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38 CFR Ch. I (7-1-10 Edition)

or any subsequent owner of the property) and the application for assumption shall be approved if the holder determines that:

(i) The proposed purchaser is credit-worthy;

(ii) The proposed purchaser is contractually obligated to assume the loan and the liability to indemnify the Department of Veterans Affairs for the amount of any claim paid under the guaranty as a result of a default on the loan, or has already done so; and

(iii) The payments on the loan are current.

(2) Should these requirements be satisfied, the holder may also release the veteran or other person from liability on the loan. This does not apply if the approval for the assumption is granted upon special appeal to avoid immediate foreclosure.

(i) If a veteran requests a release of liability under paragraph (f) of this section, or if a borrower requests a release of liability pursuant to §36.4809(c)(1)(vii), a holder described in the first sentence of §36.4803(1)(1)(i) is authorized to and must make all decisions regarding the credit-worthiness of the transferee, subject to the right of a transferee to appeal any denial to the Secretary within 30 days of being notified in writing of the denial by the holder or servicer. The procedures and fees specified in §§36.4803(1)(1)(i) and 36.4813(d)(8) applicable to decisions under 38 U.S.C. 3714 shall also apply to decisions specified in this paragraph.

(Authority: 38 U.S.C. 3703(c), 3713 and 3714)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0112)

§ 36.4327 Release of security.

(a)(1) Except upon full payment of the indebtedness, or except as provided in paragraph (a)(2) of this section or in paragraphs (e) and (f) of §36.4822, the holder shall not release a lien or other right in or to real property held as security for a guaranteed or insured loan, or grant a fee or other interest in such property, without prior approval of the Secretary.

(2) The holder may, without the prior approval of the Secretary, release the

lien on a portion of the property securing the loan provided:

(i) The holder has obtained an appraisal from the Secretary showing the value of the security prior to the partial release of the lien and the value of the security on which the lien will remain;

(ii) The portion of the property still subject to the lien is fit for dwelling purposes; and

(iii) The loan-to-value ratio after the partial release of the lien:

(A) Will be not more than 80 percent; or

(B) If the loan-to-value ratio after the partial release of the lien is 80 percent or higher, any proceeds received as consideration from the partial release of the lien shall be applied to the unpaid loan balance.

(b) A holder may release from the lien personal property including crops without the prior approval of the Secretary.

(c) Failure of the holder to comply with the provisions of this section shall not in itself affect the validity of the title of a purchaser to the property released.

(d) The release of the personal liability of any obligor on a guaranteed or insured obligation resultant from the act or omission of any holder without the prior approval of the Secretary shall release the obligation of the Secretary as guarantor or insurer, except when such act or omission consists of:

(1) Failure to establish the debt as a valid claim against the assets of the estate of any deceased obligor, provided no lien for the guaranteed or insured debt is thereby impaired or destroyed; or

(2) An election and appropriate prosecution of legally available effective remedies with respect to the repossession or the liquidation of the security in any case, irrespective of the identity or the survival of the original or of any subsequent debtor, if holder shall have given such notice as required by §36.4817 and if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the

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Secretary indicates in such notice to the holder; or

(3) The release of an obligor, or obligors, from liability on an obligation secured by a lien on property, which release is an incident of and contemporaneous with the sale of such property to an eligible veteran who assumed such obligation, which assumed obligation is guaranteed on the assuming veteran's account pursuant to 38 U.S.C. chapter 37; or

(4) The release of an obligor or obligors as provided in §36.4815; or, the release of an obligor, or obligors, incident to the sale of property securing the loan which the holder is authorized to approve under the provisions of 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714)

§36.4328 Partial or total loss of guaranty or insurance.

(a) Subject to the incontestable provisions of 38 U.S.C. 3721 as to loans guaranteed or insured on or subsequent to July 1, 1948, there shall be no liability on account of a guaranty or insurance, or any certificate or other evidence thereof, with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery; or in which the certificate of discharge or the certificate of eligibility is counterfeited, or falsified, or is not issued by the Government.

(1) Except as to a holder who acquired the loan instrument before maturity, for value, and without notice, and who has not directly or by agent participated in the fraud, or in the misrepresentation hereinafter specified, any willful and material misrepresentation or fraud by the lender, or by a holder, or the agent of either, in procuring the guaranty or the insurance credit, shall relieve the Secretary of liability, or, as to loans guaranteed or insured on, or subsequent to July 1, 1948, shall constitute a defense against liability on account of the guaranty or insurance of the loan in respect to which the willful misrepresentation, or the fraud, is practiced: *Provided*, that if a misrepresentation, although material, is not made willfully, or with fraudulent intent, it shall have only

the consequences prescribed in paragraphs (b) and (c) of this section.

(2) [Reserved]

(b) In taking security required by 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans, a holder shall obtain the required lien on property the title to which is such as to be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community in which the property is situated: *Provided*, that a title will not be unacceptable by reason of any of the limitations on the quantum or quality of the property or title stated in §36.4854(b) and if such holder fails in this respect or fails to comply with 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans, then no claim on the guaranty or insurance shall be paid on account of the loan with respect to which such failure occurred, or in respect to which an unwillful misrepresentation occurred, until the amount by which the ultimate liability of the Secretary would thereby be increased has been ascertained. The burden of proof shall be upon the holder to establish that no increase of ultimate liability is attributable to such failure or misrepresentation. The amount of increased liability of the Secretary shall be offset by deduction from the amount of the guaranty or insurance otherwise payable, or if consequent upon loss of security shall be offset by crediting to the indebtedness the amount of the impairment as proceeds of the sale of security in the final accounting to the Secretary. To the extent the loss resultant from the failure or misrepresentation prejudices the Secretary's right of subrogation acceptance by the holder of the guaranty or insurance payment shall subordinate the holder's right to those of the Secretary. Adjustments under this section may be made for failure to comply with:

(1) Obtaining and retaining a lien of the dignity prescribed on all property upon which a lien is required by 38 U.S.C. chapter 37 or the regulations concerning guaranty or insurance of loans to veterans,

(2) Inclusion of power to substitute trustees (§36.4830),