

Liability - Security interest, participation in management

Section XXXXX Liability for a security interest, participation in management.

- (1) For purposes of this part, a *person* holding a security interest in *real property, hazardous substance or container facility* participates in the management of the *real property, hazardous substance or container facility* if that person engages in acts of *facility* management that constitute actual participation in the management or operational affairs of *a facility* and that exceed the mere capacity to influence, or ability to influence, or the unexercised right to control *facility* operations. A *person* holding a security interest is participating in the management of *a facility*, while the borrower is still in possession of the *property facility* encumbered by the security interest, if the *person* holding a security interest does any of the following:
- (a) Exercises decision making control over the borrower's environmental compliance.
 - (b) Undertakes responsibility for the borrower's hazardous substance handling or disposal practices.
 - (c) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise with respect to either or both of the following:
 - (i) Environmental compliance.
 - (ii) All, or substantially all, of the operational aspects of the enterprise other than environmental compliance. As used in this subparagraph, "operational aspects of the enterprise" includes functions such as that of *facility or plant manager, operations manager, chief operating officer, or chief executive officer*. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise such as that of credit manager, accounts payable or receivable manager, personnel manager, controller, chief financial officer, or similar functions.
- (2) For purposes of this part, the following do not constitute participation in the management of *a facility* by a *person* holding a security interest *in the facility*:
- (a) The mere capacity to influence, or ability to influence, or the unexercised right to control *facility* operations.
 - (b) An act or omission prior to the time that indicia of ownership are held primarily to protect a security interest.
 - (c) Undertaking or requiring an environmental inspection of the *property facility* in which indicia of ownership are to be held, or requiring a prospective borrower to undertake response activities *at a facility* or to comply or come into compliance, whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest, with any applicable law, rule, or regulation.
 - (d) Actions that are consistent with holding ownership indicia primarily to protect a security interest. The authority of the *person* holding a security interest to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and workout activities cover and include all activities up to foreclosure and its equivalents.
 - (e) Engaging in policing activities prior to foreclosure if the *person* holding a security interest does not by such actions participate in the management of *the facility* as described in subsection (1)(a) to (c). Permissible actions include, but are not limited to, requiring the borrower to undertake response activities *at the facility* during the term of the security interest; requiring the borrower to comply or come into

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compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; and securing or exercising authority to monitor or inspect the *property/facility* in which indicia of ownership are maintained, including on-site inspections, or the borrower's business or financial condition, during the term of the security interest. A *person* holding a security interest that engages in workout activities prior to foreclosure and its equivalents will remain within the exemption if the *person* holding a security interest does not by such action participate in the management ~~of the facility~~.

- (3) As used in this section, "workout" refers to those actions by which a *person* holding a security interest, at any time prior to foreclosure or its equivalent, seeks to prevent, cure, or mitigate a default by the borrower or obligor or to preserve, or prevent the diminution of, the value of the security. Workout activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; and providing specific or general financial or other advice, suggestions, counseling, or guidance.
- (4) *Notwithstanding any other provision of this part, a person holding a security interest that engages in or conducts a lawful marshalling or liquidation of personal property is not liable under this part* if the person does not cause or contribute to the environmental contamination. This includes holding a sale of personal property on a portion of the facility.
- (5) Notwithstanding any other provision of this part, a ~~the state or local unit of government or a~~ *person* holding a security interest who has not participated in the management of the *real property, hazardous substance or container facility* is not liable under this part for costs or damages as a result of response activity taken in response to a release or threat of release. For a person holding a security interest, this subsection applies only to response activity undertaken prior to foreclosure. ~~This subsection does not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the state or local unit of government.~~