

The coming crackdown

New federal legislation and resources demonstrate Washington's resolve in going after those engaged in mortgage fraud

Whether the latest perceived crisis in business involves securities, health care, environmental protection or computers, the typical congressional reaction is to "get tough" by passing new laws or increasing punishment.



POINT OF VIEW

Pete Anderson

The recent real estate collapse is no exception. With innumerable victims and massive losses, the clarion call for revenge is understandable and predictable.

Mortgage fraud has spawned tough legislation, more investigative tools and greater resources for law enforcement. Anyone left standing in this arena better take heed and protect themselves, because they could be facing an open season.

There is no single federal criminal statute called "mortgage fraud." Investigators and prosecutors tackle it by using a variety of criminal statutes in the federal arsenal. At its core, mortgage fraud generally involves misstatements, lies or omissions in the financing of real estate transactions. These lies are often embedded in key documents in the process.

Unlike traditional federal crimes such as drug dealing and bank robbery, where the conduct is fairly predictable, mortgage fraud can be accomplished in countless ways by a variety of participants in the process.

Sometimes these players work alone; other times they act in concerted effort with other fraudsters. The players can include mortgage brokers, appraisers, the loan officers, the seller, the buyer, the closing attorney and the developer. The biggest challenges surrounding mortgage-fraud investigations involve the ever-changing

nature of the crimes, and the difficulty of separating the bad actors from those who are merely negligent, sloppy, reckless or clueless.

Sometimes the crime involves flipping, in which property is purchased and quickly resold at an artificially inflated price (aided by a fraudulent appraisal). With false down payment fraud, the scheme involves a down payment that was either never paid, or whose source was disguised, in violation of lending requirements. Another fraud strain, called chunking, centers on a schemer who recruits investors by falsely promising them a combination of a no-money-down deal with guaranteed tenants and the promise to repurchase at a higher price within a set period.

While these frauds are well-established, law enforcement is often forced to react to evolving schemes in a paper-intensive process. Unfortunately, these schemes are detected only after the losses have been suffered and the bad actors vanish.

The crimes charged can include bank fraud; mail or wire fraud; false statements; loan-application fraud; identity theft; racketeering and money laundering. Using these criminal spears, the federal government can imprison convicted fraudsters for 30 years or fine them \$1 million for each offense.

In response to mortgage-fraud trends, President Obama signed into law in May the Fraud Enforcement and Recovery Act. The law expands existing statutes to hold private mortgage brokers accountable under federal fraud laws, instead of just banks and financial institutions. The law also allows the Department of Justice and the FBI to hire more than 400

prosecutors and agents, and double the number of dedicated task forces across the country.

As part of this effort, the FBI recently created the National Mortgage Fraud Team at its headquarters to help field offices with investigations. This team will use unprecedented tools and investigative techniques to detect and tackle the problem. Even before this boost in resources, the bureau's mortgage-fraud caseload had tripled during the last three years to more than 2,400 cases.

With history as a guide, the investigations will be triggered by foreclosures or deals gone bad. The larger the collective

losses, the more rigorous the investigative scrutiny and potential criminal punishment.

The feds are likely to cast a wide net.

Whether the professionals involved are charged often depends on a prosecutor's perception of whether they were aware of improper conduct (or should have been). There is a

real risk of being judged by the outcome and through the lens of 20/20 hindsight. All real estate professionals need to take concrete steps to show (not just claim) good-faith compliance efforts.

Pete Anderson is a former federal prosecutor and is co-founder of Anderson Terpening, which defends individuals and businesses on criminal, regulatory and litigation matters. He can be reached at (704) 372-7370 or pa@houseofdefense.com.

