage insurance application, the cost certification form, and the request for final endorsement of a credit instrument.

We hope that this memorandum responds to your questions. If you have any questions concerning this issue, please contact Judy Keeler of our staff at 708-2203.

Attachments