

Department of Veterans Affairs

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shall pay, in advance if necessary, any court costs or other expenses incurred by the Secretary or properly taxed against the Secretary in any such action to which the Secretary is a party, but may charge the same, and also a reasonable amount for legal services, against the guaranteed or insured indebtedness, or the proceeds of the sale of the security to the same extent as the holder (see §36.4313 of this part), or otherwise collect from the holder any such expenses incurred by the Secretary because of the neglect or failure of the holder to take or complete proper action. The rights and remedies herein reserved are without prejudice to any other rights, remedies, or defenses, in law or in equity, available to the Secretary.

(Authority: 38 U.S.C. 3732)

[13 FR 7276, Nov. 27, 1948, as amended at 45 FR 31065, May 12, 1980; 53 FR 1351, Jan. 19, 1988; 53 FR 4978, Feb. 19, 1988; 53 FR 42950, Oct. 25, 1988, 54 FR 612, Jan. 9, 1989; 54 FR 27163, June 28, 1989]

§ 36.4320 Sale of security.

(a) Upon receipt by the Secretary of notice of a liquidation sale of any security for a guaranteed or insured loan, the Secretary shall determine the net value of the security and shall notify the holder of the net value and of the regulatory provision which will govern the disposition of the security.

(1) If the net value of the real property securing a guaranteed or insured loan exceeds the unguaranteed portion of the indebtedness, the Secretary shall specify in advance of the liquidation sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the following:

(i) The specified amount in such cases shall be the lesser of the net value of the property or the total indebtedness.

(ii) If a minimum amount for credit to the indebtedness has been specified in relation to a liquidation sale of real property, and:

(A) The holder acquires the property, or the rights to the property, at the sale for an amount not in excess of such specified amount, the holder shall

credit to the indebtedness the amount specified. The holder then may retain the property or, not later than 15 days after the date of sale, advise the Secretary of the holder's election to convey or transfer the property, or the rights to the property, to the Secretary;

(B) The holder acquires the property, or the rights to the property, at the liquidation sale for an amount in excess of the specified amount, the indebtedness shall be credited with the proceeds of the sale. The holder may elect to convey the property to the Secretary under the terms of paragraph (a)(1)(ii)(A) of this section, unless a bid in excess of the specified amount was made pursuant to paragraph (a)(3) of this section.

(Authority: 38 U.S.C. 3732(c))

(C) A third party acquires the property, or the rights to the property, at the liquidation sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale;

(D) A third party acquires the property, or the rights to the property, at the liquidation sale for an amount less than that specified, the holder shall credit to the indebtedness the amount specified.

(iii) If a minimum amount has been specified by the Secretary, the Secretary's liability under loan guaranty shall be the total indebtedness less the amount credited to the indebtedness under paragraph (a)(1)(ii) of this section, not to exceed the Secretary's maximum liability as computed under §35.4321 of this part.

(2) If the net value of the real property securing a guaranteed or insured loan does not exceed the unguaranteed portion of the indebtedness:

(i) The Secretary shall notify the holder that no minimum amount will be specified for credit to the indebtedness on account of the value of the security to be sold;

(ii) The Secretary may not accept conveyance or transfer of the property;

(iii) The holder shall credit against the indebtedness the net proceeds of the sale, and the Secretary's liability under loan guaranty shall be limited to the total indebtedness less the amount

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credited to the indebtedness not to exceed the Secretary's maximum liability as computed under §36.4321 of this part; and

(iv) The liability of the Secretary shall not be subject to adjustment by reason of any subsequent disposition of the property by the holder.

(3) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, and:

(i) Such minimum bid exceeds an amount which has been specified by the Secretary under paragraph (a)(1) of this section; and

(ii) The holder acquires the property at the liquidation sale for an amount not exceeding the amount legally required; the holder may elect to convey the property to the Secretary pursuant to paragraph (a)(1)(ii)(A) of this section. The amount bid at the sale or the total indebtedness, whichever is less, shall govern instead of the specified amount and for the purpose of determining the Secretary's liability under loan guaranty.

(Authority: 38 U.S.C. 3732)

(b) The holder should not carry out a liquidation sale until the Secretary has furnished the notice required under paragraph (a) of this section. In the event the holder carries out a liquidation sale prior to receiving such notice, the holder shall credit against the indebtedness the greater of:

(1) The net proceeds of the sale; or

(2) The amount of the indebtedness or the net value of the property, whichever is less.

The provisions of paragraph (a)(1)(ii)(A) of this section, which extends to the holder the option of conveying or transferring the property to the Secretary, shall not be applicable, and the Secretary's liability under the loan guaranty shall be the total indebtedness less the amount credited to the indebtedness under paragraph (b) (1) or (2) of this section, not to exceed the Secretary's maximum liability as computed under §36.4321 of this part.

(Authority: 38 U.S.C. 3732)

(c) When a debtor proposes to convey or transfer any real property to a hold-

er to avoid foreclosure or other judicial, contractual, or statutory disposition of the obligation or of the security, the consent of the Secretary to the terms of such proposal shall be obtained in advance of such conveyance or transfer. In consenting to the terms of the debtor's proposal the Secretary shall furnish the notice required under paragraph (a) of this section.

(Authority: 38 U.S.C. 3732)

(d) Upon receipt by the Secretary of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any personal property which is security for a guaranteed or insured loan, the Secretary may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold.

(1) If a minimum amount has been specified by the Secretary, and

(i) The holder is the successful bidder at the sale for an amount not in excess of such minimum amount, the holder shall sell the property pursuant to paragraph (d)(3) of this section and the amount realized from the resale of the property shall govern, instead of the specified minimum amount, in the final accounting for determining the rights and liabilities of the holder and the Secretary,

(ii) A third party is the successful bidder at the sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale,

(iii) A third party is the successful bidder at the sale for an amount less than that specified, the holder shall credit to the indebtedness the amount specified,

(iv) The holder is the successful bidder at the sale for an amount in excess of the specified amount, the indebtedness shall be credited with the proceeds of the sale or the amount realized from the resale of the property pursuant to paragraph (d)(3) of this section, whichever is the greater, unless the bid in excess of the specified amount was made pursuant to paragraph (d)(4) of this section.

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(2) If a minimum amount has not been specified by the Secretary under paragraph (d)(1) of this section, the holder shall credit against the indebtedness the net proceeds of the sale except as provided in paragraph (d)(4) of this section.

(3) If personal property has been repossessed or otherwise acquired by a holder and no public sale is proposed or required to be held to entitle the holder to effect a further disposition of such property, or if the holder is the successful bidder at the sale of personal property as provided in paragraph (d)(1) of this section, the holder shall sell the property within a reasonable time. The holder shall submit to the Secretary a written advice setting forth the price, terms, conditions and the expenses of the proposed sale at least 10 days in advance, and the Secretary shall either assent to such sale in which event the holder shall credit against the indebtedness the net proceeds of the sale or, upon agreement to indemnify the holder to the extent of any increased or resultant loss, the Secretary may specify the minimum net price for which the security may be sold. If such amount has been specified, the holder shall sell the personal property within a reasonable time in the open market for the best price obtainable: *Provided, that* the prior approval of the Secretary shall be obtained if the property is to be sold for a net amount less than the specified amount, or if the property is to be sold on terms other than all cash. The ultimate net amount realized by the holder from such sale shall be reported by the holder to the Secretary in an accounting which will determine their respective rights and liabilities.

(4) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Secretary and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this paragraph and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is

the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Secretary under the guaranty shall not be subject to any adjustment by reason of such bid.

(Authority: 38 U.S.C. 3732)

(e) If the Secretary has specified an amount as provided in this section, and the holder learns of any material damage to the property occurring prior to the foreclosure sale or to the acceptance of a deed in lieu of foreclosure or prior to any other event to which such specified amount is applicable, the holder shall promptly advise the Secretary of such damage.

(f) The holder in accounting to the Secretary in connection with the disposition of any property in accordance with paragraph (a), (b), or (d) of this section, may include as a part of the indebtedness all actual expenses or costs of the proceedings, paid by the holder, within the limits defined in §36.4313 of this part. In connection with the conveyance or transfer of property to the Secretary the holder may include in accounting to the Secretary the following expense items if actually paid by the holder, in addition to the consideration payable for the property under paragraph (g) of this section:

(Authority: 38 U.S.C. 3732)

(1) State and documentary stamp taxes as may be required.

(2) The customary cost of obtaining evidence of title in favor of the Secretary as specified in paragraph (h)(5) of this section but not including title evidence obtained incident to the making of the loan or any expenses incurred to clear title defects.

(3) Amount expended for taxes, special assessments, including such payments which are specified in paragraph (h)(4) of this section.

(4) Recording fees.

(5) Any other expenditures in connection with the property which are approved by the Secretary.

(g) In the event a holder elects to convey or transfer the property to the Secretary pursuant to paragraph (a),

(b), or (c) of this section, the consideration to be paid by the Secretary in return for the property shall be the specified amount: *Provided*, That if a claim under the guaranty was previously paid, the consideration payable for the property shall be an amount equal to the indebtedness (less the amount previously paid on the guaranty) or the specified amount, whichever is less. If no claim under the guaranty was previously paid, the holder may, pursuant to § 36.4321(b) submit a claim within the maximum guaranty liability for the difference between the specified amount and an amount equal to the indebtedness. In the case of an insured loan, the holder may submit a claim for the difference between an amount equal to the indebtedness and the specified amount pursuant to § 36.4374.

(h) The conveyance or transfer of any property to the Secretary pursuant to paragraphs (a), (b), or (c) of this section shall be subject to the following provisions:

(1) If the holder's notice to the Secretary electing to convey or transfer the property precedes the acquisition of the property by the holder and the holder then acquires the property, the holder shall promptly after such acquisition advise the Secretary of the acquisition. Such advice, or the notice of election if given subsequent to acquisition, shall state the amount of the successful bid (if the property was acquired by the holder at public sale) and shall state the insurance coverage then in force, specifying for each policy, the name of the insurance company, the hazard covered, the amount, and the expiration date.

(2) The holder may cancel any insurance in force when the holder acquires the property, provided the holder has obtained the prior approval of the Secretary. Coincident with the notice of election to convey or transfer the property to the Secretary or with the acquisition of the property by the holder, following such notice, whichever is later, the holder shall obtain endorsements on all such insurance policies naming the Secretary as an assured, as his/her interest may appear. Such insurance policies shall be forwarded to the Secretary at the time of the conveyance or transfer of the property to

the Secretary or as soon after that time as feasible.

(3) Occupancy of the property by anyone properly in possession by virtue of and during a period of redemption, or by anyone else unless under a claim of title which makes the title sought to be conveyed by the holder of less dignity or quality than that required by this section, shall not preclude the holder from conveying or transferring the property to the Secretary. Except with the prior approval of the Secretary, the holder shall not rent the property to a new tenant, nor extend the term of an existing tenancy on other than a month-to-month basis.

(4) Any taxes, special assessments or ground rents due and payable within 30 days after date of conveyance or transfer to the Secretary shall be paid by the holder if bills therefor are obtainable before such conveyance or transfer.

(5) Each conveyance or transfer of real property to the Secretary pursuant to this section shall be acceptable if the holder thereby covenants or warrants against the acts of the holder and those claiming under the holder (e.g., by special warranty deed) and if it vests in the Secretary or will entitle the Secretary to such title as is or would be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community in which the property is situated. Any title so acceptable will not be unacceptable to the Secretary by reason of any of the limitations on the quantum or quality of the property or title stated in § 36.4350(b) of this part:

Provided, That (i) at the time of conveyance or transfer to the Secretary there has been no breach of any conditions affording a right to the exercise of any reverter, except that title will not be unacceptable to the Secretary by reason of a violation of a restriction based on race, color, creed, or national origin, whether or not such restriction provides for reversion or forfeiture of title or a lien for liquidated damages in the event of a breach.

(ii) With respect to any such limitations which came into existence subsequent to the making of the loan, full

compliance was had with the requirements of §36.4324 of this part. The acceptability of a conveyance or transfer pursuant to the requirements of this paragraph will be established by delivery to the Secretary of any of the following evidence of title issued by an institution or person satisfactory to the Secretary, in form satisfactory to him/her showing that title to the property of the quality specified in this paragraph is or will be vested in the Secretary:

(A) A title policy insuring the Secretary in an amount approximately equal to the consideration for the property, or a commitment for such title policy; or

(B) A certificate of record title; or

(C) An abstract of title accompanied by a legal opinion as to the quality of such title of record; or

(D) A Torrens or similar title certificate; or

(E) Such other evidence of title as the Secretary may approve.

In lieu of such title evidence, the Secretary will accept a conveyance or transfer with general warranty with respect to the title from a holder described in 38 U.S.C. 3702(d) or from a holder of financial responsibility satisfactory to the Secretary. In any case where the holder does not deliver evidence of title of the character specified in this paragraph, the holder to aid the Secretary in determination of acceptability of title shall without expense to the Secretary furnish such evidence of title, including survey, if any, as may have been obtained by the holder incident to the making of the loan or attendant to the foreclosure.

(6) Except with respect to matters covered by any covenants or warranties of the holder, the acceptance by the Secretary of a conveyance or transfer by the holder shall conclude the responsibility of the holder to the Secretary under the regulations of this subpart with respect to the title and in the event of the subsequent discovery of title defects, the Secretary shall have no recourse against the holder with respect to such title other than by reason of such covenants and warranties.

(7) As between the holder and the Secretary, the responsibility for any

loss due to damage to or destruction of the property or due to personal injury sustained in respect to such property shall be governed by the provisions of this paragraph and paragraph (h)(10) of this section. Ordinary wear and tear excepted, the holder shall bear such risk of loss from the date of acquisition by the holder to the date such risk of loss is assumed by the Secretary. Such risk of loss is assumed by the Secretary from the date of receipt of the holder's election to convey or transfer the property to the Secretary or, in the event of receipt of notice of such election prior to acquisition, from the date of the Secretary's receipt of notice of acquisition by the holder:

Provided, That if custody over the property has not been delivered by the holder to the Secretary on the date when the Secretary otherwise would have assumed the risk of loss, the Secretary's assumption of the risk of loss will be deferred until such custody over the property is delivered, or until the property has been conveyed or transferred to the Secretary. The amount of any loss chargeable to the holder may be deducted from the amount payable by the Secretary at the time the property is transferred. In any case where pursuant to the VA regulations rejection of the title is legally proper, the Secretary may surrender custody of the property as of the date specified in the Secretary's notice to the holder. The Secretary's assumption of such risk shall terminate upon such surrender.

(8) The holder shall not be liable to the Secretary for any portion of the paid or unpaid taxes, special assessments, ground rents, insurance premiums, or other similar items.

(9) The Secretary shall be entitled to all rentals and other income collected from the property and to any insurance proceeds or refunds subsequent to the date of acquisition by the holder.

(10) In respect to a property which was the security for a condominium loan guaranteed or insured 38 U.S.C. 3710(a)(6) the responsibility for any loss due to damage to or destruction of the property or due to personal injury sustained in respect to such property shall in no event pass to the Secretary until the Secretary expressly assumes such

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responsibility or until conveyance of the property to the Secretary, whichever first occurs. The holder shall have the right to convey such property to the Secretary only if the property (including elements of the development or project owned in common with other unit owners) is undamaged by fire, earthquake, windstorm, flooding or boiler explosion. The absence of a right in the holder to convey such property which is so damaged shall not preclude a conveyance, if the Secretary agrees in a given case to such a conveyance upon completion of repairs within a specified period of time and such repairs are so completed and the conveyance is otherwise in order.

(i)(1) The terms "date of sale" or "date of acquisition" as used in this section are defined as the date of the event (e.g., sale, confirmation of sale when required under local practice, delivery of deed in case of voluntary conveyance, etc.) which fixes the rights of the parties in the property.

(2) The term "property" or "real property" as used in this section shall include

(i) A leasehold estate which at the time of closing the loan was not less duration than prescribed by § 36.4350(a)(2) of this part, and

(ii) The rights derived by the holder through a foreclosure sale of real estate whether or not such rights constitute an estate in real property under local law.

(j) Except as provided in paragraph (h)(6) of this section, the provisions of this section shall not be in derogation of any rights which the Secretary may have under § 36.4325 of this part. The Under Secretary for Benefits, or the Director, Loan Guaranty Service, may authorize any deviation from the provisions of this section, within the limitations prescribed in 38 U.S.C. Chapter 37, which may be necessary or desirable to accomplish the objectives of this section if such deviation is made necessary by reason of any laws or practice in any State or Territory or the District of Columbia: *Provided, that* no such deviation shall impair the rights of any holder not consenting to the deviation with respect to loans made or

approved prior to the date the holder is notified of such action.

(Authority: 38 U.S.C. 3732, Pub. L. 100-527)

[13 FR 7739, Dec. 15, 1948, as amended at 20 FR 9180, Dec. 10, 1955; 24 FR 2654, Apr. 7, 1959; 28 FR 11505, Oct. 29, 1963; 33 FR 6975, May 9, 1968; 33 FR 18026, Dec. 4, 1968; 34 FR 11095, July 1, 1969; 36 FR 320, Jan. 9, 1971; 40 FR 34591, Aug. 18, 1975; 53 FR 1352, Jan. 19, 1988; 54 FR 27163, June 28, 1989; 60 FR 38262, July 26, 1995; 61 FR 28058, June 4, 1996]

§ 36.4321 Computation of guaranty claims; subsequent accounting.

(a) Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the earliest of the following dates:

- (1) The date of the liquidation sale;
- or,
- (2) The cutoff date established under paragraph (f) of § 36.4319 of this part; or,
- (3) The cutoff date established under paragraph (b) of this section.

Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation shall be applied in reduction of the indebtedness on which the claim is based. Any escrowed or earmarked funds not subject to superior claims of third persons must likewise be so applied.

(b) In any case in which there is a delay in the liquidation sale caused by:

(1) The holder of the loan extending forbearance in excess of 30 days at the request of the Secretary, the cutoff date for computation of the indebtedness shall be 30 days after the date the Secretary determines the liquidation sale would have taken place if there had been no such delay, provided: the net value of the real property securing the loan does not exceed the unguaranteed portion of the indebtedness as of the actual liquidation sale date *and* such net value will exceed the unguaranteed portion of the indebtedness as of the cutoff date;

(2) The Secretary, including the Secretary's failure to provide the holder with advice as to the net value of the security within two working days prior