



June 1, 2018

The Honorable Josh Gottheimer
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lee Zeldin
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Gottheimer and Representative Zeldin:

On behalf of the Structured Finance Industry Group (SFIG), we write in support of The Fixing Housing Access Act of 2018. We appreciate your leadership on this important policy issue. SFIG represents over 350 members from all sectors of the securitization market, including investors, issuers, financial intermediaries, accounting, law, technology firms, rating agencies, servicers, and trustees. SFIG's core mission is to support a robust and liquid securitization market.

The False Claims Act appropriately seeks to punish bad actors and to deter fraud from being perpetrated against the government. However the statute currently suffers from overly broad language and inadequate safeguards from prosecutorial overreach, leading to aggressive—and perhaps misplaced—application by the United State Department of Justice (DOJ), especially in the context of mortgage-related disputes stemming from the financial crisis.

First, the statute does not use a materiality standard to determine whether an allegedly false claim resulted in damages incurred by the U.S. government, damages which are typically result from a mortgage insurance claim paid out by the Federal Housing Administration (FHA). This lack of a materiality standard is in contrast to the practices of the FHA, which as the insurer of the mortgages, employs a defect taxonomy to distinguish between material and immaterial allegations of breaches of reps and warranties made to the FHA by the lenders. Second, in calculating the damages, the DOJ has used the total amount of the FHA claim paid as the initial basis for calculating trebled damages before later netting out recovered expenses, instead of using the actual (i.e., netted) expenses as the initial basis for a damage calculation. Third, the DOJ has relied on sampling practices and techniques that may significantly overstate not only the number of allegedly false claims, but also their collective impact on any claims paid. This inflated number may then be trebled when calculating the fines imposed under the FCA. Finally, the current statute of limitations effectively means lenders' liability can outlast the maturity of the loan they originated.

A similar situation exists with the Financial Institutions Reform, Recover, and Enforcement Act (FIRREA), whereby the DOJ sidesteps the relevant regulator and/or guarantor of mortgages paying on a claim stemming from a defaulted mortgage in order to file statutory claims for damages. In a May 2015

report¹, the Urban Institute summed up the cumulative result of these concerns by stating, “it would thus appear that HUD and DOJ’s enforcement effort, which presumably intends to protect consumers by penalizing bad actors and to better contain risk in the system, is instead constraining access to credit and pushing risk into quarters where it is less well managed.”

The Fixing Housing Access Act would seek to resolve problems with both statutes, as well as provide additional safeguards to prevent the misapplication of the statutes in context of mortgage insurance claims. It clarifies when the statute of limitations begins to toll, including in cases where periodic recertifications are required on an ongoing basis, and provides a reasonable sunset for all claims. Additionally, it clarifies the level of knowledge necessary for a defendant to be liable under the False Claims Act. It would also help set the appropriate level of damages to bring it in line with the damages actually incurred by the U.S. government. Finally, The Fixing Housing Access Act appropriately limits the scope of changes to the FCA and FIRREA by specifically requiring the DOJ to receive consent from the relevant administrator of mortgage programs like FHA before bringing substantive charges under either law against a lender. These updates appropriately safeguards lenders while still equipping the DOJ with an effective means of combatting fraud and abuse perpetrated against the U.S. Government. This legislation will increase the stability in the securitization markets and help provide everyday Americans with access to low-cost funding, while ensuring that law enforcement agencies have the appropriate legislative tools to combat waste, fraud, and abuse.

Again, we appreciate your leadership on this important policy matter and look forward to working with you on this and other topics of significance to the securitization industry.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Johns', with a horizontal line underneath.

Richard Johns
Executive Director

¹ Urban Institute, *Wielding a Heavy Enforcement Hammer Has Unintended Consequences for the FHA Mortgage Market*, May 2015.