

CITATION: VAOPGCPREC 14-90  
Vet. Aff. Op. Gen. Couns. Prec. 14-90

DATE: 05-21-90

**TEXT:**

**SUBJECT:** Legal Opinion on the Secretary's Authority to Comply with Certain Conditions Specified in Loan Sale Agreement for AHT VI

**QUESTIONS PRESENTED:**

- a. Does the Secretary of Veterans Affairs have the authority to transfer, pursuant to the terms of the American Housing Trust VI (AHT VI) loan sale agreement, a portion of the subordinate certificates received as consideration in prior VA vendee sales to a collateral trust which will provide credit and liquidity support for AHT VI?
- b. May the Secretary agree to terms imposed by the AHT VI loan sale agreement which will require, as a condition to the sale, that within the collateral trust a reserve fund be established, maintained, and replenished by VA?
- c. May VA's loan guaranty obligation include reimbursement to AHT VI for the trust's actual expense for prepayment interest shortfalls?

**COMMENTS:**

1. The Department of Veterans Affairs currently holds in excess of \$400 million in subordinated certificates received as partial consideration for loans sold in five previous American Housing Trust transactions. These certificates are titled in the name of the Secretary of Veterans Affairs, and VA receives cash distributions on a monthly basis. The amount received by VA depends upon collections on the underlying mortgage loans and is subordinate to distributions to senior certificate holders. Structures in past American Housing Trust transactions all included subordinated as well as senior securities, with the senior securities sold to the public and the subordinated securities transferred to VA.

2. In the AHT VI loan sale, scheduled to close on or about May 24, 1990, a senior/subordinate structure will not be used. Instead, all loans will be sold to the trust with a 100 percent VA repurchase guaranty, and all of the trust passthrough certificates will be sold to the public as AAA rated securities. To preclude extensive master servicer advances which would be made to ensure timely payment and to obviate the need for issuance of subordinate securities, the trust, as purchaser of the vendee loans, will require that VA transfer title to

certain of the subordinate certificates which VA holds from prior sales to a collateral trust which will utilize the certificate income to facilitate meeting AHT VI monthly distribution shortfalls.

3. A reserve fund will be established and maintained within the collateral trust.

The reserve fund will be used to assist in meeting AHT VI monthly distribution shortfalls by promptly reimbursing the master servicer for advances and, when sufficient reserves are available, will be used to meet loan guaranty claims.

Establishment and maintenance of the reserve fund will be mandated by the terms of the loan sale agreement which also will require that, if for any reason the balance in the reserve fund is reduced below a certain floor, the Secretary must replenish it from either the Loan Guaranty Revolving Fund or the Guaranty Indemnity Fund. In addition, the loan sale agreement will require that the VA guaranty include provision for reimbursement to the trust for actual expense associated with prepayment interest shortfalls.

4. To meet the first above-mentioned condition of the loan sale agreement, title to certain VA owned personal property, i.e., certain subordinate certificates, will be transferred to a collateral trust with a reversionary interest in VA. To meet the second above-mentioned condition of the loan sale agreement, VA will agree to replenish the reserve fund in the event its balance drops below a specified floor. The third above-mentioned condition of the loan sale agreement relates to prepayment interest shortfalls. Based on the underwriters' recommendations, AHT VI will undertake to include such interest shortfalls in its accounting with investors after a loan has been terminated either through liquidation or prepayment. That is, if a loan is paid off at any time during a month, the investor will be assured of interest at the passthrough rate through the end of the month. This is a common feature in government and government sponsored mortgage-backed securities, i.e., GNMA, FNMA, and FHLMC. VA has been advised by the underwriters that by guaranteeing such an AHT VI undertaking, VA may anticipate, although is not assured, that it will receive additional AHT VI cash consideration at closing in excess of the present value cost of the guaranty.

5. Section 1820(a)(5), title 38, United States Code, provides that, notwithstanding the provisions of any other law, the Secretary is authorized relative to matters arising under the home loan program to sell, exchange, assign, convey or otherwise dispose of any real or personal property upon such terms and for such prices as the Secretary determines to be reasonable. This section of the law gives the Secretary substantial discretion in selling property and determining reasonable terms and conditions. VA vendee loans are personal property acquired in the administration of the home loan program and are subject to section 1820(a)(5). The subordinate certificates presently owned by VA are personal property acquired by the Secretary pursuant to responsibilities under the home loan program, and their transfer also is subject to section 1820(a)(5).

6. The issues addressed in this opinion are all matters which constitute terms and conditions for the sale of personal property acquired by the Secretary in carrying out responsibilities under the home loan program.

7. In addition to the authority under section 1820(a)(5), the Secretary has specific authority to sell loans with recourse. See 38 U.S.C. § 1833 An American Housing Trust sale with a VA guaranty has been determined to constitute a sale of loans with recourse. See O.G.C. Advisory 86-89. All elements in the AHT VI loan sale agreement addressing the matter of recourse constitute terms as to which the Secretary has statutory authority under section 1833 to agree. Each of the three above-mentioned loan sale conditions relates to the sale of property owned by VA and to the issue of recourse, the timing of recourse, and liability amounts under a recourse agreement. Accordingly, the Secretary, pursuant to 38 U.S.C. § 1833 as well as section 1820, has authority to agree to each of the three conditions of sale.

8. Section 3302(b) of title 31, United States Code, requires that an official or agent of the Government receiving money for the Government deposit the money in the U.S. Treasury. In the AHT VI transaction transfer of the subordinate certificates to the collateral trust will divest the Secretary of title in those certificates. Thereafter, the collateral trust will receive all distributions on the transferred certificates, and no officer or agent of the Government will receive money for the Government on such certificates. The subordinate certificate transfer is similar to the transfer of title to the vendee loans where, subsequent to transfer, the trustee and not VA receives the mortgage payments. In neither instance is there any violation of or inconsistency with section 3302(b).

**HELD:**

In the AHT VI transaction and pursuant to the loan sale agreement, the Secretary of Veterans Affairs has the authority to transfer subordinate certificates to a collateral trust, to agree to establish, maintain, and replenish a reserve fund within the collateral trust, and to include within the VA loan guaranty an obligation to reimburse the trust for prepayment interest shortfalls.

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