

Fair Housing Defense

INFORMATION ON AND COMPLIANCE WITH THE FHA

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HUD Proposes New Rules to Link Fair Housing and the Federal False Claims Act

By Scott M. Badami on September 19, 2013

One part of our federal Fair Housing Act (FHA) is that recipients of federal funds for housing commit “affirmatively to further” fair housing. This means, in part, that recipients take “proactive steps” to “foster more inclusive communities and access to community assets for all persons protected by the FHA.” A couple of months ago (in July 2013), the U.S. Department of Housing and Urban Development (HUD) issued some proposed new rules in July 2013 that anyone who received federal funds for housing will want to review and ensure compliance with.

Specifically, HUD recipients of federal funds will now be required to submit a certification that they will affirmatively further fair housing, “which means that it will take meaningful actions to further the goals identified in the [assessment of fair housing] ... and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”

The proposed rule had been literally sitting on HUD’s desk for more than five years. Which beg the questions: Why did HUD publish the proposed regulation now? Why the legalese in the HUD regulation? Simple.

Although to my knowledge there is no independent cause of action against recipients for failure to comply with affirmatively furthering fair housing, a certification like this reads to me as the government intends to explore use of the False Claims Act (FCA) if a recipient of federal funds fails to appropriately further fair housing as so perceived by HUD and the U.S. Department of Justice (DOJ). The FCA imposes liability on those who “knowingly present, or cause to be presented to an officer or employee of the United States government ... a false or fraudulent claim for payment or approval.” FCA claims are brought either by the DOJ or by private individuals (called “relators”) who file lawsuits on behalf of the federal government in what is called a qui tam action. In short, the new certifications will raise the stakes for those of us involved in affordable housing to ensure we affirmatively further what the government believes are fair housing objectives. It seems pretty clear that HUD views the current guidelines as ineffective and that the government wants supplemental data from recipients of federal funds to further review patterns of neighborhood housing opportunities, employment, poverty, diversity, transportation, and employment.

As such, you may want to speak with a lawyer like me to ensure your Affirmative Fair Housing Marketing Plans meet the new guidelines. You do not want to be the FCA test case here.

Just A Thought.

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