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CLIENT ALERT

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HUD and DOJ Release Guidance on False Claims Act

On Monday, October 28, Attorney General William Barr and Department of Housing and Urban Development Secretary Ben Carson signed a memorandum of Understanding (MOU) between the Department of Justice (DOJ) and HUD. The MOU addresses steps for consultation between DOJ and HUD regarding decisions whether to initiate False Claims Act ("FCA") litigation regarding disclosures made by lenders to the Federal Housing Administration (FHA). Links to the MOU and the joint statement issued by HUD and DOJ are set forth below.

The new MOU sets out five specific protocols regarding review of possible FCA claims:

1. HUD expects that violations of FHA requirements will be enforced primarily through HUD administrative proceedings, including HUD's Mortgagee Review Board (MRB). If a matter is referred to MRB, MRB will evaluate the matter for potential action under the FCA.
2. The MOU sets forth specific standards for MRB to refer matters to DOJ for FCA enforcement: Tier 1 in Defect Taxonomy defects existing in at least 15 loans, or in loans with unpaid principal balance or claims of at least \$2 million, and aggravating factors such as evidence that violations are systematic or widespread.
3. DOJ will confer with HUD in the event that third parties refer a matter to DOJ for FCA enforcement.
4. HUD may recommend that DOJ seek dismissal of case filed by a *qui tam* relator if HUD does not support the litigation.
5. If MRB does not refer a matter to DOJ or recommends against filing an FCA action, MRB may still seek administrative action, indemnification or civil money penalties.

The HUD-DOJ joint statement indicates that the agencies seek to create certainty for lenders in order to make doing business with FHA more attractive. However, except for the defined events that would trigger an MRB referral to DOJ, none of the protocols have specific definitions of what will cause any actions to occur under each protocol. Further, the MOU states specifically that nothing in the MOU restricts the ability of DOJ to investigate and litigate alleged violations of applicable law.

Feel free to reach out to Buchalter for further guidance on the meaning and impact of this new MOU. Buchalter's Mortgage Banking Practice Group, including former HUD Acting Attorney General Michael Flynn, bring in-depth expertise to FHA matters and enforcement issues.

MOU: https://www.hud.gov/sites/dfiles/SFH/documents/sfh_HUD_DOJ_MOU_10_28_19.pdf

HUD-DOJ joint statement: <https://www.justice.gov/opa/pr/departments-justice-and-housing-and-urban-development-sign-interagency-memorandum-application>



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