

## HUD, Justice Department agree to avoid False Claims Act for loan violations

(October 31, 2019) - A U.S. Department of Housing and Urban Development agreement with the Justice Department establishes HUD's administrative proceedings as the primary method of enforcing mortgage lending law instead of relying on the False Claims Act.

The False Claims Act ([PL 97-258](#), 111-21), which was enacted in 1863 by a Congress concerned that suppliers of goods during the Civil War were defrauding the U.S. Army, has become a central enforcement tool for mortgage law. In a series of investigations that began in 2012, HUD and DOJ determined that some lenders were originating loans insured by the Federal Housing Administration that they knew were ineligible, causing the FHA to pay hundreds of millions of dollars in fraudulent claims. They have relied on the act for enforcement of the laws ever since.

HUD Secretary Ben Carson said the agreement aims to reverse a sharp decline in banks offering FHA loans over the last decade, which he blamed on regulatory uncertainty stemming from using the False Claims Act for enforcement.

"This agreement is intended to address concerns of uncertain and unanticipated False Claims Act liability for regulatory defects which has led many well-capitalized lenders to largely withdraw from FHA lending," Carson said in a speech to the Mortgage Bankers' Association Oct. 28. Carson told the conference that traditional banks originated "nearly half" of FHA loans in 2010, falling to just 15 percent today.

The agreement will "apply remedies for FHA lender violations in a consistent, uniform and appropriate way, while establishing clear guidance on the scope of its use," Carson said. The False Claims Act will still be used, but only when necessary, he said.

According to the agreement, HUD will utilize its administrative enforcement power against lenders who violate FHA rules, except when action beyond its capabilities is warranted. The department will refer defective lender performance concerns to its Mortgage Review Board, rather than the Justice Department, except when there are aggravating factors, or where the violations are "systemic or widespread."

The memo also changes the government's approach to private actions brought for FCA violations, which are called *qui tam* actions. Under the False Claims Act, a private party may step into the government's role to sue over a violation, and may receive 15 to 30 percent of the settlement or judgment.

The memo states that the Justice Department will consult with HUD to determine if such private lawsuits meet thresholds, such as whether the alleged violation is material. It also states that the ultimate decision remains within DOJ's discretion whether to ask a federal court to dismiss a private action.

"In taking these steps, we are fulfilling an important element our Housing Finance Reform Plan and making clear to all responsible lenders that FHA's mortgage program is a program they should participate in," Carson said in a HUD press release. "At the same time, HUD will not tolerate irresponsible or fraudulent lenders who defraud borrowers and taxpayers."

Erika Kelton, a partner at Washington-based law firm Phillips and Cohen, who regularly handles whistleblower claims, called the agreement "outrageous," saying it "essentially gives mortgage lenders the green light to ignore the law and defraud government programs."

Lenders need to be held accountable for ripping off federal funds, and the False Claims Act is the most effective way to do that," Kelton told CQ Roll Call.

Kelton said lenders have paid more than \$3 billion to the federal government to resolve False Claims Act cases.

By Keith Lewis, CQ Roll Call

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