

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

**Health Resources and
Services Administration
Rockville MD 20857**

OCT 30 1989

To: Lenders Participating in the Health Education Assistance Loan (HEAL) Program

Subject: Clarification of Procedures for Filing HEAL Bankruptcy Claims HEAL Lender Policy Memorandum # 89-13

This policy memorandum: (1) Clarifies the procedures for filing bankruptcy claims, as set forth in section 60.40(c)(4) of the HEAL regulations (42 CFR Part 60); and (2) Provides guidance on procedures that can be followed to cure or obtain the excuse of certain defects in claims, in accordance with section 60.41(d) of the regulations, in cases where a lender or holder fails to file a bankruptcy claim on a timely basis.

Time Periods for Filing Bankruptcy Claims

Section 60.40(c)(4) of the HEAL regulations requires that a lender must file a bankruptcy claim with the Secretary within 30 days after the lender receives the notice of the first meeting of creditors in a borrower's bankruptcy proceeding, except that if the bankruptcy proceeding is under Chapter 13, the lender must file a bankruptcy claim with the Secretary within 10 days of receipt of court notice of the pending action. In calculating the period of time allowed for filing a claim, the following should be noted:

- (1) The period of time allowed for filing a bankruptcy claim is calculated based on the date of the lender or holder's actual receipt of notice of the first meeting of creditors. In cases where the loan has been assigned to a new holder, and the borrower has been notified of the assignment in accordance with 42 CFR 60.38, the date of receipt refers to the date the current holder receives notice of the first meeting of creditors, regardless of any delay that could occur if the borrower incorrectly lists the original lender as the creditor for the HEAL loan.
- (2) The date of receipt refers to the lender or holder's initial receipt date, rather than the date of receipt by the employee who prepares the claim for submission to the Department. Documentation of the initial receipt date with a date stamp should be included as part of the claims package; failure to document the initial receipt date with a date stamp may be considered a defect on the basis that the claim would lack evidence of the date of receipt.

- (3) Periods of time for filing claims are counted by calendar days, including Saturdays, Sundays, and Federal holidays, beginning with the first day following receipt of the notice. However, if the due date falls on a Saturday, Sunday, or Federal holiday, the final day would be the next Federal workday.

If, prior to receiving the notice of the first meeting of creditors, a lender or holder obtains reliable information in writing indicating that a borrower has filed for bankruptcy, the lender or holder should file the bankruptcy claim immediately, with an explanation as to why the notice of meeting of creditors is missing.

Bankruptcy Claims Involving Defective Service

In bankruptcies where there is defective service (due to, for example, the borrower's failure to list the proper creditor, or the borrower's failure to list the creditor's correct address), the lender or holder must include with the bankruptcy claim the following:

- (1) A declaration attesting to the fact that the lender or holder was not directly served with the notice of meeting of creditors. This declaration must also indicate when and how the lender or holder did learn of the bankruptcy; and
- (2) In cases where the defective service was due to the borrower's failure to list the proper creditor, a copy of the letter sent to the borrower at the time of purchase of the HEAL loan by the holder, or a sample letter with documentation indicating when the letter was sent to the borrower.

These documents are required in accordance with 42 CFR 60.40(a)(4) and (c)(4)(vi), which require a lender or holder to provide with each claim a history of the loan activities from the date of loan disbursement through the date of claim, and a statement of any facts of which the lender or holder is aware that may form the basis for an objection to the bankrupt's discharge or an exception to the discharge.

In Chapter 13 bankruptcies where there is defective service, there may be cases when the lender or holder is not able to comply with the court deadline for filing a proof of claim, as required by 42 CFR 60.40(c)(4). Since the absence of a proof of claim would be a defect, the lender or holder must include with the claim submission package a letter requesting that the defect be excused, and satisfying the Secretary that the defect did not contribute to the default and would not prejudice the Secretary's attempts to collect the loan. These criteria will be deemed to have been met if the lender or holder complies with paragraphs (1) and (2) above and the claim does not have other defects.

Procedures for Curing Timely Filing Defects

Section 60.41(d) of the HEAL regulations provides that the Secretary may excuse a defect or permit a lender or holder to cure a defect in a HEAL claim when the claimant "satisfies the Secretary that the defect did not contribute to the default or prejudice the Secretary's ability to collect the loan from the borrower." This provision contains general criteria for the cure or excuse of defects but does not address specific circumstances.

Examples of procedures that can be followed to cure or excuse the defect of failing to file a bankruptcy claim on a timely basis are provided below. However, lenders and holders are not limited to these methods of curing or obtaining the excuse of defects in such claims. The criteria in 42 CFR 60.41(d) are broad enough to afford a claimant flexibility and discretion in methods of curing or excusing defects in claims.

Chapter 7 Bankruptcy Claims: If a lender or holder fails to file a Chapter 7 bankruptcy claim within 30 days of its receipt of notice of the first meeting of creditors, the following procedures may be used to cure the timely filing defect:

- (1) The lender or holder must hold the loan and monitor the bankruptcy proceedings to ascertain that the debt is not discharged. The lender or holder must contest any attempt by the debtor to obtain discharge of the HEAL loan; and
- (2) The lender or holder must attempt to collect the account once the bankruptcy stay is lifted, using the procedures required by 42 CFR 60.35, including litigation if appropriate. If the borrower defaults at that time, the lender or holder may file a default claim.

In accordance with 42 CFR 60.41(d), the lender or holder must include with the claim submission package a letter indicating how the defect was cured, and satisfying the Secretary that the defect did not contribute to the default and would not prejudice the Secretary's attempts to collect the loan. These criteria will be deemed to have been met if the lender or holder complies with the requirements of paragraphs (1) and (2) above, provided that the bankruptcy stay is lifted, the HEAL loan obligation has not been discharged, and the claim does not have other defects.

Chapter 13 Bankruptcy Claims: If a lender or holder fails to file a Chapter 13 bankruptcy claim within 10 days of its receipt of notice of the first meeting of creditors, either of the following procedures may be used to cure the timely filing defect:

- (1) The lender or holder may file a bankruptcy claim if, at the time the claim is received by the Department, at least 15 days remain for the filing of an objection to the bankrupt's proposed plan (after approval of requests for extensions, if any, by the bankruptcy court); or

(2) The lender or holder may hold the loan, monitor the bankruptcy proceedings and plan administration, and contest any attempt by the borrower to obtain discharge of the HEAL loan. The lender or holder must attempt to collect the account once the bankruptcy stay is lifted, using the procedures required by 42 CFR 60.35, including litigation if appropriate. If the borrower defaults at that time, the lender or holder may file a default claim. The value of plan payments which would have been paid with respect to the HEAL loan if it had been included in the plan (based on the percentage of payment applied to other unsecured loans in the plan), or the total interest that accrued on the loan since the borrower filed for bankruptcy, whichever is greater, will be deducted from the claim.

In either of the above cases, and in accordance with 42 CFR 60.41(d), the lender or holder must include with the claim submission package a letter indicating how the defect was cured, and satisfying the Secretary that the defect did not contribute to the default and would not prejudice the Secretary's attempts to collect the loan. These criteria will be deemed to have been met if the lender or holder complies with the requirements of either paragraph (1) or (2) above, provided that the bankruptcy stay is lifted, the HEAL loan obligation has not been discharged, and the claim does not have other defects.

We hope this information will be helpful. Questions on this memorandum should be directed to Mr. John Haczewski of the Claims Staff at (301) 443-0603.

Sincerely yours,

Michael Heningburg
Director
Division of Student Assistance