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# AUDIT REPORT



PORTNOY & GREENE, P.C.  
CLOSING AGENT CONTRACT

BOSTON, MASSACHUSETTS

00-FW-222-1005

AUGUST 16, 2000

OFFICE OF AUDIT, SOUTHWEST DISTRICT  
FORT WORTH, TEXAS

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Issue Date
August 16, 2000

Audit Case Number
00-FW-222-1005

TO: Engram Lloyd  
Director  
Philadelphia Single Family Homeownership Center, 3AHH

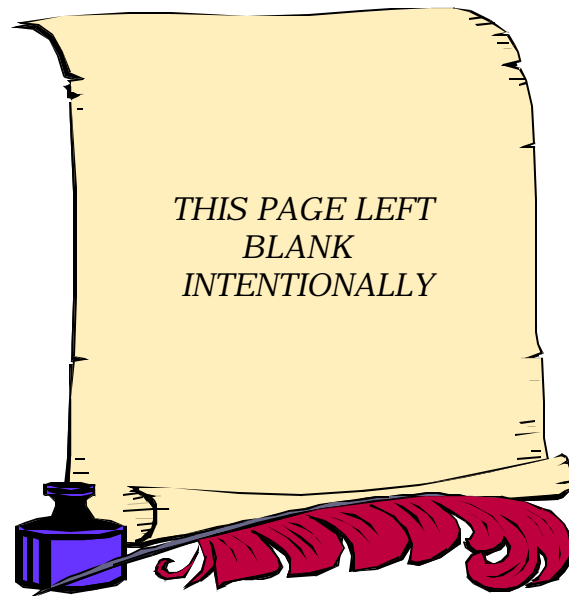
FROM: D. Michael Beard  
District Inspector General for Audit, 6AGA

SUBJECT: Portnoy & Greene Closing Agent Contract

We performed an audit of Portnoy & Greene's Closing Agent contract to determine whether management controls were adequate to ensure the prevention of fraud, waste, and abuse. Our report contains two significant findings concerning Portnoy & Greene's performance as a closing agent.

Within 60 days please give us, for each recommendation in this report, a status report on: (1) the corrective action taken; (2) the proposed corrective action and the date to be completed; or (3) why action is considered unnecessary. Also, please furnish us copies of any correspondence or directives issued because of the audit.

If you have any questions, please contact Theresa A. Carroll, Assistant District Inspector General for Audit, at (817) 978-9309.



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# Executive Summary

We performed an audit of the law offices of Portnoy & Greene, P.C. (Portnoy & Greene), a closing agent for HUD, as part of a nationwide effort to review closing agents. Our audit objective was to determine whether management controls were adequate to ensure the prevention of fraud, waste, and abuse. To meet this objective, we performed audit steps to determine whether the closing agent complied with its contract terms and conditions. Overall, Portnoy & Greene's management controls were insufficient to ensure that it complied with its HUD contract. Instead, Portnoy & Greene's overall performance as a closing agent was substandard. In addition, we found that Portnoy & Greene was improperly collecting the full closing agent fee even though another entity performed the closing.

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**Portnoy & Greene's overall performance was substandard.**

Portnoy & Greene's overall performance as a closing agent was substandard. Portnoy & Greene did not comply with all of the terms of its closing agent contract. Portnoy & Greene did not: (1) deposit sales proceeds in a timely manner; (2) wire the proceeds to HUD in a timely manner; (3) accept only cash or certified funds; (4) properly itemize closing costs; (5) maintain sufficient documentation in its closing files; and (6) limit charges to only allowable expenses. Substandard performance occurred because Portnoy & Greene lacked or did not follow management controls to ensure contract compliance. Portnoy & Greene's inability to perform its duties negatively impacted HUD financially. In addition, HUD has no assurance that Portnoy & Greene properly conducted closings.

**Portnoy & Greene improperly collected the full closing agent fee.**

Portnoy & Greene improperly collected the full closing agent fee even though another entity conducted the closing. Portnoy & Greene's closing agent contract limited its fee for third-party closings to 50 percent of the full closing agent fee. Portnoy & Greene charged the full fee because, in its opinion, it was not conducting third-party closings. Third-party closing agents closed 98 percent of the 60 closing files reviewed. Thus, one-half of the fee Portnoy & Greene received on the 59 identified files or \$16,933 is ineligible. In addition, Portnoy & Greene may owe HUD an additional \$258,587 for 98 percent of the remaining 901 closings conducted under its current HUD contract, if the closings were performed by a third-party closing agent.

**Recommendations**

As a result of these findings, we recommend that HUD terminate its closing agent contract with Portnoy & Greene. HUD should recover from Portnoy & Greene the \$105 in ineligible charges. Further, HUD should require Portnoy & Greene to review all closings conducted under this contract to identify and repay any other improper charges. In addition, HUD should recover \$16,933 in fees on the 59 files reviewed where third-party closings occurred, since Portnoy & Greene was only entitled to one-half of its contract fee rather than the full fee. HUD should also require Portnoy & Greene to review the other 901 closings it conducted under this contract to disclose all other instances where a third-party closing occurred. Finally, HUD should recover one-half of the fee paid to Portnoy & Greene for any other third-party closing which could amount to \$258,587.

We provided a draft of this report to Portnoy & Greene and the Director, Philadelphia Homeownership Center on June 23, 2000. We discussed the findings with Portnoy & Greene on July 1, 1999. Portnoy & Greene provided a written response to the draft report on July 19, 2000. We have summarized and evaluated the response in the findings and included it in its entirety as Appendix C. We have also modified this final report from the draft, where appropriate.

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## Abbreviations

CFR	Code of Federal Regulations
HUD	U.S. Department of Housing and Urban Development
OIG	Office of Inspector General





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# Introduction

## Background

The Law Office of Portnoy & Greene, P. C. (Portnoy & Greene) contracted with the Department of Housing and Urban Development (HUD) to conduct closings of HUD's single family properties for the State of Massachusetts. Portnoy & Greene's current closing agent contract<sup>1</sup> started on May 6, 1996. However, Portnoy & Greene has been a closing agent for HUD in this area since 1992.

Portnoy & Greene had an indefinite quantity contract to provide closing services for single family properties owned by HUD. The primary objectives of Portnoy & Greene's contract were to ensure that: (1) the sale of all properties closed within the time stipulated by the Sales Contract; (2) prompt and accurate payment of all closing costs were made; (3) net proceeds from each sale were wire transferred to HUD's account with the United States Treasury on the day of closing or the next banking day; and (4) complete and accurate closing packages were submitted to HUD within 2 business days after closing.

To conduct a closing, Portnoy & Greene's contract required it to:

- Establish individual property files and maintain the files by FHA case number;
- Coordinate with purchaser, broker, and if appropriate, mortgagee, to establish a firm closing date on or before the date specified in the Sale Contract;
- Review title and title evidence submitted by mortgagee;
- Prepare all necessary documents at closing to provide a complete closing including a settlement statement (HUD-1), deed, note and mortgage, or deed of trust, if applicable;
- On day of closing or next banking day, deposit sales proceeds, initiate the wire transfer, and obtain the bank's wire transfer confirmation; and
- Store title documents<sup>2</sup> that are the property of HUD in a secure cabinet furnished by the closing agent.

According to information obtained from HUD's Single Family Asset Management System (SAMS), Portnoy & Greene closed 961 properties as a closing agent from May 6, 1996, to July 5, 1999. According to its contract, Portnoy & Greene would

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<sup>1</sup> Contract number H01C96000300000.

<sup>2</sup> Such as title policy and deed.

receive \$574 from HUD for each closing it conducted. If the closing was conducted by a third party, Portnoy & Greene would receive 50 percent of the \$574 fee or \$287 to represent HUD at the closing. If a sale canceled, HUD would pay Portnoy & Greene 25 percent of its fee or \$143.50.

**Audit Objective**

Our audit objective was to determine whether management controls were adequate to ensure the prevention of fraud, waste, and abuse.

**Scope and Methodology**

We obtained background information by:

- Reviewing prior closing agent audit programs.
- Participating in a teleconference with KPMG regarding its findings for the fiscal year 1998 FHA Financial Statement Audit.
- Reviewing the KPMG Briefing Paper regarding the fiscal year 1998 FHA Financial Statement Audit.

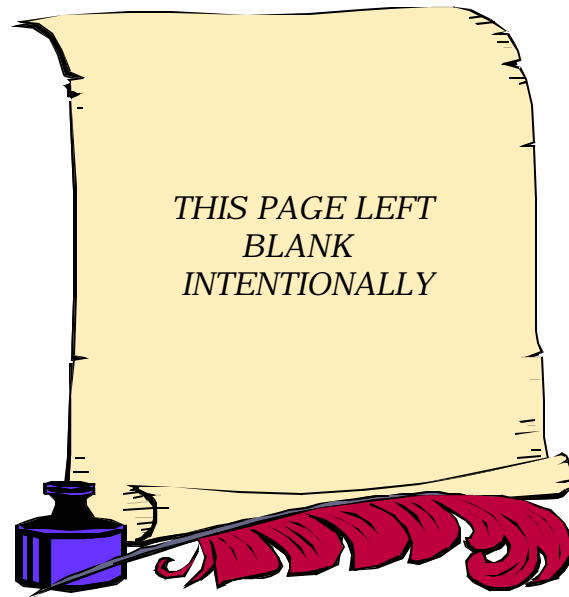
To accomplish our audit objective, we:

- Examined the contract and HUD's Property Disposition Handbook.
- Obtained information from the Single Family Asset Management System (SAMS).
- Obtained from SAMS a listing of closings performed by Portnoy & Greene. We selected 70 closed files judgmentally using a random number generator for testing.
- Interviewed HUD and Portnoy & Greene staff regarding the closing process.
- Obtained an understanding of Portnoy & Greene's closing and accounting processes.
- Obtained and reviewed closing files while on site. Due to time constraints, we reviewed only 60 files. We tested the selected closing files for the following contractual and HUD Handbook requirements:
  1. The property closed timely and, if the property did not close timely, we documented the number of days late;
  2. The closing file contained an extension request and approval, if applicable;
  3. The correct extension fee was collected, if applicable;
  4. Only allowable expenses were paid;
  5. The correct fees were collected;
  6. The sale proceeds were deposited timely;
  7. The correct amount was wired timely;

8. The Deed was recorded timely;
9. The correct amount was collected for the taxing authority;
10. The correct amount was paid to the closing agent;
11. Returned funds were distributed correctly;
12. Clear title was issued;
13. The title insurance premium was not split;
14. A Warranty Deed was prepared;
15. The Warranty Deed was forwarded to HUD timely;
16. The selling amount on the sales contract and the settlement statement were identical;
17. Closing costs for the buyer were identical on both pages of the HUD-1; and
18. The correct amount of extension fees were on the HUD-1, if applicable.

#### **Audit Period and Site**

We conducted the audit at Portnoy & Greene's offices located at 113 Union Wharf, Boston, Massachusetts. The audit covered closings by Portnoy & Greene from April 1, 1998, to March 26, 1999. We extended the scope of our review to include all closings conducted by Portnoy & Greene under this contract. We performed site work from June through July 1999. We performed additional audit work in May and June 2000 to update our findings. We conducted our audit in accordance with generally accepted government auditing standards.



# Portnoy & Greene's Overall Performance was Substandard

Portnoy & Greene's overall performance as a closing agent was substandard. Portnoy & Greene did not comply with all of the terms of its closing agent contract. Portnoy & Greene did not: (1) deposit sales proceeds in a timely manner; (2) wire the proceeds to HUD in a timely manner; (3) accept only cash or certified funds; (4) properly itemize closing costs; (5) maintain sufficient documentation in its closing files; and (6) limit charges to only allowable expenses. Substandard performance occurred because Portnoy & Greene lacked or did not follow management controls to ensure contract compliance. Portnoy & Greene's inability to perform its duties negatively impacted HUD financially. In addition, HUD has no assurance that Portnoy & Greene properly conducted closings. Since the findings are systemic in nature, we recommend that HUD terminate its contract with Portnoy & Greene.

## Criteria

The Portnoy & Greene's closing agent contract stated that it, as contractor, would furnish the necessary services, personnel, material, equipment and facilities to provide sales closing services for single family properties owned by HUD.<sup>3</sup>

Portnoy & Greene's contract duties included the following responsibilities:

- Complete all documents necessary to provide a complete closing, including the settlement statement, deed, note and mortgage, or deed of trust, if applicable.
- Prorate unpaid property taxes to the date of closing.
- Collect recording fees from the purchaser and record the deed.
- Accept only cash, a certified check, cashier's check, or money order made payable to Portnoy & Greene.
- Deposit the sale proceeds and wire transfer the amount to HUD on the day of closing or the next banking day.
- Deliver the closing package to HUD within 2 working days after the closing.
- Maintain a complete record of the closing.<sup>4</sup>

<sup>3</sup> Section B.1.

<sup>4</sup> Sections C.2(b)(9) paragraphs i through iv; C.2(b)(11) paragraphs i and iv; C.2(b)(14); and C.2(b)(18).

In addition, Portnoy & Greene's contract required it to pay only those closing costs determined to be reasonable and customary for the local real estate market.<sup>5</sup> Finally, Portnoy & Greene's fee was to be inclusive of all postage and shipping costs.<sup>6</sup>

**Sales proceeds not deposited timely.**

In 32 (or 53 percent) of the files reviewed, Portnoy & Greene did not deposit the sales proceeds timely.<sup>7</sup> Instead of depositing the sales proceeds on the day of closing or the next banking day, Portnoy & Greene made deposits ranging from 2 to 13 days after closing. Portnoy & Greene's late deposits occurred because its staff did not attend closings conducted by third parties (see Finding 2). Since Portnoy & Greene was not present at the closing, the closing entity would express mail the proceeds to Portnoy & Greene the day of or the day after closing. Thus, Portnoy & Greene did not even have the sale proceeds available for deposit until the day after closing at the earliest.

**Sale proceeds not wired to HUD timely.**

In 59 (or 98 percent) of the files reviewed, Portnoy & Greene did not wire the sale proceeds to HUD timely. Portnoy & Greene's contract required that a wire transfer request be initiated to wire the sale proceeds to HUD on the day of closing or the next banking day. As in the cases of late deposits, Portnoy & Greene's late wires also occurred because of the third parties performing its closings. Portnoy & Greene's late wires resulted in HUD not getting its sales proceeds timely. Thus, the government would have had to pay interest if HUD needed funds and the proceeds were unavailable.

**Uncertified funds accepted at closing.**

Portnoy & Greene accepted uncertified funds from third-party closing agents. Portnoy & Greene's contract required acceptance of only cash, cash equivalents, or certified funds. Since Portnoy & Greene did not attend third-party closings, the other entities would issue checks for the sale proceeds on their attorney trust accounts and express mail the checks to Portnoy & Greene. Portnoy & Greene had to wait for these uncertified funds to clear its bank before it could wire the proceeds to

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<sup>5</sup> Section B.4.

<sup>6</sup> Section D.1.

<sup>7</sup> Portnoy & Greene may have been late depositing the proceeds on an additional two closings. However, Portnoy & Greene's file documentation was so poor that we were unable to determine when the sales proceeds were deposited in both cases and when the closing took place on one.

HUD. In addition to causing a delay in the wires, Portnoy & Greene's acceptance of uncertified funds exposed it and HUD to the risk that sufficient funds did not exist for the check to clear.

**Closing Costs were not itemized.**

Portnoy & Greene did not itemize closing costs on the settlement statements it prepared for HUD. Portnoy & Greene's contract did not require itemization of closing costs. However, Portnoy & Greene was required to pay only those closing costs determined to be reasonable and customary for the local real estate market. Without an itemization of closing costs, HUD has no way of knowing what costs it is paying and no assurance that the costs being paid are reasonable or customary. Portnoy & Greene stated that a HUD contract representative told it to show items this way on the settlement statement. Yet, Portnoy & Greene could not provide us written documentation showing where HUD approved its use of a summary amount for closing costs. In addition, HUD Single Family staff stated they had not instructed Portnoy & Greene to show costs in a summary manner.

**Closing files lacked sufficient documentation.**

Portnoy & Greene's contract files lacked sufficient documentation in several required categories. Portnoy & Greene's files lacked documentation to support that it correctly prorated the amount of taxes due on 49 (or 82 percent) of the files reviewed. Portnoy & Greene's files did not contain any evidence that clear title was conveyed on all 60 of the cases reviewed. In addition, one instance was noted where clear title may not have been conveyed. None of Portnoy & Greene's files documented when the file was conveyed to HUD. In 12 of the 21 cases where a closing did not occur timely, Portnoy & Greene's file did not document that an extension was obtained and the appropriate fee was paid to or waived by HUD. In 12 (or 20 percent) of the files reviewed, Portnoy & Greene's records did not document that the deed was properly recorded. Portnoy & Greene's contract required it to perform and document all of the above items. Portnoy & Greene's management stated that these items were performed. Yet based on the substandard conditions of the files, Portnoy & Greene obviously lacked the necessary management system and controls to ensure that proper record-keeping occurred. Since the files lack the above required documentation, HUD has no

assurance that the closings performed by Portnoy & Greene were proper or complete.

**Ineligible mail expenses charged to HUD.**

Portnoy & Greene improperly charged HUD a total of \$105 in overnight shipping charges on 6 of the 60 files reviewed. According to Portnoy & Greene's contract, shipping and postage costs are included in its contract fee. Portnoy & Greene admitted that these improper charges occurred and stated it charged HUD in error.

**Similar problems found in the past.**

Portnoy & Greene had similar problems in the past. A Price Waterhouse audit in the early 1990's had findings concerning the timeliness of wires and deposits. A HUD Single Family review in early 1999 found problems with the timeliness of deposits. HUD's 1999 review also questioned Portnoy & Greene's assertion that it was the settlement agent when third parties were performing the closings.

In a July 23, 1999 letter to OIG, Portnoy & Greene stated that it was now performing all closings in person and having the proceeds wired to its account by the lender's attorney. However, we performed no testing to determine if Portnoy & Greene was following the new procedures.

Based on the above facts, Portnoy & Greene obviously lacks the necessary management and system controls to fulfill its contract. Portnoy & Greene's inability to fulfill its contract was demonstrated not only by its inability to deposit funds timely but also by its failure to properly complete and document a large number of its other contract duties. The identified duties are core responsibilities of a closing agent and Portnoy & Greene's performance of them was substandard.

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**Auditee Comments**

Portnoy & Greene disagreed with all items in this finding except for the \$105 of improperly billed overnight charges which it agreed to repay. Portnoy & Greene said that its position was that the firm met or exceeded performance standards established by HUD. The firm further stated that in those few instances where the technical requirements of the contract were not met, it was due to either HUD's actions or inactions, or to express directions from HUD employees. In addition, Portnoy



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& Greene said they were hampered in responding to the report as we had not provided them with specific closing files and had presented the findings in the aggregate.

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## OIG Evaluation of Comments

We stand by our original conclusions and recommendations. Portnoy & Greene's response clearly shows that it either did not fully understand or was unwilling to fulfill its contract. For example, Portnoy & Greene stated that it was not required to order a title search until its contract was modified in April 1999. However, Portnoy & Greene's 1996 contract required it to obtain a 50-year title search and review the title on each closing. Further, Portnoy & Greene stated that it accepted law firm checks because it was standard practice in Massachusetts and was as secure as certified funds. Yet, Portnoy & Greene's response did not address the fact that its contract required certified funds and that it was not fulfilling that requirement. Regarding their complaint of our not providing specific files, we supplied a list of the closing files to Portnoy & Greene during the audit.

Portnoy & Greene did not provide us with written contract amendments or written directions from HUD to support its contract deviations and assertions. As a law firm, Portnoy & Greene should have known that verbal directions do not change a written contract. In fact, Portnoy & Greene obviously realized that a contract modification was necessary. During the audit, the firm wrote several letters to HUD seeking several contract modifications. However, prior to the end of our field work, HUD had not approved any modifications which would have an impact on this report.

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## Recommendations

We recommend that the Director of the Philadelphia Homeownership Center:

- 1A. Request HUD's Contracting Operations Branch terminate HUD's closing agent contract with Portnoy & Greene for default.

Finding 1

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- 1B. Recover the \$105 in ineligible overnight shipping costs from Portnoy & Greene.
  
- 1C. Require Portnoy & Greene to review all closing statements for any other possible overcharges that were made to HUD and repay any other instances of improper billing.

## Portnoy & Greene Improperly Collected the Full Closing Agent Fee

Portnoy & Greene improperly collected the full closing agent fee even though another entity conducted the closing. Portnoy & Greene’s closing agent contract limits its fee for third-party closings to 50 percent of the full closing agent fee. Portnoy & Greene charged the full fee because, in its opinion, it was not conducting third-party closings. However, a close analysis of the situation showed that third-party closing agents conducted the majority of Portnoy & Greene’s closings. Third-party closing agents closed 59 or (98 percent) of the 60 closing files reviewed. Thus, one-half of the fee Portnoy & Greene received on the 59 identified files or \$16,933 is ineligible. In addition, Portnoy & Greene may owe HUD an additional \$258,587 for 98 percent of the remaining 901 closings conducted under its HUD contract, if the closings were performed by a third-party closing agent.

### Criteria

HUD defines third-party closings in its Single Family Property Disposition Handbook.<sup>8</sup> Under the paragraph titled Third Party Closing Agents<sup>9</sup>, the Handbook states “There will be instances where a purchaser/funding lender uses a closing agent other than HUD’s. Such third party (defined as any closing agent not under a HUD-authorized contractual arrangement who is conducting the closing of property sold by HUD) closings shall be handled as follows:” The Handbook goes on to say that the HUD contractor is responsible for ensuring that the closing is completed accurately, the correct amount of sales proceeds is properly wired and that the sales package is forwarded to HUD on a timely basis.

Portnoy & Greene’s contract contains clauses concerning the use of third-party closing agents. Foremost, the contract limited Portnoy & Greene’s fee to 50 percent of the full \$574 fee for third-party closings at which it represented HUD.<sup>10</sup>

Additionally, Portnoy & Greene’s contract required it to “Physically represent HUD at closings being conducted by third party closers.” Further, Portnoy & Greene’s contract required it to ensure that the HUD-1 Settlement Statement was accurate, the proper amount of the sale proceeds was deposited within 1

<sup>8</sup> HUD Handbook 4310.5, Rev-2, dated April,1994.

<sup>9</sup> HUD Handbook 4310.5, Rev-2, paragraph 11-10.

<sup>10</sup> Contract Section B.2(a)(2).

banking day of closing, the request for wire transfer to HUD was initiated, the closing package was sent to HUD within 2 working days of closing, and the deed was filed.<sup>11</sup>

**Third-party agents performed the majority of closings reviewed.**

Another entity conducted the closing for Portnoy & Greene in 59 out of the 60 files reviewed. HUD did not have a contract with any of the entities which conducted the closings. Based on HUD's Handbook definition, third-party agents performed the closings. Thus, Portnoy & Greene should have only collected one-half of its fee. However, in each case, Portnoy & Greene charged and collected its full \$574 fee from HUD.

**Portnoy & Greene did not attend closings.**

Portnoy & Greene did not attend closings conducted by third parties. Portnoy & Greene's contract required it to physically attend closings to represent HUD. Attorneys for Portnoy & Greene admitted they did not attend closings outside the Boston area. Closing file reviews supported their comments since 98 percent of the closings occurring outside Boston were not attended by Portnoy & Greene. However, Portnoy & Greene did not attend five closings that were only 15 miles or less from Boston. Thus, the facts indicate that Portnoy & Greene did not attend any closing conducted by a third party. Since Portnoy & Greene did not attend closings, no one represented HUD at the closings.

**Two settlement statements prepared.**

Contrary to standard closing practices, two settlement statements were prepared for third-party closings of HUD properties. The third-party agents who actually conducted the closing normally prepared their own settlement statement and listed themselves as the settlement agent. However, Portnoy & Greene also prepared a settlement statement which showed Portnoy & Greene as the settlement agent even though it was not at the closing. Portnoy & Greene would sign the settlement statement before closing and mail or fax it to the entity conducting the closing. HUD and several Massachusetts attorneys stated that the practice of completing two settlement statements was unusual. The attorneys further stated that the only time they ever had buyers sign two settlement statements was for HUD closings conducted for Portnoy & Greene. Portnoy & Greene stated that it prepared the separate settlement statement because HUD wanted certain costs shown

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<sup>11</sup> Contract Section C.2(b)(22).

in a particular manner. This explanation does not explain why Portnoy & Greene showed itself as settlement agent when it was not at the closing. Portnoy & Greene's practice of preparing a separate settlement statement in addition to the third-party agent's settlement statement was misleading to HUD and confusing to the buyer.

**Portnoy & Greene believed it was not performing third-party closings.**

In Portnoy & Greene's opinion, third-party closings do not occur in Massachusetts. Portnoy & Greene defined a third-party closing agent as an escrow agent or title company that conducts closings and acts on behalf of all the parties. However, Portnoy & Greene provided HUD Single Family staff with the third-party closing agent definition from HUD's Single Family Property Disposition Handbook. Thus, Portnoy & Greene was aware of what HUD considered to be a third-party closing agent. Portnoy & Greene also stated that it prepared an additional settlement statement because HUD wanted certain figures shown in certain ways and because HUD did not want third-party closings to be occurring.

Portnoy & Greene's actions and statements are contradictory and illogical. For example, if Massachusetts did not have third-party closings as it contends, Portnoy & Greene should not have been so intent on issuing another settlement statement that showed itself as the settlement agent for the closing. Further, Portnoy & Greene asserted that it was not participating in third-party closings because it represented HUD at closings. Yet, Portnoy & Greene did not physically attend the majority of closings conducted under its contract. Additionally, if Portnoy & Greene knew how its contract and HUD defined third-party closing agents, Portnoy & Greene should not have used another definition. Portnoy & Greene is arguing with itself.

HUD Contracting complicated the third-party closing agent issue by issuing a letter to Portnoy & Greene during our audit. Contracting's letter was issued based on a request for a contract modification by Portnoy & Greene and without the Contracting Officer contacting OIG or HUD Single Family staff. Contracting's letter stated that as long as Portnoy & Greene was performing its contracted duties it was not performing third-party closings. First, this letter incorrectly defines third-party closings and is contradictory to Portnoy & Greene's contract and HUD's Single Family Property Disposition

Handbook. Second, Portnoy & Greene was not performing its contracted duties. Further, we believe that if Contracting had possessed the information that OIG had concerning Portnoy & Greene's lack of representation at closings and other problems cited in this report, the letter would not have been issued.

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**Auditee Comments**

Portnoy & Greene's position is that the firm collected the proper fee under the circumstances. Portnoy & Greene said that the firm performed all of the work HUD expected it to perform to earn the fee. Further, the firm stated that HUD's own contract concedes that local law, custom and practice would control the closing process and that was what the firm adhered to in Massachusetts.

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**OIG Evaluation of Comments**

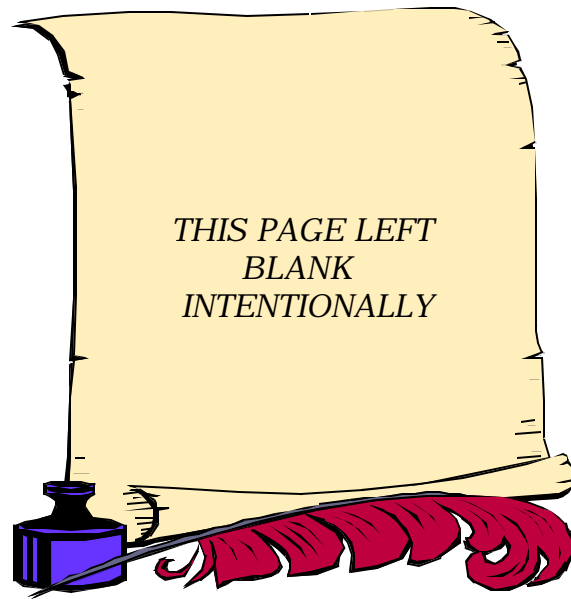
We disagree with Portnoy & Greene's comments. First, as Finding 1 clearly shows, Portnoy & Greene did not properly perform all of the work required under its contract. Second, HUD's contract does not concede that local law would control the closing process. The only place Portnoy & Greene's contract mentions local law is part of a 1999 amendment that deals only with homeownership association dues.

Portnoy & Greene's contract allowed for two methods of compensation for services: (1) a fixed fee for closings conducted by the contractor and (2) 50 percent of the fixed fee for closings at which the contractor represented HUD. As the report clearly states, other entities conducted the closings because Portnoy & Greene was not physically at the closings. Thus, Portnoy & Greene should have only received 50 percent of the fixed fee for compensation.

Recommendations

We recommend that the Director of the Philadelphia Homeownership Center:

- 2A. Recover the \$16,933 in ineligible fees received by Portnoy & Greene.
  
- 2B. Require Portnoy & Greene to disclose all other instances where another entity conducted the closings. After determining the number of cases, repay HUD one-half of its fee for those closings, which could be as much as \$258,587.





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# Management Controls

**In planning and performing our audit, we obtained an understanding of management controls relevant to our audit. Management is responsible for establishing effective management controls. Management controls, in the broadest sense, include the plan of organization, methods, and procedures adopted by management to ensure that its goals are met. Management controls include the processes for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance.**

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## Relevant Management Controls

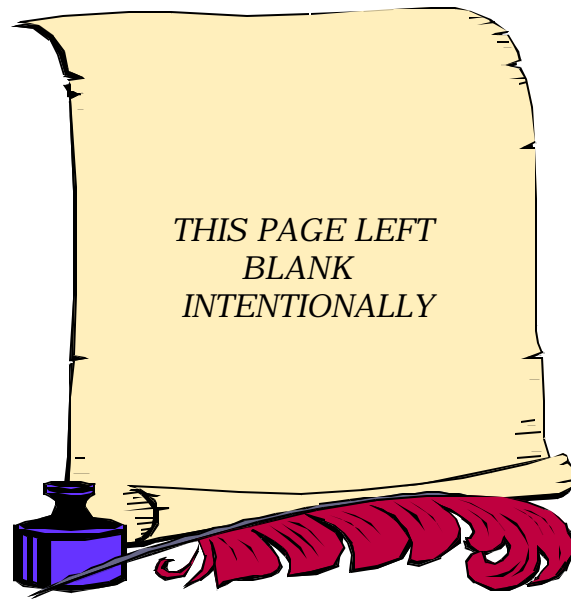
We determined that the following management controls were relevant to our audit objective:

- Policies and procedures of the sales process at HUD.
- Policies and procedures of closing agent to ensure that closings were properly conducted according to its contract.
- Administrative controls of the closing agent to ensure the closing files and documents were complete, accurate and secure.

## Significant Weaknesses

A significant weakness exists if management controls do not give reasonable assurance that resource use is consistent with laws, regulations, and policies; that resources are safeguarded against waste, loss, and misuse; and that reliable data are obtained, maintained, and fairly disclosed in reports. Based on our review, we believe the following items are significant weaknesses as discussed in this report:

- Portnoy & Greene's overall performance was substandard because it either lacked or did not follow a system of effective management controls to ensure compliance with its contract (Finding 1).
- Portnoy & Greene improperly collected the full closing agent fee even though another entity conducted the closing (Finding 2).

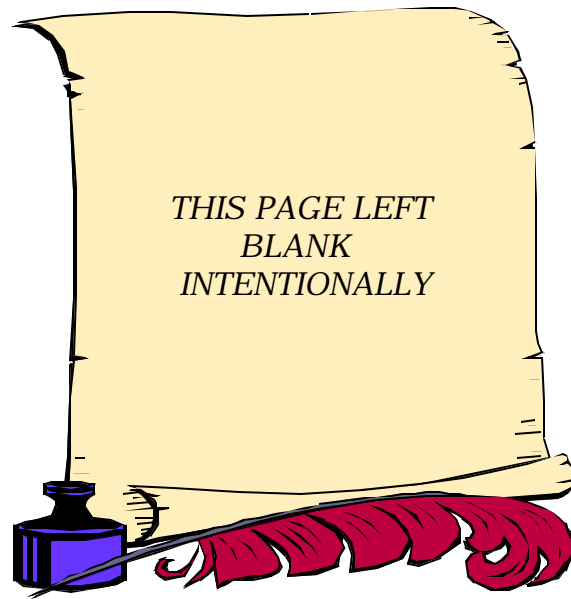


# Schedule of Questioned Costs

<u>Issue</u>	<u>Type of Questioned Costs</u>	
	<u>Ineligible</u> <sup>1/</sup>	<u>Unsupported</u> <sup>2/</sup>
1B. Overnight shipping costs	\$105	
2A. Ineligible fees	16,933	
2B. One-half of closing fees		\$258,587
	_____	_____
<b>Totals</b>	<b><u>\$17,038</u></b>	<b><u>\$258,587</u></b>

<sup>1</sup> Ineligible costs are costs charged to a HUD-financed or insured program or activity that the auditor believes are not allowable by law, contract, or federal, state, or local policies or regulations.

<sup>2</sup> Unsupported costs are costs questioned by the auditor because the eligibility cannot be determined at the time of audit. The costs are not supported by adequate documentation or there is a need for a legal or administrative determination on the eligibility of the costs. Unsupported costs require a future decision by HUD program officials. This decision, in addition to obtaining supporting documentation, might involve a legal interpretation or clarification of Departmental policies and procedures.



# Report Schedule

## PORTNOY & GREENE

Case Number	Settlement Agent	Extension in Writing	Sales Proceeds		Deed Recorded Timely	Correct Amount to Taxing Authority	Docs Forwarded to HUD Timely
			Deposited Timely	Wire Timely			
251-189263	GREEN, MILES, LIPTON	N/A	YES	NO	YES	?	?
251-189706	RICHARD NOVITCH	N/A	YES	NO	YES	YES	?
251-176594	JOHN F LUCEY	N/A	YES	NO	YES	?	?
251-176623	ANTHONY COPANI	YES	YES	NO	?	?	?
251-176676	BOULEY&DONAHOE	YES	NO	NO	YES	?	?
251-179107	RICHARD TASKIN	N/A	NO	NO	YES	YES	?
251-181169	PONICHTERA&DENARDIS	N/A	YES	NO	?	YES	?
251-181990	DAVID LADIZKI	N/A	NO	NO	YES	?	?
251-195164	GREENWALD, GREENWALD	NO	NO	NO	YES	?	?
252-000461	DAVID LADIZKI	N/A	NO	NO	YES	?	?
252-001899	THOMAS ROOKE	YES	YES	NO	YES	?	?
251-152988	MICHAEL NEWHOUSE	N/A	NO	NO	YES	?	?
252-004690	WILLIAM BARRY	N/A	YES	NO	YES	YES	?
252-005080	DAVID LADIZKI	N/A	NO	NO	YES	?	?
252-005578	DAVID LADIZKI	N/A	NO	NO	?	?	?
253-000588	DAVID LADIZKI	NO	NO	NO	YES	?	?
251-136293	SIMS & SIMS	NO	NO	NO	YES	?	?
251-143620	GOLDMAN & GOLDMAN	N/A	YES	NO	YES	?	?
251-141734	RUSSO & SCOLNICK	N/A	NO	NO	?	?	?
251-142754	GILMARTIN & FITZSIMMONS	NO	NO	NO	YES	YES	?
251-148161	DAVID LADIZKI	N/A	NO	NO	YES	?	?
251-149433	SIMS & SIMS	N/A	YES	NO	YES	?	?
251-149566	CARLOS GOMEZ	NO	NO	NO	NO	?	?
251-150006	AHALT, BALL, BRODEUR	N/A	NO	NO	?	YES	?
251-152270	AHALT, BALL, BRODEUR	N/A	YES	NO	YES	?	?
251-153815	TASHJIAN, SIMSARIAN	YES	YES	NO	YES	?	?
251-156550	DAVID LADIZKI	NO	YES	NO	YES	?	?
251-156877	DAVID LADIZKI	NO	NO	NO	YES	?	?
251-174053	BARRY GRUNIN	YES	YES	NO	YES	?	?
251-176494	JOHN MURPHY	YES	YES	NO	?	NO	?
251-170066	?	N/A	YES	NO	YES	?	?
251-170280	SAULINO & SILVA	N/A	NO	NO	YES	?	?
251-171329	BACON & WILSON	YES	YES	NO	YES	YES	?
251-166039	RICHARD GOLDMAN	N/A	YES	NO	?	?	?
251-166232	KORTEZ & MURPHY	N/A	NO	NO	?	?	?
251-166645	GIANNINI CRAVEN LEACH	N/A	NO	NO	NO	?	?
251-182900	FLEMING TITLE	N/A	NO	NO	YES	?	?
251-176767	ARTHUR F. HALEY	NO	NO	NO	?	?	?
251-190775	RICHARD A. BROOSLIN	request only	NO	NO	YES	?	?
252-000694	JOHN S. O'BRIEN	N/A	YES	NO	YES	?	?
252-000979	FRATAR & KERN	N/A	NO	NO	YES	?	?
252-002527	HUNTER & GRAZIANO	N/A	NO	NO	YES	?	?
252-003151	FREEDMAN, DeROSA, & RONDEAU	N/A	YES	NO	YES	?	?
252-003753	DRAYMORE, MASTIN, & GOLDBERG	N/A	NO	NO	NO	?	?
252-004376	DANIEL P. GARVEY	N/A	YES	NO	YES	?	?
252-004990	HUNTER & GRAZIANO	N/A	YES	NO	YES	?	?
252-005255	PORTNOY & GREENE	N/A	YES	YES	YES	YES	?
253-000132	GERALD B. BERG	N/A	NO	NO	?	?	?

Appendix B

Case Number	Settlement Agent	Extension in Writing	Sales Proceeds Deposited Timely	Wire Timely	Deed Recorded Timely	Correct Amount to Taxing Authority	Docs Forwarded to HUD Timely
253-000717	DRAYMORE, MASTIN, & GOLDBERG	NO	YES	NO	YES	?	?
251-136777	DRAYMORE, MASTIN, & GOLDBERG	NO	YES	NO	YES	?	?
251-147687	COSTELLO & GREYDANUS	N/A	NO	NO	NO	?	?
251-146306	ARTHUR F. HALEY	NO	NO	NO	YES	?	?
251-150506	JAMES V. PAOLINO	N/A	NO	NO	YES	YES	?
251-154506	THOMAS P. MILLOTT	N/A	NO	NO	YES	YES	?
251-157005	VICTOR M. FORSLEY	YES	NO	NO	YES	?	?
251-173152	LEVIN & LEVIN	N/A	NO	NO	YES	?	?
251-172194	JOSEPH M. FIDLER	N/A	YES	NO	YES	?	?
251-176683	SIMS & SIMS	N/A	?	NO	YES	?	?
251-166682	GOULD & GOULD	N/A	YES	?	?	?	?
251-164108	DANIEL W. MURRAY	NO	?	?	?	?	?

YES	8	26	1	44	10	0
NO	12	32	57	4	1	0
N/A	39	0	0	0	0	0
WAIVED	0	0	0	0	0	0
?	0	2	2	12	49	60
MAYBE						
REQUEST ONLY	1					

# Auditee Comments

LAW OFFICES  
OF  
PORTNOY AND GREENE, P. C.

113 UNION WHARF EAST  
BOSTON, MASSACHUSETTS 02109

(617) 523-7461  
(617) 523-5892  
FAX NUMBER (617) 523-0183

July 19, 2000

By Overnight Mail

D. Michael Beard  
Assistant District Inspector General  
U.S. Department of Housing and Urban Development  
Southwest District Office of Inspector General  
819 Taylor Street, Room 13A09

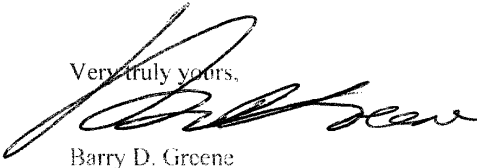
Re: Office of Inspector General Audit Case Number 00-FW-222-100

Dear Mr. Beard,

Enclosed please find the Response of Law Office of Portnoy & Greene PC to Office of Inspector General Audit Case Number 00-FW-222-100 together with a check in the amount of \$105.00 made payable to the U.S. Department of Housing & Urban Development. The check is for the payment of certain overnight charges that are discussed in the Audit and in our Response. Per the policy of the Office of Inspector General, please include the enclosed Response as an appendix to the Final Report to be issued by your office.

Please do not hesitate to contact my attorney, Thomas J. Gallitano, Esq. Of Conn Kavanaugh Rosenthal Peisch & Ford, LLP at 617-348-8213 if you need any information relative to the above referenced matter.

Very truly yours,



Barry D. Greene

Cc: Thomas J. Gallitano, Esq.

**RESPONSE OF LAW OFFICE OF PORTNOY & GREENE, P.C. TO  
OFFICE OF INSPECTOR GENERAL AUDIT CASE NUMBER 00-FW-222-100**

**SUMMARY**

The Law Office of Portnoy & Greene, P.C. ("P&G") hereby submits this Response of Law Office of Portnoy & Greene, P.C. to Office of Inspector General Audit Case Number 00-FW-222-100 (the "Audit"), to be included in accordance with the policy of the Office of Inspector General as an appendix to the Final Report to be issued in connection with the Audit.

P&G sets forth below its responses to the specific conclusions reached in the Audit relative to P&G's performance as a closing agent for HUD, as well as with respect to the issue of collection of closing agent fees. Simply stated, P&G's position is that the firm met or exceeded performance standards established by HUD, and that in point of fact in those few instances where the technical requirements of the contract were not met, it was due either to HUD's actions or inactions, or to express directives from HUD employees concerning how contract obligations were to be fulfilled. With respect to the matter of collection of closing agent fees, P&G's position is that the firm collected the proper fee under the circumstances, the firm performed all of the work HUD expected P&G to perform so as to earn that fee, and the Inspector General's position reflects a fundamental miscomprehension of Massachusetts law pertaining to real estate conveyancing practices in general, and the obligations imposed upon P&G by HUD in particular.

In addition to the foregoing, P&G states that it has been hampered in its ability to respond in greater detail to the Draft Audit Report, for at least two reasons. First, the Draft Audit Report describes alleged substandard performance with respect to 60 files selected by HUD for review, but the allegations are made in the aggregate without reference to particular files. Accordingly, P&G is prevented from responding to the Draft Audit Report with the degree of specificity, on a file by file basis, that the firm believes is warranted under these circumstances. Second, shortly after receipt of the Draft Audit Report, Thomas J. Gallitano, Esq., counsel to P&G, spoke with Theresa A. Carroll, Assistant District Inspector General, to request the opportunity to speak with HUD employees about the subject matter of the Draft Audit Report. Ms. Carroll responded to that request on July 11, 2000, indicating in a voicemail message that Mr. Gallitano could contact HUD employees as requested. Mr. Gallitano and his firm made prompt efforts to reach Edwin T. Steffek, HUD's Contracting Officer, but did not learn until late on Thursday, July 13, 2000 that Mr. Steffek's position was that he would not speak about the subject matter of the Draft Audit Report without first obtaining written authority to do so from the Office of Inspector General and from HUD. [Mr. Gallitano and his firm also desired to interview a former HUD employee named Richard Weston, but Mr. Weston is retired and as yet they have been unable to locate him.]

In view of the deadline for submittal of this Response, P&G has been unable to include pertinent information it expected to obtain from Mr. Steffek and Mr. Weston, in the form of sworn affidavits. Accordingly, P&G respectfully requests that: (1) the Office of Inspector General and HUD provide written authority to Mr. Steffek, and others if requested, granting permission to discuss the subject matter of this Audit with P&G and its attorneys; (2) HUD



provide to P&G and its attorneys a last known address and telephone number for Richard Weston; and (3) P&G be given an opportunity to supplement its response to the Draft Audit Report once it has obtained a sworn affidavit from Mr. Steffek and once it has exhausted efforts to locate Mr. Weston and obtain a sworn affidavit from him.

### **OIG ALLEGATIONS AND P&G RESPONSES**

1. **OIG Allegation:** PORTNOY & GREENE’S OVERALL PERFORMANCE WAS SUBSTANDARD

**P&G Response:** P&G’S PERFORMANCE COMPLIED WITH THE HUD CONTRACT AND HUD’S ALLEGATIONS REPRESENT A FUNDAMENTAL MISUNDERSTANDING OF HOW CLOSINGS ARE CONDUCTED IN MASSACHUSETTS.

- a. **OIG Allegation:** Sales proceeds not deposited timely.

**P&G Response:** *Sales proceeds deposited by wire as soon as they were available to P&G.*

- b. **OIG Allegation:** Sales proceeds not wired to HUD timely.

**P&G Response:** *P&G authorized sales proceeds to be wired to HUD as soon as they were deposited, and any delay in this were occasioned by either bank delay or the timing of the wire authorization.*

**P&G Response to both (a) and (b):**

The allegations of both (a) and (b) represent a fundamental misunderstanding of how closings are conducted in Massachusetts. Contrary to HUD’s allegation, the timing of the deposit of the sales proceeds is not dependent on P&G’s attendance at the closings<sup>1</sup>, but rather, on the *availability* of the sales proceeds.

In Massachusetts, sales proceeds are not available to the seller until the deed has been recorded. According to Massachusetts General Laws (“G.L.”) c. 183, §63B, otherwise known as the Massachusetts Good Funds Law, (annexed as Exhibit A), the deed may not be recorded until the lender’s attorney (or buyer’s attorney, if there is no financing) has received the loan proceeds from the lender.

The allegations in HUD’s audit report also overlook the fact that sales proceeds are not available to P&G until after the deed is recorded, the timing of which is beyond P&G’s control. As a practical matter, in Massachusetts, the deed is recorded by lender’s attorney in virtually all instances, for three reasons. First,

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<sup>1</sup> P&G takes issue with any characterization that the closings in question were third party closings, for reasons fully set forth in section 2.

they are the ones charged with ensuring good title in the name of the buyer and a good mortgage in the name of the lender. A lender's attorney will not, therefore, issue title insurance unless they record the deed themselves. Second, a lawyer is ethically prohibited from delivering a deed to the Register of Deeds without knowing that the funds to pay for the deed or the funds to pay for a refinance are actually sitting in his or her escrow account. A lender's attorney, therefore, is the only one that can ethically record the deed. Third, it is important that the deed and the mortgage are recorded simultaneously. Any lag time would carry the danger of selling the property before the mortgage is recorded. This is an unacceptable risk for lenders and their attorneys, and for these reasons, a lender's attorney records the deed and the mortgage simultaneously. Accordingly, in light of the manner in which real estate conveyancing is conducted in Massachusetts, P&G cannot control when sales proceeds become available for deposit.

Since the 1999 Audit, P&G has established a system whereby P&G authorizes the wiring of net proceeds to HUD as soon as they become available. Once the deed has been recorded, P&G causes the net proceeds to be wired directly into P&G's account with Boston Private Bank & Trust Company. From there, per P&G's instructions, the net proceeds are wired to HUD as soon as practicable.

It is important to note that this practice operates within the constraints of the banking world, which are sometimes unavoidable. For example, depending on the timing of the wire request, a wire may not go out until the next business day. This is the case with wire requests made after 2:00 p.m., and Friday wire requests. This system transfers funds to HUD in the quickest manner possible.<sup>2</sup>

Moreover, the HUD audit report automatically (and unfairly) concluded that any delays in depositing funds were P&G's fault, without analyzing the reasons behind the delays. This generalization does not take into account that delays in depositing the sales proceeds are occasioned for various reasons beyond P&G's control. These reasons can include a delay caused by a lender, a Friday closing (meaning that the deed would not be recorded until Monday), or simply a delay in the closing attorney sending the closing packages to P&G. HUD has not provided a single specific instance where it determined that P&G was responsible for the delays in the deposit of funds, and cannot do so, because the fact remains that P&G deposited the sales proceeds as soon as the proceeds were made available to P&G.

- c.     **OIG Allegation:**     Uncertified funds accepted at closings.
- P&G Response:**     P&G's prior practice of accepting law firm issued checks at closing is standard practice in Massachusetts and as secure as any certified check.

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<sup>2</sup> Boston Private has informed P&G that funds in the form of a certified check would not be wired until the next business day after the wire was authorized.

In Massachusetts, lenders are represented by attorneys, who issue net proceeds on law firm trust accounts known as Interest on Lawyers' Trust Accounts ("IOLTA") accounts. The receipt of funds in this manner is as secure as any certified check and in accordance with local custom and usage. Massachusetts attorneys are held to the highest ethical standards and responsibilities in safeguarding and issuing checks from IOLTA client funds, and can be disbarred if a check issued from an IOLTA fund bounces. Therefore, these types of checks carry the assurance that the trust accounts contained sufficient funds to clear the checks. For these reasons, law firm IOLTA account checks are as reliable as certified checks in this jurisdiction.

Moreover, accepting IOLTA checks carries no risk because of the Good Funds Law, which provides that a deed cannot be recorded until closing funds have been received from the lender to the lender's attorney. This law protects the seller by ensuring that the lender's attorney will not go to record until he or she receives the relevant sales proceeds.

Another reason for the practice of accepting IOLTA checks is because conveyance funds are often not available from the lender bank at the time of the closing itself. Certified checks, therefore, cannot be issued. In addition, with respect to the IOLTA checks, P&G has no control over when funds are actually posted to a lender's counsel's account. This is so because both sellers and buyers are subject to the methods by which lenders do business. Lenders fund loans on the day of a closing during normal business hours, and therefore, a closing at 9 a.m. may not be funded until 5 p.m. that same day. These circumstances are a product of the lending industry practice that is beyond P&G's control.

In the context of this reality, since the 1999 HUD Audit, P&G has established a direct wire transfer system that facilitates the quickest transfer of funds to HUD once the funds do become available. This system is more fully described in the response to (a) and (b).

Finally, HUD has failed to identify any occasion where the proceeds accepted at closing were not sufficiently funded by the accounts from which they were drawn.

d. **OIG Allegation:** Closing costs were not itemized.

**P&G Response:** *HUD specifically precluded P&G from itemizing closing costs on its settlement statements.*

As explained in more detail below, HUD provided P&G with very specific instructions that they wanted settlement statements prepared in a particular fashion, which excluded itemized closing cost credits.

Although the draft audit report is not specific about what closing costs were not itemized, P&G was specifically instructed by HUD that closing cost credits were to be listed as one line item.

P&G calculated closing cost credits according to local custom, which is permitted pursuant to P&G's contract with HUD. The audit report apparently incorrectly assumes that closing costs may not have been done reasonably because they were not itemized. However, P&G employed a specific formula for determining closing cost credits, which can be used by HUD to itemize the closing costs.

The formula utilized is as follows: 800 Series (Bank Fees) + 1100 Series (Attorney, Title and Title Insurance Fees) + 1200 (Recording Fees) + 1300 (Survey and Miscellaneous Fees).

The closing cost credit was calculated according to local custom and practice. Indeed, certain items were never included in the closing cost credit regardless of where the closing cost credit figures were located on the HUD settlement statement, including the following: (1) prepaid interest on a loan, (2) prepaid homeowner's (hazard) or mortgage insurance premiums, (3) prepaid escrows for real estate taxes, mortgage insurance premiums or homeowner's insurance premiums, and (4) prepaid rehabilitation funds (203k loan). Accordingly, contrary to HUD's audit report, HUD does have a way of knowing what closing costs are being paid and whether or not those costs are reasonable.

In addition, the closing cost credits reflected on the settlement statement were often lower than those originally estimated in the contract, because P&G attorneys determined that the closing costs incurred were actually less than originally estimated. This demonstrates that P&G was very attentive to ensuring that the closing cost credits were both accurate and reasonable.

Robert Davis was the Chief Property Officer at the time P&G was awarded the contract in 1992. Mr. Davis made it very clear that HUD's settlement statements had to be prepared in a particular fashion. He also stressed that he wanted consistency and uniformity from matter to matter so that information on the settlement statements could be readily entered into the SAMS system. Mr. Davis therefore required that P&G prepare a HUD settlement statement for each and every closing, even in those instances when the buyer would use bank financing. Mr. Davis repeatedly made this point to P&G employees.

Moreover, P&G was also told by several other HUD employees, including Christopher Cline, that a separate HUD settlement statement, in HUD-approved format, was necessary for the data entry of the information by HUD employees into the SAMS system. (See Affidavit of Jack Smolokoff, annexed as Exhibit B). This format was not acceptable to some lenders or their counsel, who prepared their own settlement statements that did itemize the closing costs.

Accordingly, since HUD repeatedly and specifically directed P&G to prepare settlement statements that were not itemized, P&G was not at liberty to itemize them without specific instructions from HUD. In a July 23, 1999 letter to Paula Graf, P&G addressed this problem with HUD and asked for specific direction in this regard. (See P&G's July 23, 1999 letter annexed as Exhibit C). Despite this letter, P&G did not receive any response from HUD on this issue.

- e. **OIG Allegation:** Closing files lacked sufficient documentation.

**P&G Response:** *Closing files contained all necessary documentation that was generated in the course of the real estate conveyancing process.*

- i. **OIG Allegation:** Lacking documentation to support that it correctly prorated amount of taxes due.

**P&G Response:** *P&G would sometimes be forced to prorate taxes with information it received over the telephone, since towns did not always provide the necessary documentation in a timely basis to include in the file.*

A Municipal Lien Certificate ("MLC") issued by the town where the property is located contains the tax information necessary to prorate the amount of taxes due. Although Massachusetts law requires the town to provide the MLC within ten days of the request, some towns, such as Boston, Worcester, and Springfield, could not provide the MLC in time for the closing.

At the time period subject to the audit, the HUD contract did not require P&G to do a tax search or order an MLC. The lender's attorney, however, would order the MLC, and were not compelled to send P&G a copy for the HUD file. P&G would therefore obtain the tax information orally, in one of two ways: (1) from the Lender's attorney, or (2) by calling the town directly. P&G would then calculate the taxes due according to the figures orally provided.

Accordingly, the fact that some of the files reviewed did not contain MLCs, has no bearing on whether the taxes were correctly prorated, since this information was obtained orally by P&G if the Lender's attorney did not forward the MLC or the MLC was not forwarded in a timely basis by the town .

In addition, HUD has pointed to no instance where it has been advised by any city, town or any other entity that the amount of taxes due was incorrectly prorated by P&G.

ii. **OIG Allegation:** No evidence that clear title was conveyed.

**P&G Response:** *At the time in question, P&G was not required to order a title search, and was not provided with the requisite documentation from HUD to determine that clear title was being conveyed.*

At the time that the audited files were generated, P&G was not required to order a title search.<sup>3</sup> Rather, it was HUD's responsibility, if it so chose, to provide P&G with the information regarding clear title. Foreclosure attorneys would send the title submissions directly to HUD for approval. These would include very important documents, such as the owner's title policies (which ensure marketable title) and foreclosure documents which could be reviewed for accuracy. However, HUD did not provide P&G with these documents despite P&G requests, and HUD was actually cited by an internal audit for the backlog in processing the title information provided by the foreclosure attorneys.

This issue was discussed at length between P&G and HUD, and ultimately resulted in an April 1999 amendment to the P&G contract that allowed P&G to search for title.

Despite HUD's failure to provide P&G with the documents it needed, as a practical matter, P&G knew clear title was conveyed, by virtue of the title insurance obtained by the lender's attorney. Lender's attorneys would only issue title insurance if a title search had been conducted to determine that marketable title was being conveyed. In cases of no financing, P&G, at the direction of HUD, required buyers to have attorneys (who would perform a title examination and certify title to the buyer). In the alternative, buyers were required to sign a waiver regarding the title. If a problem regarding the title was found in the process of issuing title insurance, P&G would have been notified of this by the lender or buyer counsel, and would have included such documentation in the file.

Accordingly, if any audited files did not contain evidence that clear title was conveyed, it was because at the time in question, P&G was not required to conduct title searches, and were not provided with the evidence of clear title from HUD.

iii. **OIG Allegation:** No documentation of when file conveyed to HUD

**P&G Response:** *The deed provided evidence of when the property was conveyed to HUD*

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<sup>3</sup> That task only recently became a requirement pursuant to contract Modification No. 5, dated April 1999.

P&G is interpreting this audit point to mean that there is no documentation of when the property itself was originally conveyed to HUD. In response to that, P&G states that in Massachusetts, a deed must contain a reference to when property was conveyed to the seller. Therefore, the deeds in each file did contain evidence, by means of book and page number in the Registry of Deeds, of when the property in question was conveyed to HUD.

In addition, P&G incorporates its response to item 1(e)(ii) herein, in that P&G was not required at that time to order title searches, and was not provided with the requisite documentation from HUD regarding the title search. It would be unfair, therefore, to blame P&G for HUD's oversight. If P&G's interpretation of this audit point is different than what is described above, P&G requests clarification and an opportunity to respond accordingly.

- iv. **OIG Allegation:** No documentation that deed was properly recorded.

**P&G Response:** *The deed itself contains the evidence that the deed was properly recorded.*

Since in Massachusetts the deed may not be recorded until the lender's attorney has received the loan proceeds from the lender, the lender or buyer attorney, pursuant to custom and practice, typically records the deed.

P&G ensures that the deed is properly recorded by having the recording attorney call with the recording information, which P&G then handwrites on the copy of the deed sent to HUD in the closing package and contained in the file itself. Therefore, the files do contain documentation, by means of the book and page number, that the deed was properly recorded

- v. **OIG Allegation:** When a closing did not occur in a timely manner, lack of documentation that an extension was obtained and the appropriate fee was paid to or waived by HUD.

**P&G Response:** *Extensions were always obtained from HUD, and were often necessitated by HUD's lack of readiness to convey good title.*

In the event that a closing did not occur in a timely manner, extensions were always obtained from HUD. The extensions would be sought from the buyer or the buyer's broker, and often, directly to HUD staff without P&G's involvement. Obviously, in those instances where P&G did not

have any involvement in the extensions, no paperwork would be included in the P&G file.

Moreover, extensions were obtained on an informal basis and without paperwork because of sparse staff at HUD and the large number of closings that were conducted on a monthly basis. HUD did not require any form to be filled out when extensions were granted, but P&G attorneys often noted on the inside cover of the case file that an extension was approved by HUD. The HUD audit report does not reflect whether the inside covers of the audited files were examined for these handwritten notations by P&G staff.

The HUD audit report also failed to acknowledge the important point that often, an extension was needed by HUD itself because of HUD's own inability to convey good title at the first scheduled time for a closing.

In addition, HUD has not provided any evidence that the closings conducted in the 12 of the 21 cases were jeopardized in some way because the HUD file itself did not contain documentation of the approval provided by HUD for the delayed closing. Likewise, HUD has not provided any evidence that P&G compromised HUD's position in any way due to a delayed closing or absence of documentation of the approval provided by HUD.

- f. **OIG Allegation:** Ineligible mail expenses charged to HUD.

**P&G Response:** *P&G has agreed to pay HUD the \$105 in overnight shipping charges that were incorrectly charged to HUD.*

P&G has already advised HUD that the \$105 in overnight shipping was incorrectly charged to HUD. P&G hereby reimburses HUD the \$105 in overnight shipping charges (check annexed). P&G also points out that these shipping charges, although erroneously charged to HUD, are nominal, and do not rise to the level of warranting termination of P&G's contract with HUD.

- g. **OIG Allegation:** Similar problems found in the past.

**P&G Response:** *Past audits did not implicate P&G's performance.*

A Price Waterhouse audit was never conducted of P&G, but of HUD itself, and to P&G's knowledge, said audit did not implicate P&G's performance of the HUD contract. Given that P&G's contract with HUD did not begin until 1992, the allusion to a Price Waterhouse audit in the early 1990's is otherwise too vague to respond to without further information. P&G respectfully requests that it be provided with specific information regarding any allegation that this audit criticized P&G, in order to fully and completely respond to this allegation.



Regarding the HUD Single Family Review in early 1999, the problems found with the timeliness of deposits had to do with the fact that certified checks were unavailable from lenders at the time of closing, a fact which is a product of the lending industry and beyond P&G's control.

In addition, HUD's 1999 review did not question P&G's assertion that it was the settlement agent. Rather, Paula Graf from HUD indicated that she felt there was a difference of opinion *within HUD itself* (between Contracting and HUD Single Family) over the definition of third party closings and whether or not third party closings were done in Massachusetts. (See Exhibit C). At the conclusion of that audit, Ms. Graf indicated that she would be meeting with other HUD employees in an attempt to resolve this internal confusion. Id.

**2. OIG ALLEGATION: PORTNOY & GREENE IMPROPERLY COLLECTED THE FULL CLOSING AGENT FEE.**

**P&G RESPONSE:** *THERE ARE NO THIRD PARTY CLOSINGS IN MASSACHUSETTS AND THEREFORE P&G PROPERLY COLLECTED THE FULL CLOSING AGENT FEE INSOFAR AS IT PERFORMED ALL OF THE WORK REQUIRED TO EARN THE FULL FEE.*

- a. OIG Allegation:** Third-party agents performed the majority of closings reviewed.

**P&G Response:** *Lender attorneys who attended the closings did so on behalf of the lender only, and are ethically prohibited from acting as third party agents in a closing.*

Real estate closings are conducted differently from state to state. As a result, a national contract does not always fit neatly in all instances. HUD's own contract concedes that local law, custom, and practice would control the closing process, and that is what P&G has adhered to in Massachusetts.

Unlike other jurisdictions, lawyers, not neutral third party agents, conduct closings in Massachusetts. See Massachusetts Association of Bank Counsel Inc., et al., v. Closings, Ltd., 1993 WL 818916. Accordingly, third party agent closings do not occur in Massachusetts.

Moreover, an attorney cannot represent adverse parties without the express consent of each party. (See Mass. Rules of Professional Conduct, Rule 1.7, annexed as Exhibit E) Sellers and buyers are not represented by the same attorney at a closing: they are either represented by separate counsel, or they do not have counsel. Therefore, as a seller's attorney, P&G could not impart advice to the buyer, nor could P&G prepare the buyer's closing documents, such as

notes, mortgages, deeds of trust, and other loan documents that would typically be prepared by a bank's attorney.

The bank's attorney, who conducts the closing in cases of financing, is not acting independently of the parties. Rather, that attorney is acting only at the direction of, and in the best interests of, his or her client, the lender. Therefore, in cases where a bank attorney conducts the closing on behalf of the lender, he or she is not acting as HUD's third-party agent as that term is defined in HUD's Single Family Property Disposition Handbook. In fact, Massachusetts ethical rules imposed on lawyers expressly forbid lawyers from representing the interests of adverse parties without the express written consent of each party. (See Exhibit E).

This point is further driven home given the fact that HUD's Single Family Property Disposition Handbook provides that in the context of a third-party closing, P&G would be responsible for overseeing the work of the third-party agent. However, lawyers cannot control or oversee the work performed by other lawyers representing separate (and adverse) clients. P&G cannot, therefore, be responsible for the work of bank attorneys representing the lenders.

The fact that there is no such thing as third party closings in Massachusetts is a point that has been repeatedly admitted to by HUD personnel including Richard Weston, Edwin Steffek, and Robert Davis. (See June 30, 1999 letter from Weston and November 1, 1999 letter from Steffek, annexed as Exhibits F and G). Davis has even reiterated to P&G that one of the reasons he required a HUD settlement statement was in order to adhere to HUD policy that third party closings are to be avoided whenever possible. To underscore this directive, Davis provided Mr. Greene with a 1993 internal document that specifically made this point.

Indeed, the preparation of a HUD settlement statement required P&G to undertake the time-consuming process of verifying and balancing the closing figures in question, a fact which further demonstrates that the closings were not being conducted by third party agents.

Accordingly, the allegation that third parties performed most of the closings reviewed represents a fundamental misunderstanding of how closings are in fact conducted, and the interests represented at each closing. In light of the above explanation, P&G has shown that there are no independent agents in a Massachusetts closing, and no fee splitting would therefore be warranted.

b. **OIG Allegation:** Portnoy & Greene did not attend closings.

**P&G Response:** *HUD approved of P&G conducting closings through the mail, and this issue is now moot because P&G now attends each and every HUD closing.*

HUD and P&G discussed that given the sheer volume of HUD closings, and their location across the state, P&G was unable to attend all of them. This fact was made known to HUD by P&G, and HUD employees, including Chris Cline, approved of P&G's practice of conducting closings through the mail. (See Exhibit B, Affidavit of Jack Smolokoff, at ¶ 4).

Moreover, physical presence at the closings did not ensure the representation of HUD's interests, since for the most part, the closing itself was not much more an exchange of signatures. Most of the work for a closing was done by P&G prior to the closing, which is why it was feasible to conduct closings by mail.

Finally, this issue is now moot because since the spring of 1999, P&G has attended each and every HUD closing.

- c. **OIG Allegation:** Two settlement statements prepared.

**P&G Response:** *HUD required that P&G prepare a second settlement statement in HUD-mandated format.*

HUD unequivocally required P&G to prepare a second settlement statement for HUD's use, despite the fact that other parties to the closing (typically the lender's attorney) also prepared a settlement statement.<sup>4</sup>

HUD employees such as Robert Davis and Christopher Cline stressed that the HUD settlement statements were to include only certain figures, in certain locations on the form, for uniformity and so that information on the settlement statements could be readily entered into the SAMS system. (See Exhibit B, Affidavit of Jack Smolokoff, at ¶ 3).

Therefore, P&G's practice of preparing a separate settlement statement for HUD was done at HUD's specific direction and approval, and neither misled HUD, nor confused the buyer.

- d. **OIG Allegation:** Portnoy & Greene believed it was not performing third-party closings.

**P&G Response:** HUD repeatedly advised P&G that the closings it was conducting were not third-party closings.

At P&G's request, HUD's Contracting Officer, Richard Weston, clarified HUD's position on the issue of "third party" closings in a June 30, 1999 letter to P&G. In that letter, Mr. Weston acknowledges that independent closing agents are not used in Massachusetts, and makes explicit that P&G's closings were not third-party closings. (See Exhibit F). "Under the subject contract, your firm is HUD's

<sup>4</sup> The lender's attorneys would often reject the HUD settlement statement because it did not itemize the closing costs in the detail preferred by conveyancing attorneys in Massachusetts.

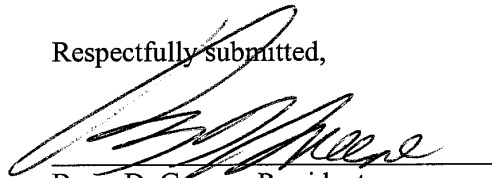
lawyer, and acts as the seller's attorney in closing the sales of all HUD-owned property in Massachusetts." Id.

Two other HUD employees admitted that no third-party closings took place in Massachusetts. Robert Davis, the former HUD Chief Property Officer, admitted to P&G that no third-party closings were being conducted in Massachusetts, and relayed this information to another government agency in the context of a 1994 audit of P&G.

Most recently, Edwin T. Steffek, HUD's Contracting Officer, reiterated that both he and Peter Spina, the GTR, agreed that the closings conducted by P&G were not third party closings. In a November 1, 1999 letter to P&G, Steffek writes, with emphasis, "it has been determined by both the GTR, Peter Spina, and the undersigned Contracting Officer that these closings conducted by your firm when you perform the duties specified as your duties are NOT Third Party Closings since closings done on behalf of HUD in Massachusetts require an attorney to do such closings." (Exhibit G).

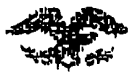
Therefore, not only P&G, but also HUD believed that P&G was not performing third party closings. Any confusion in this belief was internalized at HUD, as Paula Graf from HUD noted at her 1999 review of P&G. At the conclusion of that audit, Ms. Graf indicated that she would be meeting with other HUD employees in an attempt to resolve this internal confusion, which, unfortunately continues to persist.

Respectfully submitted,



Barry D. Greene, President  
Portnoy & Greene, P.C.

CKDOCS:80829.1



## Good Funds Law

### Good Funds

- A synopsis of the "Good Funds Law," in layman's terms, would be as follows:

If a lender lends money in a real estate transaction that involves a mortgage, the mortgage shall not be recorded until the lender has forwarded to either the mortgagor, the mortgagor's attorney, or the mortgagee's attorney the proceeds of the loan in the form of a certified check, bank treasurer's check, cashier's check, or wired funds, but the attorneys, once they receive the money, do not have to disburse the funds in that form.

The "Good Funds Law" is contained in G.L.c. 183, §63B. The full text of the statute is as follows:

No mortgagee who makes a loan to be secured by a mortgage or lien on real estate located in the commonwealth in conjunction with which, a mortgage deed evidencing the same is to be recorded in a registry of deeds or registry district in the commonwealth, shall deliver said deed or cause the same to be delivered into the possession of such registry of deeds or registry district for the purpose of the recording thereof unless prior to the time said deed is so delivered for recording, said mortgagee has caused the full amount of the proceeds of such loan due to the mortgagor pursuant to the settlement statement relevant thereto given to said mortgagor or in the instance of any such loan in which the full amount of the proceeds due to the mortgagor pursuant to the terms thereof are not to be advanced prior to said recording, so much thereof as is designated in the loan agreement, to be transferred to the mortgagor, the mortgagor's attorney or the mortgagee's attorney in the form of a certified check, bank treasurer's check, cashier's check or by a transfer of funds between accounts within the same state or federally chartered bank or credit union, or by the fundtransfer system owned and operated by the Federal Reserve Banks, or by a transfer of funds processed by an automated clearinghouse; provided, however, that neither the mortgagor's attorney or the mortgagee's attorney shall be required to make disbursements or deliver said proceeds to the mortgagor in such form; provided, however, that the provisions of this section shall not apply to the commonwealth, its agencies, or political subdivisions.

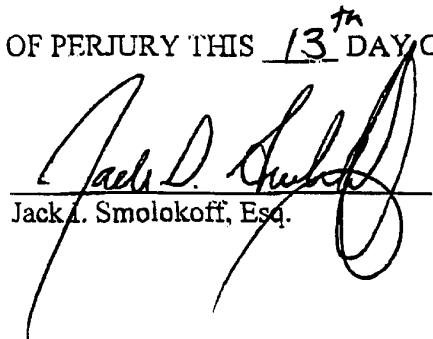
**AFFIDAVIT OF JACK I. SMOLOKOFF**

I am an attorney admitted to the practice of law in Massachusetts and make the following statements under oath and with personal knowledge:

1. I was employed by Portnoy & Greene, P.C. ("P&G"), a real estate law firm, as an associate from January 4, 1994 to December 1998.
2. While I was at P&G, P&G was the closing agent for the United States Department of Housing and Urban Development ("HUD") pursuant to a contract entered into between P&G and HUD. From approximately 1995 until December 1998, I was primarily responsible for handling the HUD contract closings, and this required me to have direct involvement with HUD employees, like Christopher Cline, Catherine McDonald, and Kim Demeo.
3. On several occasions during the time that I was handling the HUD contract closings, including the time period between April 1998 and December 1998, Mr. Cline, Ms. McDonald, Ms. Demeo, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald, explicitly instructed me that I was always to prepare a settlement statement for HUD's use even though the lender's attorney was already preparing a settlement statement. Mr. Cline, Ms. Demeo, Ms. McDonald, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald explained that this second HUD settlement statement was to include certain figures, which were to be placed in certain specific locations on the form. They further explained that this was necessary because HUD wanted uniformity in the entry of the settlement statement data into the SAMS database.

4. During the time that I was handling the HUD contract closings, including the time period between April 1998 and December 1998, Mr. Cline, Ms. McDonald, Ms. Demeo, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald approved of P&G conducting closings through the mail. Mr. Cline, Ms. McDonald, Ms. Demeo, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald repeatedly discussed with me that given the sheer volume of HUD closings, and their location across the state, P&G was unable to attend all of them. Mr. Cline, Ms. McDonald, Ms. Demeo, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald never instructed me otherwise, and explicitly approved of P&G's practice of conducting closings through the mail, because this allowed HUD to meet its quota of closings.
5. When extensions to the closing date were needed, I obtained approval for these extensions orally from Mr. Cline, Ms. McDonald, Ms. Demeo, and/or HUD employees working directly for Mr. Cline and/or Ms. McDonald, as was the accepted practice, and often made an informal handwritten notation to this effect in the file. These HUD employees freely approved of these extensions, and only rarely required the payment of a late fee for them. This was the practice during the time that I was handling the HUD contract closings, including the time period between April 1998 and December 1998.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 13<sup>th</sup> DAY OF July, 2000.

  
\_\_\_\_\_  
Jack L. Smolokoff, Esq.

CKDOCS:81362.1

LAW OFFICES  
OF  
PORTNOY AND GREENE, P. C.

113 UNION WHARF EAST  
BOSTON, MASSACHUSETTS 02109

(617) 523-7461  
(617) 523-5892  
FAX NUMBER (617) 523-0183

July 23, 1999

Via Fax# 817-978-9316  
And UPS

Paula Graf, CPA, CGFM  
Office of the Inspector General For Audit  
U.S. Department of Housing and Urban Development  
P.O. Box 2905  
1600 Throckmorton  
Rm. 404  
Fort Worth, TX 76113

Re: HUD Contract No. H01C96000300000, Portnoy & Greene PC

Dear Ms. Graf,

This letter is to summarize the content of our recent entrance and exit interviews with you and some of the discussions that we had during the course of those interviews.

You advised us that the issue of third party closings was your primary concern. During the course of the audit you informed me that you believed there is a difference of opinion between Contracting and HUD Single Family over the definition of third party closings and whether or not third party closings are done in Massachusetts. During the course of the time that you were in our office I provided to you a significant amount of information that shed light on how we do closings in Massachusetts in comparison to how closings are done elsewhere. I hope you found this information helpful. In addition you also received a copy of a letter that we received from Richard Weston, our contracting officer. The purpose of the letter was in part, to clarify his position concerning third party closings. He is of the opinion that we are and have been in compliance with our contract. Given the apparent confusion over the issue of third party closings it is my understanding that you will be returning to Boston to meet with Mr. Weston and others at HUD including Robert Davis, Catherine MacDonald, Chris Cline and possibly others for the purpose of attempting to resolve the confusion. While you are not planning to have Michelle Machado or me be part of that meeting, please understand that we will be available to discuss matters with you or anyone else connected to this issue.

During the course of your examination you reviewed a number of matters that I understand you will be covering in a report that we may or may not see at some future date. I would like to review some of the issues that you covered. You requested to see copies of Special Warranty Deeds that we prepare incident to our duties as closing agent. You and I discussed the fact that although the contract is a national contract that is meant to cover the entire country it must be



viewed in terms of local custom and practice. We do not issue a deed called a **Special Warranty Deed**. Our deeds are either **Warranty Deeds** or **Quitclaim Deeds**. For all practical purposes however a **Special Warranty Deed** is a **Quitclaim Deed**. Thus, in our view, the issue is a matter of form over substance. I do not believe we should alter our practice in this regard at this time. You may recall that I provided to you a copy of the Massachusetts statute and a copy of a section of our Massachusetts Practice Series that define the deeds used in Massachusetts.

You commented on a number of other issues, including the identification of items on the **Settlement Statement**, the timeliness of wires, and the delivery of closed files to HUD. With regard to the identification of items on the **Settlement Statement**, please understand that HUD has dictated the place of items on the **Settlement Statement**. You raised issues about these items and it was concluded that these were issues that you had to raise with HUD as we are simply directed by HUD in that regard. Of particular concern was the lack of itemization of closing cost credits. We agree that it would be a better practice to list these items separately. However we need to be directed to do so by HUD.

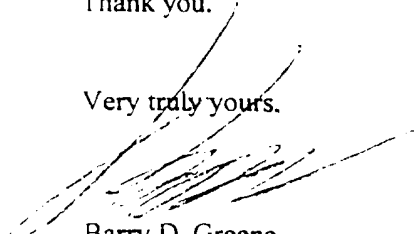
With respect to the wiring of funds you commented that we were late on our wires. Since we did not deal with each wire you identified I am not in a position to comment on why the wires were late. Notwithstanding this issue, we have taken steps to cure this problem. Firstly we are closing all transactions in person and, secondly we are having the funds wired to our account by the lender's attorney. If there is no lender we will have the funds in the form of a certified or bank check. We then wire the funds. To my knowledge but without an extensive inquiry, I am informed that the process is improved.

You also commented about the timeliness of the delivery of closed packages. We explained that we send the files back to HUD in bulk. Your recommendation was to note the date of delivery on the outside of each file. We will do so from now on.

In closing, I remain ready and available to supply you with whatever additional information you may need to complete your audit of our contract with HUD. If this letter does not accurately set forth our recent discussions and meetings, please contact me immediately so that you and I can discuss this further.

Thank you.

Very truly yours,



Barry D. Greene

Cc: Richard Weston  
Thomas J. Gallitano, Esq.

Citation	Search Result	Rank 2 of 10	Database
1993 WL 818916			MA-CS
1 Mass.L.Rptr. 87			
<b>(Cite as: 1993 WL 818916 (Mass.Super.))</b>			

Superior Court of Massachusetts.  
MASSACHUSETTS ASSOCIATION OF BANK COUNSEL, INC. et al  
v.  
CLOSINGS, LTD.  
No. 903053C.  
Sept. 2, 1993.

SPURLOCK, J.

\*1 The plaintiffs, Massachusetts Association of Bank Counsel, et al, having appeared on the date scheduled for trial of this matter and the defendant, Closings, Ltd. ("Closings") having failed to defend, this Court pursuant to Mass.R.Civ.P. 55(b) makes the following findings of fact and rulings of law and enters judgment herein.

Upon the default of Closings this Court, in accordance with Mass.R.Civ.P. 55(b), finds the following facts to have been admitted as true:

1. Closings is a Delaware corporation having a principal place of business located at Highland Avenue, Needham, Massachusetts.
2. On or about April 8, 1988, Closings was incorporated by a national business corporation for the purpose of conducting residential real estate closings. On or about May 13, 1989, a Foreign Corporation Certificate for Closings was approved by the Office of the Secretary of State for the Commonwealth of Massachusetts.
3. The company's original employees included the lawyers who formerly comprised the residential real estate conveyancing group of a Massachusetts law firm, Ardoff & Morse, P.C. located on 10 Elm Street, Danvers, Massachusetts. Closings's business plan called for the company to develop a high volume conveyancing practice almost identical to that conducted by Ardoff & Morse.
4. Among the aspects of Closings's operations designed to achieve its business objectives were the employment of experienced lawyers, the investment of substantial capital by non-lawyers, control and management of the business by non-lawyers, mass marketing of its services, including in-person solicitation, and fee-sharing between lawyers and non-lawyers.
5. Since its organization, Closings has performed all of the tasks required in connection with real estate closings, including, but not limited to, preparing and completing all closing documents, obtaining title abstracts, municipal lien certificates and plot plans, explaining closing documents, advising individuals as to the effect of closing documents, negotiating closing documents, conducting closings, disbursing funds and recording necessary documents. According to materials published by Closings, Ltd., the services offered by Closings include all of the above-referenced services which are normally part of a residential real estate closing.
6. As a result of Closings's promotional efforts, members of the public are encouraged to and do rely on Closings to render advice on all aspects of real estate closings.
7. Since its organization, Closings has conducted hundreds of real estate

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1993 WL 818916

(Cite as: 1993 WL 818916, \*1 (Mass.Super.))

closings at which legal advice is rendered by lawyers employed by Closings and non-lawyers acting as employees of a business corporation. Among other actions, employees of Closings have interpreted and explained documents having legal significance and have prepared legal documents including, but not limited to: escrow agreements, deeds, powers of attorney and affidavits.

8. The lawyers employed by Closings, who perform the above described services, are directed by and subject to the control of persons not members of the bar of the Commonwealth.

\*2 9. To accomplish its corporate objectives, Closings holds itself out to the public as capable of rendering a complete package of closing services, including legal services.

10. The closing of a real estate transaction involves the preparation and interpretation of documents having legal significance and which affect the legal rights and obligations of the participants.

Upon consideration of these uncontroverted facts, this Court makes the following rulings of law:

1. The practice of law in Massachusetts includes the handling of residential real estate conveyancing and the following specific acts:

(a) the preparation of deeds, mortgages, releases, transfers and other instruments affecting title to real estate and other agreements in connection with residential real estate closings; and

(b) advising persons, firms and corporations as to their legal rights in connection with the conveyance of residential real estate.

2. Through the use of lawyers, who are directed by and subject to the control of persons not members of the bar of the Commonwealth, to perform the above described services Closings is holding itself out as being able to handle all aspects of residential real estate closings, and therefore, Closings is in violation of G.L.c. 221, § 46.

WHEREFORE, this Court grants the plaintiffs' demand for relief and:

1. Declares that the acts of Closings, as described above, constitute the unauthorized practice of law in violation of G.L.c. 221, § 46 and 46A;

2. ORDERS that Closings, Ltd. is and shall be permanently restrained and enjoined from engaging in the activities described above; including, but not limited to:

(a) drafting escrow agreements, deeds, mortgages and other instruments affecting title to real estate and other agreements in connection with residential real estate closings;

(b) advising persons, firms and corporations as to their legal rights in connection with the conveyance of residential real estate; and

(c) handling all aspects of residential real estate closings; and

3. ORDERS that Closings, Ltd. is and shall be permanently restrained and enjoined from holding itself out to the public as able to perform residential real estate closings.

SO ORDERED.

END OF DOCUMENT

Corresponding ABA Model Rule. (a) identical to Model Rule 1.6(a) except that the information must be confidential information; (b) different, in part taken from DR 4-101(C); (c) based on DR 4-101(E).

Corresponding Former Massachusetts Rule. DR 4-101(C), see also DR 7-102(B).

Cross-reference: See definition of "consultation" in Rule 9.1(c).

## RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Adopted June 9, 1997, effective January 1, 1998.

### Comment

#### *Loyalty to a Client*

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of

clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

#### *Consultation and Consent*

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

#### *Lawyer's Interests*

[6] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest. Likewise, a lawyer should not accept referrals from a referral source, including law enforcement or court personnel, if the lawyer's desire to continue to receive referrals from that source or the lawyer's relationship to that source would discourage or would reasonably be viewed as discouraging the lawyer from representing the client zealously.\*

\* Pub. note: Fifth sentence added December 9, 1998, effective January 1, 1999.

#### *Conflicts in Litigation*

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in



U.S. Department of Housing and Urban Development  
 New York Contracting Operations Branch  
 Thomas P. O'Neill, Jr Federal Building  
 10 Causeway Street  
 Boston, Massachusetts 02222-1092  
<http://www.hud.gov/cts/ctshome.html>

Office of the Chief Procurement Officer

June 30, 1999

Portnoy & Greene, P. C.  
 Att: Barry D. Greene, Esq.  
 113 Union Wharf  
 Boston, MA 02109

Dear Mr. Greene

Subject: Contract No. H01C96000300000, Modification No. 7

Enclosed for your signature are four copies of Standard Form 30, Amendment of Solicitation/Modification of the subject contract. Please return all four copies to this office after completing blocks 15A, B and C. We will return a signed copy of the modification after it is executed by the Government. The modification consists of an equitable adjustment to your contract fee pursuant to our negotiation on June 25, 1999. The negotiation resulted from the request set forth in your letter of May 6, 1999, which was related to the additional duties imposed by Modification No. 5 on April 6, 1999. We reached agreement on the issues you raised as follows:

1. You requested a clarification of the issue of "third party" closings. HUD's definition of "third party" appears in Handbook 4310.5, REV-2 (*Property Disposition Handbook—One to Four Family*, paragraph 11-10), as "any closing agent not under a HUD-authorized contractual arrangement who is conducting the closing of a property sold by HUD." Under the subject contract, your firm is HUD's lawyer, and acts as the seller's attorney in closing the sales of all HUD-owned property in Massachusetts. You are authorized to act in each sale by a task order issued by the Marketing and Management (M&M) contract, CitiWest Properties. Section C. 2. (b) of your contract, as modified by Modification No. 5 on 4/6/99 sets forth a list of duties you are required to perform after receipt of each task order. If you perform these duties, you have conducted the closing of that sale. I would consider it a third party closing if the buyer's attorney performed all or most of the duties enumerated in your contract, and your function was simply to pick up the sale proceeds and deposit them, or, alternatively, if a third party closing agent, separate from the seller, buyer or lender, were retained to perform closing agent functions and to conduct the closing. As you and I have discussed, independent closing agents are not used in Massachusetts.

Pursuant to this clarification, we have agreed that there is no need to waive contract article B. 2. (a) (2), as modified.

2. You requested an equitable adjustment of \$150.00 per closing for title examinations. Actual costs for title examinations are reimbursable to you at closing out of the sale's proceeds, and there is no need for an equitable adjustment.


3. The modification requires that you prepare a special warranty deed, rather than a quitclaim deed. We agreed that there will be no equitable adjustment for this item.

4. We agreed to an equitable adjustment increasing your fee by \$6.00 per closing to cover the additional cost of preparing form 1099s as required in paragraph 8 of the modification.

5. Finally, as to paragraph 9 of the modification, the certification you have been providing will meet the requirements of item 5, and no equitable adjustment is needed.

If you have any questions, please call me at (617) 565-5191.

Sincerely,



Richard E. Weston  
Contracting Officer

Enclosures

cc: Susan Hoffman  
Peter Spina  
Robert Contois



*Office of the Chief Procurement Officer*

**U.S. Department of Housing  
and Urban Development**

New York Field Contracting Operations  
26 Federal Plaza, Room 35-120  
New York, NY 10278  
<http://www.hud.gov/cts/ctshome.html>

Nov. 1, 1999

Portnoy & Greene  
113 Union Wharf  
Boston, MA 12109

**Subject: Purchase Order for Closing Services**

**Attn: Mr. Greene**

This serves as your Notice of Award of Purchase Order #P-NYC-00518 for Closing Attorney Services in the State of Massachusetts for a period of six weeks commencing Nov. 6, 1999 with an Option to Extend the Services for one additional month.

The price per closing is \$580.00. It has been determined by both the GTR, Peter Spina and the undersigned Contracting Officer that these closings conducted by your firm when you perform the duties specified as your duties are NOT Third Party Closings since closings done on behalf of HUD in Massachusetts require an attorney to do such closings.

The GTR for the contract is Peter Spina. His phone number is (215) 656-0509, Ext. 3462. The GTM is John McGuckin at (215) 656-0509, Ext. 3410. They share the same FAX #: (215) 656-3457.

The Contract Specialist for this purchase order is Maureen Dugan who is located in the HUD Boston Office. Please acknowledge receipt and agreement to this purchase order and send same to me in New York.

Any closings assigned to you up to and including Nov. 5 are to be performed under contract HO1C96000300000 until the expiration time for any given time for a closing. Assignment on or after Nov. 6 are to be done under this purchase order.

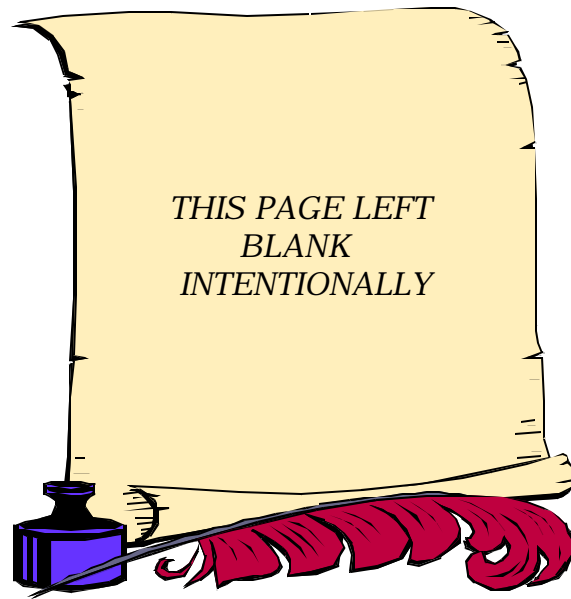
If you have any questions regarding this, please do not hesitate to call me at 212-264-8000, ext. 3312 or contact me by E-mail at [Edwin\\_T\\_Steffek@hud.gov](mailto:Edwin_T_Steffek@hud.gov).

cc: Maureen Dugan

Sincerely,

A handwritten signature in black ink that reads "Edwin T. Steffek".

Edwin T. Steffek,  
Contracting Officer.





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725 17<sup>th</sup> Street, NW, Room 9226, New Exec. Ofc. Bldg., Washington, D.C. 20503

Inspector General, G

Portnoy & Greene, P.C.