



# Fair Housing Enforcement: Time for a Change

2009 Fair Housing Trends Report

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National Fair Housing Alliance  
1101 Vermont Avenue, NW  
Suite 710  
Washington, DC 20005  
(202) 898-1661  
[www.nationalfairhousing.org](http://www.nationalfairhousing.org)

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### **About the National Fair Housing Alliance**

Founded in 1988 and headquartered in Washington, DC, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Through comprehensive education, advocacy and enforcement programs, NFHA protects and promotes equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

## **Executive Summary**

Since the passage of the Fair Housing Act over forty years ago, we have made some progress towards advancing fair housing, residential integration and equal opportunity goals. Yet the challenges of discrimination remain with us. What we have as a result is ongoing residential segregation that results in disparities in access to quality education, employment, homeownership and wealth accumulation for communities of color.

In today's economic climate, this is especially relevant given how the ongoing foreclosure crisis has had a particularly harmful effect on minority communities. Over the past year, our government has begun to implement programs whose broad reach will define housing policy for decades to come. To that end, fair housing laws and principles must be brought to bear in any federal or state action to address the crisis.

In order to present an annual snapshot of fair housing enforcement in America, each year, the National Fair Housing Alliance (NFHA) collects data from private fair housing groups, the U.S. Department of Housing and Urban Development (HUD), state and local agencies (FHAPs), and the U.S. Department of Justice (DOJ) with the purpose of documenting for advocates, academics, government officials and the general public the nature and extent of housing discrimination, the importance of effective fair housing enforcement and recommendations for how to move forward with achieving the promise of equal housing opportunity.

***Fair housing organizations processed almost twice as many complaints as all government agencies combined.*** 2008 saw the highest total number of complaints ever: 30,758 complaints. Private fair housing groups processed 20,173, or 66 percent, of the total complaint load. HUD processed 2,123 complaints, and state and local agencies processed 8,429. DOJ filed 33 fair housing cases.

***Housing discrimination in the nation has spiked due to the worsening foreclosure crisis and internet advertising that violates fair housing laws.*** Fair housing centers around the country have seen more cases of discrimination in mortgage lending than ever before: 1,499 as compared to 1,245 in 2007. But HUD initiated only 4 investigations into lending discrimination last year; DOJ brought only one fair lending case. In addition, HUD processed only 60 fair lending complaints in 2008. Another trend is with the use of the internet to initiate most housing transactions, discriminatory ads are popping up online. NFHA alone filed more than 300 complaints of internet housing discrimination with HUD last year. Most of the ads discriminate against families with children; discrimination against families increased from 2007 to 2008.

### ***Summary of Recommendations***

Following is a summary of recommendations that are critical to instituting a strong fair housing enforcement and education mechanism in our country.

### **Create an Independent Fair Housing Enforcement Agency**

NFHA concurs with the bi-partisan National Commission on Fair Housing and Equal Opportunity recommendation for the creation of an independent fair housing enforcement agency. HUD has an inherent conflict of interest with enforcing the law while maintaining partnerships with lenders, builders, real estate companies and apartment management companies that may be in violation of the Fair Housing Act. HUD handles little more than 2,000 complaints, while an estimated 4 million violations occur each year. HUD also has the clear authority and responsibility to initiate its own investigations without relying on complaints; however it has done little in this area.

### **Improve HUD's Complaint Processing**

HUD must improve its standards for complaint processing so that complaints are processed in a timely fashion and with meaningful results. The statute gives HUD 100 days to investigate cases of discrimination, but too often the time to process a case is more than a year. Also, HUD routinely closes cases for reasons including "complainant failed to cooperate" and "unable to locate complainant" many times because of the delay. There should be consistent and quality standards for investigations and investigators who are well versed in legal standards and case law.

### **Improve DOJ's Fair Housing Enforcement**

The Fair Housing Act as amended clearly states that DOJ must pursue cases charged by HUD; however DOJ has too often not done so. The Department should also bolster two areas of enforcement at DOJ that have been underutilized in recent years: cases brought under their testing program and mortgage and predatory lending cases. Moreover, DOJ should reinstate its policy of filing disparate impact cases. Disparate impact cases are crucial in the fight against housing discrimination because while many rental, sales, lending, insurance and related policies are not discriminatory on their face, they can have a disparate and detrimental impact on members of protected classes trying to find housing.

### **Strengthen HUD's Fair Housing Initiatives Program (FHIP)**

FHIP is the primary federal program that funds private fair housing groups to carry out education and enforcement activities. FHIP funding allocation should focus on establishing comprehensive, full-service organizations, rather than funding new, and often unqualified, organizations with intermittent or one time grants that do little to promote fair housing. Funding for FHIP should be, at a minimum, \$52 million, and should expand to approximately \$109 million to cover all Metropolitan Statistical Areas. FHIP should also fund an annual national media campaign and regional or national systemic investigations; provide quality training and professional development opportunities; and develop cooperative relationships between private fair housing organizations, HUD, the Department of Justice and representatives of the housing, lending, and insurance industries.

### **Address Discriminatory Internet Advertising**

Internet sites that publish discriminatory ads should be held liable, as are print media, so that they will implement effective screening systems to prevent discriminatory advertisements from ever reaching the public. HUD should use its subpoena powers to compel websites such as craigslist.com to identify the poster of a discriminatory advertisement. In addition, the Communications Decency Act should be amended to carve out an exception for the Fair Housing Act. An amendment should explicitly prohibit internet advertisements that violate the federal Fair Housing Act and state clearly that CDA does not limit any claim arising under the Act.

### **Affirmatively Further Fair Housing**

Under federal law, all government agencies and recipients of federal funds “affirmatively further fair housing,” i.e. promote diverse, inclusive communities. HUD must strengthen the regulations that implement the affirmatively furthering fair housing requirement and provide more effective oversight. And HUD should require CDBG recipients to update their Analyses of Impediments to Fair Housing Choice (AIs) to reflect new barriers, work with grantees to improve the CDBG reporting systems, and strengthen the fair housing reporting requirements. In the Gulf region, where communities continue to struggle to rebuild following the hurricanes of 2005, Congress should appropriate more funding to complete the task of rebuilding in a way that provides safe, decent and affordable options to all residents of the region.

### **Improve Fair Lending Enforcement by HUD, DOJ, and the Regulators**

HUD, DOJ, the federal regulators, and others must rededicate themselves to fair lending enforcement and strict oversight of all financial players. The federal government’s lax enforcement of fair housing and fair lending laws has contributed to our financial downturn and economic crisis. Now, as the government puts forth unprecedented resources to address the crisis, it must meet basic civil rights standards.

### **Refine and Clarify the Making Home Affordable Program**

The Obama Administration’s Making Home Affordable program is a significant step toward sustaining communities by providing homeowners with affordable loans. There are four areas that need improvement: transparency and accountability, releasing information to the public to measure the effectiveness of the program with regard to fair lending and consumer protections; the administration of the program to assure additional fees are not charged to consumers; expansion of the eligibility and access to the program to assure it reaches those most affected by the crisis; and the long-term effectiveness of the program.

### **Effectively Administer the Neighborhood Stabilization Program**

HUD should assure that all jurisdictions receiving NSP funds have a current Analysis of Impediments to Fair Housing Choice (AI), which assesses their communities’ needs, describes

strategies to improve fair housing compliance, implements the strategies, and continues to be updated at least every five years. All properties acquired through foreclosure must to be marketed and managed by real estate firms and professionals who have received comprehensive fair housing training.

**Pass Broad Bankruptcy Reform and Anti-Predatory Lending Legislation**

Congress should give judges the ability to modify unaffordable loans for homeowners facing foreclosure. Congress should also enact comprehensive anti-predatory lending legislation that includes: effective rights and remedies; prohibitions against steering; a designation of “high-cost” that includes all loan fees; a ban on yield spread premiums; a ban on pre-payment penalties; no federal preemption; and advanced disclosure of costs and fees.

## Introduction

In 2008, the 40<sup>th</sup> anniversary year of the passage of the federal Fair Housing Act, four civil rights agencies – the National Fair Housing Alliance, the NAACP Legal Defense Fund, the Leadership Conference on Civil Rights Education Fund, and the Lawyers’ Committee for Civil Rights under Law – secured funding from lenders, realtors, foundations, and others to establish the National Commission on Fair Housing and Equal Opportunity. The Commission was convened to explore the state of fair housing in America. It held regional hearings in five major cities and collected testimony about both the impact of housing segregation on education, health and employment opportunities and strategies for changing the federal fair housing enforcement mechanism and education system to effectively address housing discrimination and promote residential diversity. The seven member bipartisan Commission was co-chaired by former U.S. Department of Housing and Urban Development Secretaries Henry Cisneros and Jack Kemp and included representatives from academia, city government, the disability community and the real estate industry.

The Commission released a comprehensive report in December 2008 detailing recommendations for policy, legislative and legal strategies to strengthen fair housing enforcement and education throughout the country. It unanimously recommended “the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at the U.S. Department of Housing and Urban Development (HUD).”<sup>1</sup> The Commissioners arrived at this conclusion for many reasons, including HUD’s persistent failure to process and resolve fair housing complaints in an effective, consistent and timely manner. It is estimated that 4 million incidents of housing discrimination occur annually;<sup>2</sup> however, HUD and state agencies process only slightly more than 10,000 complaints annually. Two former Assistant Secretaries for Fair Housing and Equal Opportunity testified about HUD’s conflict of interest with enforcing the law while maintaining partnerships with members of the housing industry that may be in violation of the Fair Housing Act.<sup>3</sup> Former HUD Secretaries Cisneros and Kemp confirmed that it is a tenuous position for HUD to be in – to enforce fair housing at the very same institutions with which it partners.

The Commission put forth the following recommendations:

- Create an independent fair housing enforcement agency;
- Revive the President’s Fair Housing Council according to Executive Order 12892 issued by President Clinton in 1994. The order requires all federal agencies to cooperate with the HUD Secretary to “review the design and delivery of all federal programs to ensure they support a coordinated strategy to affirmatively further fair housing;”
- Ensure federal compliance with the “affirmatively furthering fair housing” obligation first initiated by Congress in 1974;
- Strengthen compliance with the affirmatively furthering fair housing obligation by federal grantees;

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<sup>1</sup> The National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing*. Available at [www.nationalfairhousing.org](http://www.nationalfairhousing.org).

<sup>2</sup> National Fair Housing Alliance, *2004 Fair Housing Trends Report* (April 7, 2004).

<sup>3</sup> Testimony of Elizabeth K. Julian (Atlanta); Testimony of Roberta Achtenberg (Los Angeles).



- Strengthen the Fair Housing Initiatives Program (FHIP) by increasing funding to a level at which every metropolitan area has a private, non-profit fair housing center to conduct individual and systemic investigations, research and community education;
- Adopt a regional approach to fair housing;
- Ensure that fair housing principles are incorporated in programs that address the mortgage, foreclosure and financial crises;
- Create a consistent national fair housing education campaign to teach people to recognize and report discrimination as well as to promote the benefits of multi-racial, multicultural neighborhoods; and
- Create a collaborative approach to address fair housing issues by identifying the best fair housing practices from the housing industry, corporations, state and local governments, fair housing practitioners and advocates.

Building upon the timely and important work of the Commission, this report aims to underscore several fair housing principles, issues, and solutions that are highlighted by the ongoing economic and foreclosure crises in America.

Section I builds on the Commission's top recommendation of creating an independent agency, with an historic framework of fair housing, current complaint data and the conflict of interest present in our federal efforts to enforce fair housing.

Section II reports on and analyzes the fair housing complaint data for 2008 by private fair housing organizations, HUD, public Fair Housing Assistance Program (FHAP) agencies, and the Department of Justice (DOJ).

Section III reports on the federal fair housing enforcement system. It describes systemic problems with fair housing complaint processing and investigations at HUD and DOJ. Troubling yearly trends in HUD's and DOJ's fair housing enforcement activities are detailed, and constructive corrective recommendations are offered.

Section IV of this report describes the fair housing implications of the current economic and foreclosure crises. This section begins with the issue of discriminatory internet advertising and how it is changing the marketplace. We then draw on examples of insufficient attention to fair housing requirements from the Gulf Region's hurricane recovery efforts, as well as other fair housing violations around the country, to demonstrate the importance of affirmatively furthering fair housing and incorporating fair housing principles into any federal or state action to address the crises. Over the past year, Congress and several agencies of the federal government have enacted programs whose broad and profound reach will shape the nature of housing—including fair housing—policy for decades to come. This section concludes with a discussion of the effects of the foreclosure crisis on communities of color, how the federal government's fair lending enforcement is lacking, and new opportunities to address the crisis.

## Section I. An Ailing Enforcement System: The Need for an Independent Fair Housing Agency

The National Commission on Fair Housing and Equal Opportunity recommended “the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at HUD.”<sup>4</sup> The Commissioners arrived at this conclusion for many reasons, including HUD’s long history of failing to effectively, consistently and in a timely manner process and resolve complaints.

When the Fair Housing Act was introduced in 1966 by Senators Walter Mondale (D-MN) and Edward Brooke (R-MA), it included a strong enforcement mechanism. However, when it passed in 1968, this enforcement mechanism was stripped from the bill. From 1968 to 1988, HUD only had authority to investigate a complaint and *attempt* conciliation. If the respondent did not want to engage in conciliation, HUD was required to close the case. The complainant could proceed to federal court, but would have to bear all the costs of litigation. As a result, during this twenty year period, it was the private, non-profit fair housing movement that brought the vast majority of complaints in federal and state courts and established precedent setting case law and settlements in real estate sales, mortgage lending, private mortgage insurance, homeowners insurance cases as well as sexual and racial harassment in housing and agency and tester standing to sue. It is the private litigation that reached the U.S. Supreme Court in 1972, *Trafficante et.al v Metropolitan Life Insurance Co, et.al.*, that codified the tenet that the goal of the Fair Housing Act was to not only eliminate discrimination, but to achieve residential integration as well.

In 1988, President Reagan signed into the law the Fair Housing Amendments Act (FHAA) which included a new enforcement mechanism by giving the HUD Secretary comprehensive authority and power to investigate complaints and initiate systemic investigations to identify companies that perpetuate residential segregation. The FHAA incorporates a process called “prompt judicial action” to hold an apartment or house for a complainant while the investigation is undertaken. Congress included prompt judicial action so that people could actually secure the housing they were seeking because too often an apartment owner would just pay nominal damages to keep the victim of discrimination from moving in. HUD must investigate complaints in 100 days and, if charged, the parties can elect to have a HUD administrative law judge (ALJ) hear the case within 120 days of the issuance of a charge. If either party elects federal court rather than the HUD ALJ process, the Department of Justice is required to represent the Secretary’s charge of discrimination. The FHAA also removed the \$1,000 cap on punitive damages from the 1968 law and added two more protected groups, families with children and people with disabilities. The legislation was supported by the industry, including the National Association of Realtors, as well as fair housing practitioners.

For the past 21 years this extraordinary power to enforce the law and conduct Secretary-initiated investigations has rarely been used. Housing discrimination continues virtually unabated in America. HUD’s own research shows astonishingly high rates of discrimination occurring in the rental and sales markets. Every ten years since 1977, HUD has conducted research into the nature and extent of

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<sup>4</sup> *The Future of Fair Housing*, op. cit.

rental and sales discrimination. *How Much Do We Know*, a report published by HUD's Office of Policy, Development and Research in April 2002, found that about 14% of the adult public or approximately 28 million people believed they had experienced housing discrimination. The report also cited HUD's first two national housing discrimination studies (1977, 1987), which found that African Americans and Latinos experienced discrimination in the rental and sales markets 50% of time they sought housing. HUD estimated that 2 to 10 million incidents of housing discrimination occurred during the period 1977 to 1987. Based on HUD's 2000 Housing Discrimination Study, an analysis done for the National Fair Housing Alliance estimated that approximately 3.7 million fair housing violations occur annually against African Americans, Latinos, Native Americans, and Asian Pacific Islanders in rental and sales. Yet, HUD processed only 2,123 complaints in 2008.

The chart below shows the number of fair housing complaints filed across the country since 1999. These represent complaints filed by 93 members of the National Fair Housing Alliance, Fair Housing Assistance Program (FHAP) recipients (107 state and local government agencies that receive HUD funding to investigate fair housing complaints), HUD, and DOJ. HUD handled only seven percent of the nation's fair housing claims and complaints in 2008; private fair housing groups processed 66 percent.

<b>TOTAL FAIR HOUSING COMPLAINTS FILED</b>					
	<b>NFHA Member Complaints</b>	<b>FHAP Claims &amp; Complaints</b>	<b>HUD Claims &amp; Complaints</b>	<b>DOJ Case Filings</b>	<b>Total</b>
<b>1999</b>	11,531	3,676	2,198	48	<b>17,453</b>
<b>2000</b>	15,131	4,971	1,988	45	<b>22,135</b>
<b>2001</b>	16,550	5,041	1,902	53	<b>23,546</b>
<b>2002</b>	17,543	5,129	2,511	49	<b>25,232</b>
<b>2003</b>	17,022	5,352	2,745	29	<b>25,148</b>
<b>2004</b>	18,094	6,370	2,817	38	<b>27,319</b>
<b>2005</b>	16,789	7,034	2,227	42	<b>26,092</b>
<b>2006</b>	17,347	7,498	2,830	31	<b>27,706</b>
<b>2007</b>	16,834	7,705	2,449	35	<b>27,023</b>
<b>2008</b>	20,173	8,429	2,123	33	<b>30,758</b>

\* HUD, FHAP and DOJ data are for Fiscal Year 2008. DOJ data represent case filings of HUD Election and Enforcement cases, and Pattern or Practice cases. DOJ's jurisdiction under the Fair Housing Act is limited to pattern or practice cases and cases referred by HUD. HUD, FHAP and NFHA data represent fair housing complaints received and/or processed.

HUD has responded to few complaints and launched few investigations into housing discrimination and segregation. In large part because of the government's lack of dedication to enforcing fair housing, our communities continue to be segregated and billions of dollars are being lost to the foreclosure crisis, predatory lending, real estate sales steering, insurance discrimination and other significant problems. HUD has relinquished the primary duty of enforcing the Fair Housing Act to its FHAP partners, many of whom continue to have high numbers of case closures, aged cases and staff with limited experience in handling complex complaints in sales, lending and insurance. Even more problematic is that some FHAPs are operating in areas where fair housing laws are not "substantially equivalent" to the federal law, in violation of the Fair Housing Act. A recent example is Ohio, whose court recently ruled that private fair housing centers do not have standing to sue under its state law. In spite of this clear difference with federal law, the Ohio Civil Rights Commission continues to be designated a FHAP by HUD and receive funding. In another example, Michigan law explicitly states there is no recovery of punitive damages, yet the Michigan Department of Civil Rights remains a FHAP agency.

HUD has an inherent conflict of interest with enforcing the law while maintaining partnerships with lenders, builders, real estate companies and apartment management companies that may be in violation of the Fair Housing Act, as testified to by two former Assistant Secretaries of Fair Housing and Equal Opportunity before the National Commission.<sup>5</sup> It is a tenuous position for HUD to be in – to enforce fair housing at the very same institutions with which it partners. HUD has the clear authority and responsibility to initiate its own investigations without relying on complaints. In 2008, for example, HUD initiated only four fair lending complaints, for a total of seven fair lending complaints over the last three years. No results of any of these investigations have been released and no charges brought.

There are also conflicts of interest between offices within HUD. When a jurisdiction receives Community Development Block Grant (CDBG) funds, it officially certifies that it will affirmatively further fair housing. Because of internal conflicts, although the Office of Fair Housing and Equal Opportunity (FHEO) may challenge a city's CDBG application of funds, FHEO could be overruled by HUD's Office of Community Development and Planning (CPD) and/or the Secretary. A clear example of this is a memo from FHEO to HUD's General Counsel regarding the City of Gulfport's request to divert \$600 million in CDBG funding for low-income housing to the construction of a port. FHEO advised that granting the request could "result in violation of HUD's civil rights requirements" and "non-compliance with [...] fair housing laws."<sup>6</sup> Nevertheless, HUD granted the request.

Another egregious example of HUD's failure to address discrimination under the Fair Housing Act with a CDBG recipient involves the City of Zanesville, OH. A federal jury found the City liable under the Fair Housing Act of denying public water service to a primarily African American neighborhood while providing water to surrounding white neighborhoods. To date, HUD has taken no action against Zanesville (this case is described in more detail in Section IV).

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<sup>5</sup> Testimony of Elizabeth K. Julian (Atlanta); Testimony of Roberta Achtenberg (Los Angeles).

<sup>6</sup> HUD Memorandum from Pamela Walsh to Aaron Santa Anna re: FR-5051-N-08, June 13, 2007.

## **Recommendation for an Independent Fair Housing Enforcement Agency**

**The National Fair Housing Alliance concurs with the National Commission on Fair Housing and Equal Opportunity's recommendation for the creation of an independent fair housing enforcement agency.** In order to ensure timely and effective federal fair housing enforcement activities, the Commission recommended an independent agency that should include three components. First, investigators should be career staff with significant fair housing experience. Second, there should be an advisory council or commission appointed by the President with the advice and consent of the Senate that is broadly representative of industry, advocates, and enforcers. Third, there should be adequate staff and resources to make fair housing a reality. The agency would then be empowered to work with the HUD Secretary and other federal departments to advance proactively all of the fair housing issues that are critical to building stronger communities.

## Section II. National Trends in Fair Housing

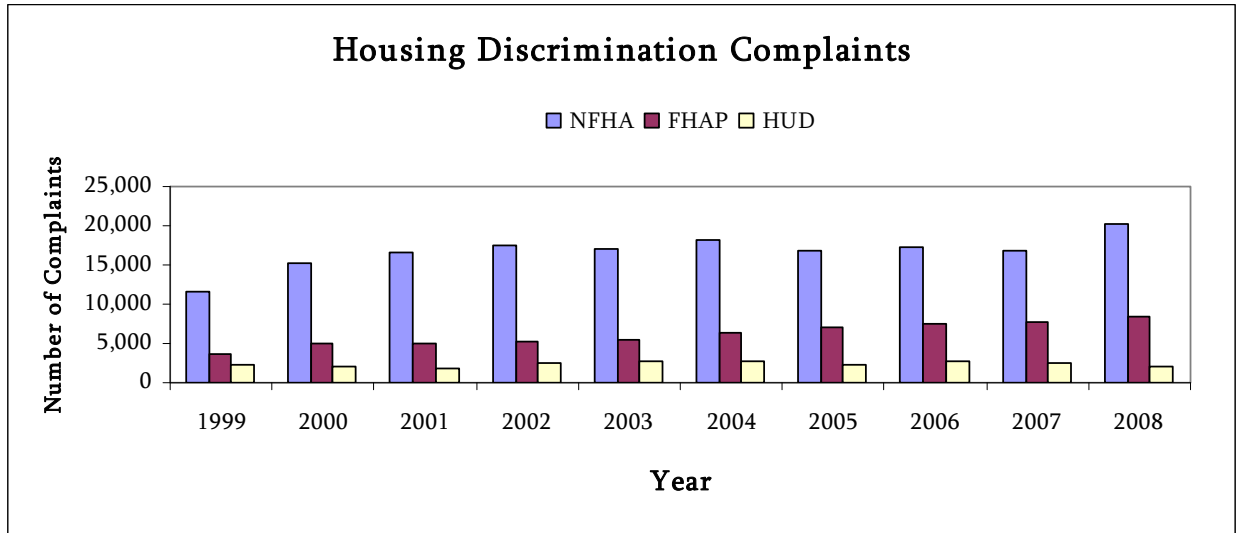
### A. Housing Discrimination Complaints for 2008

Each year NFHA collects data from both private fair housing groups and government entities in order to present an annual snapshot of fair housing enforcement in America. And each year these numbers paint a daunting picture: compared to a conservative estimate of 4 million annual fair housing violations, the aggregate number of complaints documented and investigated is small. The following chart lays out the complaint filings and case filings reported by private and governmental fair housing agencies and organizations since 1999. Fair Housing Assistance Program (FHAP) organizations are state and local government organizations that receive HUD funding to investigate and process fair housing complaints. Under the Fair Housing Act, HUD is required to refer cases to these agencies if the agencies are “substantially equivalent” under the law, i.e. that the state or local law is substantially equivalent to the federal law.

<b>TOTAL FAIR HOUSING COMPLAINTS FILED</b>					
	<b>NFHA Member Complaints</b>	<b>FHAP Claims &amp; Complaints</b>	<b>HUD Claims &amp; Complaints</b>	<b>DOJ Case Filings</b>	<b>Total</b>
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\* HUD, FHAP and DOJ data are for Fiscal Year 2008. DOJ data represent case filings of HUD Election and Enforcement cases, and Pattern or Practice cases. DOJ's jurisdiction under the Fair Housing Act is limited to pattern or practice cases and cases referred by HUD. HUD, FHAP and NFHA data represent fair housing complaints received and/or processed.

In 2008, there were 30,758 complaints of housing discrimination, an increase of 3,735 since FY07. This is the highest total number of complaints ever taken from all reporting agencies. Private fair housing groups continue to process the highest number of complaints –20,173, or 66 percent, of the total complaint load.



Private fair housing groups with average staff size of five, while few in number and largely underfunded, year after year continue to process more fair housing complaints, educate more consumers, and train more industry providers than any other entity in the nation, including state and federal agencies charged with enforcing the federal Fair Housing Act. Since 1999, private non-profit fair housing organizations have processed 167,014, or nearly 66 percent, of the fair housing complaints in the United States, while Fair Housing Assistance Program agencies have processed 61,205, or 24 percent, and HUD only 23,790, or 9 percent, of the cases. It is important to note that these data are from 93 reporting private fair housing groups and 107 FHAP agencies, and that many cases filed with HUD and FHAP agencies are referrals by private organizations. The percentage of complaints handled by fair housing groups has continued at this high level over the past few years, despite the closure or near closure of more than 25 fair housing organizations.

## B. Discrimination by Protected Class

The following chart breaks out the percentage of claims/complaints by protected class.

DISCRIMINATION BY PROTECTED CLASS				
Basis	NFHA Members	HUD	FHAP	DOJ
Race	18.5%	31%	36%	39%
Disability	31.3%	49%	43%	36%
Family Status	17.5%	17%	16%	21%
National Origin	9.5%	9%	14%	6%
Sex	3.9%	9%	11%	9%
Religion	1.5%	2%	3%	6%
Color	0.6%	1%	3%	n/a
Other*	17.1%	4%	6%	n/a

\* The "other" category for NFHA complaints represents complaints arising from categories protected at the state or local level including sexual orientation, source of income, marital status, medical condition, age, or student status. The "other" category for HUD and FHAP complaints represents complaints of retaliation. HUD, FHAP, and DOJ data are for Fiscal Year 2008. Totals may exceed 100 percent, because a single complaint may have multiple bases. Other than NFHA's data, percentages are rounded to the nearest whole number.

The trend continues this year for complaints alleging discrimination on the basis of disability to rank as the highest among all protected classes, except for DOJ cases. At DOJ, cases on the basis of race were the highest in FY08, followed by disability cases. Disability complaints remain high for several reasons. First, many apartment owners make direct comments refusing to make reasonable accommodations for people with disabilities. Second, HUD has an office devoted solely to disability issues. Lastly, builders still continue to design and construct apartment complexes that violate the Accessibility Guidelines in spite of the fact that HUD has spent millions of dollars on the Fair Housing Accessibility FIRST program to educate architects and builders.



## C. Discrimination by Transaction/Category – Public & Private Data

### ***Rental Market—Public & Private Groups Report 24,350 Complaints<sup>7</sup>***

Of the many categories of complaint data for housing discrimination, rental cases continue to represent the largest number of complaints, primarily because it is easier to recognize this type of discrimination. Private fair housing groups reported 16,041 complaints of housing discrimination in the rental market, a significant jump from 12,606 in 2007; FHAP agencies reported 6,592 and HUD reported 1,717 complaints. One explanation for the rise in rental market complaints is the current foreclosure crisis. Many families and individuals were evicted from apartments when the owner defaulted on the mortgage—even if the families were current in their rent payments. Other families lost their homes to foreclosure and went on to experience discrimination in the rental market because of their race, national origin or because they have children or a family member with a disability. Data indicate that these groups filed the most complaints.

### ***Home Sales— Public & Private Groups Report 1,902 Complaints***

Private groups reported 526 complaints in the home sales market; FHAP agencies reported 1,133 and HUD reported 243 complaints. Private groups last year reported 636 complaints. This decline may be attributed to the housing crisis and a general decline in the number of people who were in the market to purchase a home.

### ***Mortgage Lending— Public & Private Groups Report 1,779 Complaints***

Private groups reported 1,499 complaints of mortgage lending discrimination in 2008, up from 1,245 in 2007; FHAP agencies reported 220 and HUD reported 60 fair lending complaints.

HUD has the authority to initiate its own investigations of discriminatory practices. In FY08, it initiated four investigations into lending discrimination for race and national origin discrimination. Three of the investigations are the result of Home Mortgage Disclosure Act data review, plus additional information. To date, HUD has not shared the results of these cases nor notified the public about whether they have been resolved. HUD initiated a total of three other fair lending investigations in FY07 and FY06. In addition, HUD processed only 60 fair lending complaints in 2008.

### ***Homeowners Insurance— Public & Private Groups Report 40 Complaints***

Private fair housing groups reported 32 complaints of discrimination in the insurance market, compared to 46 in 2007; FHAP agencies reported 6 and HUD reported 2 complaints. Nearly all complaints were filed on the basis of race. Discrimination related to homeowners insurance can be difficult to identify because its implementation is rarely overt. For example, in testing, when African Americans and Latinos called agents and left messages requesting insurance quotes and other

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<sup>7</sup> Complaint data by type of allegation does not equal the total number of complaints because not all organizations provided this type of information, and some complaints fall in multiple categories.

information, often their calls were not returned; meanwhile, calls from whites were returned. Such “linguistic profiling” – whereby a person is treated differently based on a racially- or ethnically-identifiable voice – is a significant and documented phenomenon in many types of housing transactions. Complaints are also beginning to focus on insurance companies’ denying claims, using credit scores to price insurance products, or canceling policies due to claims’ filing.

***Harassment—Private Groups Report 1,141 Complaints***

Private fair housing groups reported 1,141 complaints of harassment. (Government agencies did not provide data on harassment cases.) Many of the complaints were filed on the basis of national origin, familial status and race. The Fair Housing Act makes it illegal to direct abusive, foul, threatening, or intimidating language or behavior toward a tenant, resident, or homeseeker because of their membership in one of the federally protected classes, or to someone helping a person exercise his/her fair housing rights.

### Section III. Trends in Public and Private Fair Housing Enforcement

#### A. U.S. Department of Housing and Urban Development

HUD is charged with carrying out the Fair Housing Act's mandate to eliminate housing discrimination through effective enforcement. To that end, HUD's Office of Fair Housing and Equal Opportunity (FHEO) is charged with enforcing the Act and other civil rights laws, including Title VI of the Civil Rights Act of 1964, Section 109 of the Housing and Community Development Act of 1974, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, Title IX of the Education Amendments Act of 1972, and the Architectural Barriers Act of 1968.

HUD has the authority to investigate and conciliate housing discrimination complaints filed under the Fair Housing Act. It can also initiate investigations and file complaints on behalf of the Secretary, as authorized under Section 810 of the Fair Housing Act. In addition to enforcement activities, HUD can publish and distribute educational materials that provide information how to report unlawful discrimination; administer and manage the Fair Housing Assistance Program (FHAP), and the Fair Housing Initiatives Program (FHIP); establish fair housing and civil rights regulations and policies for HUD programs; publish guidance on complying with the requirements of fair housing and various civil rights laws; and monitor and review HUD programs and activities for compliance with federal nondiscrimination requirements and the requirement to affirmatively further fair housing.

HUD ADMINISTRATIVE COMPLAINTS	
1990	4286
1991	5836
1992	6578
1993	6214
1994	5006
1995	3134
1996	2054
1997	1808
1998	1973
1999	2198
2000	1988
2001	1902
2002	2511
2003	2745
2004	2817
2005	2227
2006	2830
2007	2449
2008	2123

While there are at least 4 million fair housing violations annually, only 30,758 complaints were filed in 2008. Private fair housing groups processed 20,173 of the 30,758 complaints and cases filed in 2008 – a total of 66 percent of all complaints. HUD processed 2,123 complaints, a 13% decline from last year’s figure, while state and local agencies (FHAPs) processed 8,429, an 8% increase from last year. As shown in the chart that follows, the number of cases that HUD processed in 2008 is still vastly lower than its 1992 high of 6,578 complaints.

***Charged Cases***

If an investigation yields a determination by HUD that there is reasonable cause to believe that illegal discrimination has occurred, the agency will issue a charge. The parties to a case can elect to have the case heard in federal district court in a case filed by the Justice Department or, if no election is made, a HUD administrative law judge will hear the case.

In 2008, HUD issued 48 charges following a determination that there was reasonable cause to believe that unlawful discrimination occurred. HUD does not indicate how many of these charges stem from complaints carried over from previous years. While this is a small increase from last year’s 31 charged cases, it is still only 2% of HUD’s total complaint load. In light of the over 4 million estimated fair housing violations in America, 48 charged cases is much too low.

FAIR HOUSING ACT CASES IN WHICH HUD ISSUED A CHARGE							
2001	2002	2003	2004	2005	2006	2007	2008
88	69	23	43	47	34	31	48

***Aged Cases***

With the exception of complex or systemic cases, Fair Housing Act regulations require that HUD investigate a case in 100 days or less. After a complaint is filed, HUD must perform an investigation in order to determine whether there is reasonable cause to believe discrimination has occurred. The result can be that HUD refers a case to a local FHAP agency for further investigation, finds cause to believe that discrimination occurred and issues a charge, or finds no cause to believe that discrimination occurred and closes the case. One of these actions must be taken within 100 days of a complaint being filed.

Yet HUD routinely carries an “aged” case load; that is, cases that have surpassed the 100 day benchmark without an outcome. According to the Government Accountability Office, only 31% of cases meet the 100 day deadline; 14% take more than 130 days.<sup>8</sup> In FY08, there were 841 cases at

<sup>8</sup> Government Accountability Office. *Fair Housing, HUD Needs Better Assurance that Intake and Investigation Processes Are Consistently Thorough*. October 2005.

HUD that passed the 100 day mark, a decrease of 512 from the 1,353 aged cases in FY07.<sup>9</sup> There were 4,227 aged cases at FHAP agencies (HUD’s counterparts at the state/local levels), an increase of 146 since FY07.<sup>10</sup>

Aged cases may be a reflection of understaffing at the Office of Fair Housing and Equal Opportunity, or a breakdown in investigatory practices and systems. In any case, HUD’s delayed action undermines its ability to promptly obtain meaningful resolution and may explain why many people are reluctant to file complaints with the Department, out of a belief that nothing will come of it.<sup>11</sup>

***Administrative Closures and No Cause Cases***

In FY08, HUD closed 591 cases and found no cause to believe discrimination occurred in 1,111 cases, totaling 1,702 cases. FHAP agencies closed 1,270 cases and found no cause in 4,293, totaling 5,563. Together, HUD and its FHAP agencies closed 7,265 cases in FY08. The chart below lists the number of closed cases by HUD and FHAPs, followed by a breakdown of reasons for administrative closures at HUD.

<b>FHEO CASES CLOSED NATIONWIDE</b>			
	<b>HUD</b>	<b>FHAP</b>	<b>Total</b>
<b>Administrative Closure</b>	591	1,270	1,861
<b>Conciliation/Settlement</b>	754	2,544	3,298
<b>No Cause</b>	1,111	4,293	5,404
<b>ALJ Consent Order</b>	5	n/a	5
<b>DOJ Non-Election Closure</b>	13	n/a	13
<b>DOJ Election for Court</b>	22	n/a	22
<b>Judicial Consent Order</b>	n/a	199	199
<b>Judicial Dismissal</b>	n/a	73	73
<b>Litigation – Discrimination Found</b>	n/a	15	15
<b>Litigation – No Discrimination Found</b>	n/a	6	6
<b>Hearing – Discrimination Found</b>	n/a	28	28
<b>Hearing – No Discrimination Found</b>	n/a	7	7
<b>Total Closures</b>	<b>2,496</b>	<b>8,435</b>	<b>10,931</b>

<sup>9</sup> *The State of Fair Housing – FY2007 Annual Report on Fair Housing*, US Department of Housing and Urban Development, the Office of Fair Housing and Equal Opportunity (March 31, 2008), p. 30.

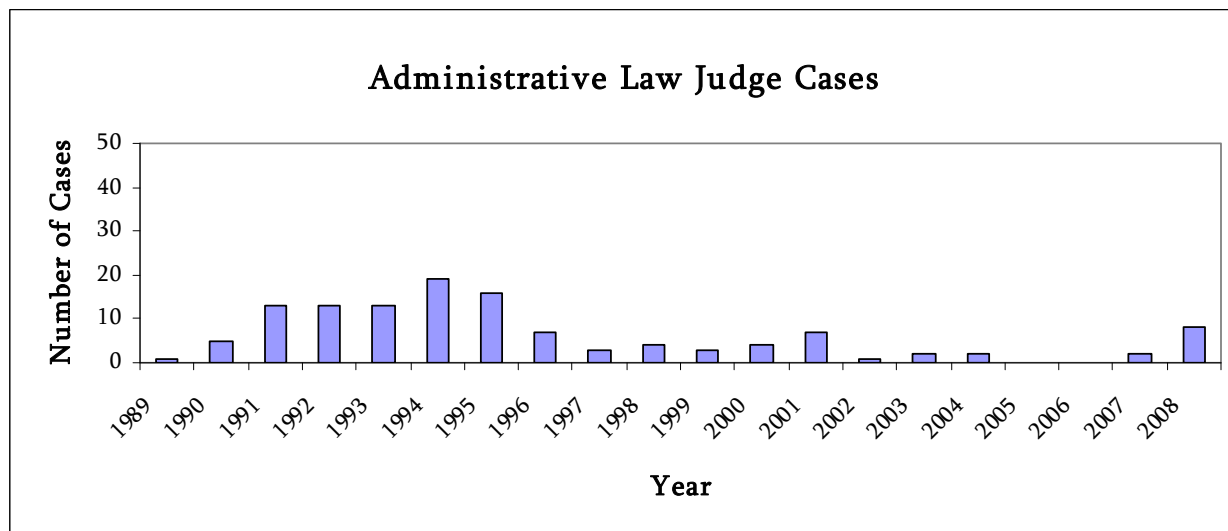
<sup>10</sup> *Ibid.*, p. 56.

<sup>11</sup> *The State of Fair Housing – FY2006 Annual report on Fair Housing*, U.S. Department of Housing and Urban Development, the Office of Fair Housing and Equal Opportunity (March 29, 2007), p. 7. HUD states that “Only one percent of individuals who believed they experienced housing discrimination reported it to a government agency. The most common reason cited for not taking action was a feeling that it was not worth the effort.”

HUD ADMINISTRATIVE CLOSURES	
Reason for Closure	Cases
Untimely filed	10
Dismissed for lack of jurisdiction	106
Unable to locate complainant	73
Complainant failed to cooperate	220
Unable to identify respondent	1
Complaint withdrawn by complainant without resolution	173
Unable to locate respondent	6
Closed because trial has begun	2
<b>Total</b>	<b>591</b>

### *Administrative Law Judge Hearings*

If a case is charged but the parties do not elect to have their case heard in federal district court, it will go before an administrative law judge (ALJ) who will decide the case and in some instances assess and award damages, affirmative relief, and attorneys' fees. In 2008, there were eight ALJ hearings that concluded with either a consent order or some form of relief. This is an improvement from prior years, when only two ALJ proceedings were heard last year, and none were heard in 2005 and 2006. The following chart illustrates the number of HUD ALJ proceedings since 1989.



## Recommendations to Improve HUD's Complaint Processing

HUD must improve its standards for complaint processing so that complaints are processed in a timely fashion and with meaningful results. With the annual number of complaints exceeding 30,000, and the estimated number of violations more than 4 million, it is not enough that last year HUD issued only 48 charges of discrimination. HUD must have consistent and quality standards for investigations, ensure its investigators are well versed in legal standards and case law, and improve its case processing so that cases are investigated in a timely manner. In addition, HUD has spent millions of dollars in the past twenty years educating builders about design and construction requirements. No builder can fail to be acquainted with these requirements. HUD should move these resources to systemic enforcement of the law.

HUD should abide by the standard for "reasonable cause." A possible explanation for HUD's low number is that it consistently sets the bar too high before permitting a claim to move forward. The standard for issuing a charge is that there is "reasonable cause" to believe that the Fair Housing Act has been violated. "Reasonable cause exists when one can conclude based on all relevant evidence that a violation may have occurred."<sup>12</sup>

### B. U.S. Department of Justice

The Department of Justice filed 33 cases in FY08, a decrease from the already low number of 35 cases filed last year. This is the third lowest number of filed cases since the National Fair Housing Alliance began tracking this data. The breakdown of cases in FY08 by protected class was: 39% race, 36% disability, 21% familial status, 9% sex, 6% national origin and 6% religion. There were no cases filed for discrimination based on age, marital status or source of income.

TOTAL DOJ CASES FILED BY YEAR									
FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06	FY07	FY08
48	45	53	49	29	38	42	31	35	33

The Justice Department's Housing and Civil Enforcement Section is responsible for enforcing the Fair Housing Act, the Equal Credit Opportunity Act, and Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations. The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against credit applicants on the basis of race, color, national

<sup>12</sup> U.S. Dep't of Housing and Urban Development, Guidance Memorandum, *Reasonable Cause Determinations under the Fair Housing Act* (1999), available at [http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD\\_resources\\_reasonable\\_cause\\_memo](http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_reasonable_cause_memo).

origin, religion, sex, marital status, age or source of income. Under this Act, the Justice Department has the authority to investigate and file a fair lending lawsuit.

The 1968 Fair Housing Act gave DOJ the authority to prosecute cases involving a “pattern or practice” of housing discrimination, as well as cases involving acts of discrimination that raise “an issue of general public importance.” In addition, the Justice Department can also bring cases where a housing discrimination complaint has been investigated and charged by the Department of Housing and Urban Development and one of the parties has "elected" to go to federal court.

When the Fair Housing Act was amended in 1988, the Justice Department was further empowered to initiate civil lawsuits in response to matters that involve fair housing violations by any state or local zoning or land-use laws referred by HUD.<sup>13</sup> Finally, the Civil Rights Division of DOJ has the authority to establish fair housing testing programs, which it first did in 1992. The division also subsequently established a fair lending program designed to challenge discriminatory lending mortgage practices and to educate lenders of their obligations under the Fair Housing Act and Amendments.

### ***DOJ's Recent Record***

As documented above, the 33 cases filed by the Department of Justice in FY08 represents the third lowest number of cases filed since FY99. While DOJ has filed several cases with important outcomes, the decline in the number of cases and the failure to focus on patterns that contribute to segregated communities merit serious concern.

An examination of the Justice Department's data for fiscal years 1999-2008 reveals some disturbing trends:

- Between 1999-2003, DOJ brought 224 cases; between 2004-2008, DOJ brought 179 cases; a reduction of 45, or 20%.
- Between 1999-2003, DOJ brought 41 pattern and practice cases based on race; between 2004-2008, DOJ brought 27 of these cases; a reduction of 14, or 34%.
- Between 1999-2003, DOJ filed 26 pattern and practice cases based on its testing program; between 2004-2008, DOJ filed 12 of these cases, a reduction of 14, or 46%.

One reason for the decline in filed cases may be that DOJ has continued to assert that it is not required to file “election” cases from HUD, insisting that it may instead perform additional investigations, thereby duplicating HUD's activities and prolonging the process. Election cases are cases where HUD has charged a complaint and either the complainant or respondent has elected to go to federal court instead of utilizing the HUD ALJ process. In FY08, the Justice Department filed only 14 election cases from HUD, down from the 16 election cases last year.

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<sup>13</sup> See Bill Lann Lee, “An Issue of Public Importance,” in *Cityscape: A Journal of Policy Development and Research*, v. 4, n. 3 (1999), pp. 35-56, p. 47n17.



The decline on case filings can also be attributed to the Department's refusal to prosecute disparate impact cases. In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination.<sup>14</sup> The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints. As the courts emphasized in permitting disparate impact cases in the first place, many rental, sales, insurance and related policies are not discriminatory on their face but have a disparate impact that is at odds with the purpose of fair housing legislation. An example of disparate impact is the patchwork of proposed ordinances and laws that place a limit on the number of persons per bedroom, which has a disparate impact against families with children (more information below).

### ***Mortgage Lending Enforcement***

In 2008, the Justice Department brought only one mortgage lending case, alleging that First Lowndes Bank discriminated against African American borrowers by charging them higher interest rates on manufactured housing loans than similarly-situated white borrowers.<sup>15</sup> Under the consent order, which is pending court approval, the Bank will pay \$185,000 to compensate borrowers who were charged higher rates.<sup>16</sup>

That the Justice Department brought only one mortgage lending case in FY08 is especially troubling given the extensive research into how discriminatory lending practices were so prevalent in the subprime market. Absent a strong enforcement effort that sends a clear message to the mortgage lending industry that illegal discriminatory practices will not be tolerated, there are too few incentives for the lending industry to comply with the law and engage in practices that are safe and sound.

During the 1990s, the Justice Department engaged in strong fair lending enforcement. It brought 14 high-profile fair lending cases challenging mortgage lenders engaged in "pattern or practice" discrimination between 1992 and 2000, many of which challenged discriminatory predatory activities and resulted in successful outcomes for communities of color. Yet in the years since, the Justice Department has prosecuted only a handful of new lending discrimination cases, despite the significant discriminatory predatory lending that has been going on throughout the past several years.

### ***Restrictive Ordinances and Exclusionary Zoning***

In a similar trend, DOJ has also retreated from filing cases alleging discriminatory land use or zoning decisions. These cases are an especially important area of fair housing enforcement given the long history of such discrimination and the current resurgence of restrictive zoning ordinances passed by local communities in response to the influx or perceived influx of immigrants.

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<sup>14</sup> HUD HUB Directors' meeting (Rhode Island, 2003).

<sup>15</sup> The complaint is available online at: <http://www.usdoj.gov/crt/housing/documents/lowndescomp.pdf>.

<sup>16</sup> The consent decree is available online at: <http://www.usdoj.gov/crt/housing/documents/lowndessettlefinal.pdf>. Under the decree, the bank will also implement new procedures to prevent discrimination in setting interest rates, and will provide enhanced equal credit opportunity training to its officers and employees who set rates for housing loans.

In FY08, the Justice Department brought only three cases challenging land use or exclusionary zoning practices. Specific practices can include limitations on nonresidential uses or types of housing, restrictions on maximum building or number of occupants per bedroom or structure, or requirements for minimum lot sizes. Exclusionary zoning has the effect, and often the purpose, of discouraging certain segments of the population from settling in the area.

In the past, the Justice Department successfully used its authority to challenge discriminatory zoning ordinances. For instance, in 1969, a community organization outside of St. Louis, Missouri began plans to construct multifamily housing for low and moderate income residents in a predominantly Black area that was not incorporated into the city. The predominantly White population successfully petitioned the county to incorporate the area and then proceeded to enact a zoning ordinance prohibiting the construction of any new multifamily dwellings. The Civil Rights Division challenged the zoning ordinance and the court ruled that the racial effect of the zoning ordinance was sufficient to violate the Fair Housing Act.

Modern day restrictive ordinances come in many different forms. Some ordinances fine landlords for renting to undocumented immigrants, a practice that stands in direct contradiction to fair housing law. U.S. courts have consistently protected immigrant fair housing rights, including the right to be free from illegal, discriminatory housing ordinances that have bearing on both the housing rental and sales markets.

Other ordinances, such as one that arose in Manassas, Virginia in 2005, attempt to control who can live together by restricting households to immediate relatives, even when the total number of occupants falls below the legal limit. Excluding extended family members such as aunts, uncles, nieces and nephews from residing together in one structure unduly affects immigrant households who often reside in extended families, and violates the Fair Housing Act by discriminating on the basis of national origin and familial status. Or, a restrictive ordinance can prohibit more than three people from living together in the same house if they are unrelated by blood, marriage or adoption, such as the case in Black Jack, Missouri in 2006. Such an ordinance places an undue burden on non-traditional families and has a disparate impact on families with unmarried heads of households.

A recent example of a racially restrictive ordinance occurred in St. Bernard Parish in Louisiana. Since Hurricane Katrina, the court has found – not once, but twice – that the Parish violated the Fair Housing Act by restricting housing availability for African Americans. Despite these court findings, HUD has not sanctioned the Parish in any way. One of the most onerous ordinance was one in Hazleton, Pennsylvania, which imposed a \$1,000-per-day fine on landlords who rented to undocumented immigrants. In 2007, a federal judge issued a permanent injunction against this restrictive ordinance.

### **Recommendations to Improve DOJ's Fair Housing Enforcement**

**DOJ must enhance its case filings.** In 2008, it filed only 33 cases, of which only 14 were election cases from HUD and only one involved mortgage lending discrimination. In the midst of a

foreclosure crisis, with the annual number of complaints exceeding 29,000, and the estimated number of violations more than 4 million, this is insufficient.

**DOJ must follow the statute and pursue cases charged by HUD.** The Fair Housing Act clearly states that DOJ must pursue cases charged by HUD. DOJ took the position in the last administration that it is not required to file these cases but that it may instead perform additional investigations, thereby prolonging and duplicating the process. In addition, there are two areas of enforcement at DOJ that have been underutilized in recent years: cases brought under their testing program and mortgage and predatory lending cases. Cases in those two areas have dropped precipitously in the past few years.

**DOJ Must File Disparate Impact Cases.** DOJ has stated its position that it will not litigate disparate impact cases involving housing discrimination.<sup>17</sup> Disparate impact cases are crucial in the fight against housing discrimination, and the federal government is often the only entity with enough resources to launch such a case.

### **C. Private, Non-Profit Fair Housing Efforts**

Private fair housing centers are at the forefront of the current foreclosure crisis by working to counsel people who have been victims of housing discrimination and finding ways to enforce the laws intended to protect them. There are approximately 100 qualified full-service fair housing organizations nationwide, many of which are funded by the Fair Housing Initiatives Program (FHIP) to provide vital enforcement and education services to their communities.

FHIP is authorized under Section 561 of the Housing and Community Development Act of 1987 and is the primary federal program that funds private fair housing groups throughout the country to assist people who believe they have been victims of housing discrimination, to conduct investigation, and to promote fair housing laws and equal housing opportunity awareness. Components of the program include the Private Enforcement Initiative (PEI) that enables private fair housing groups to carry out testing and enforcement activities; the Education and Outreach Initiative (EOI) that funds groups to engage in initiatives that educate the general public and housing providers about the rights, responsibilities and compliance with the law; and the Fair Housing Organizations Initiative (FHOI) that builds the capacity and effectiveness of fair housing groups and funds the creation of new organizations.

In, 2008, private fair housing organizations processed 20,173 complaints, approximately 66 percent of the total 30,758 complaints. There are fewer private fair housing organizations than federal, state and local government groups and yet, these private fair housing organizations continue to process nearly twice as many complaints with far less money. During the past five years one-quarter of private fair housing centers have closed, or were forced to significantly curtail or eliminate their enforcement activities and survive with drastic reduction in staff.

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<sup>17</sup> HUD HUB Directors' meeting Rhode Island 2003.

The FY2009 omnibus appropriations bill contains encouraging improvements. The bill includes \$27.5 million for FHIP, which amounts to a \$3.8 million increase over the FY08 appropriation. Of the \$27.5 million, \$2 million will support activities that protect the public from mortgage scams and \$500,000 will fund the creation and promotion of translated materials to assist people with limited English proficiency. However, this amount still falls below the amount required to effectively address systemic issues of discrimination in America. The appropriations bill also includes \$26 million for Fair Housing Assistance Program (FHAP) agencies, which brings the total funding for fair housing activities to \$53.5 million.

The following chart shows FHIP appropriations since 1994.

CONGRESSIONAL APPROPRIATIONS FOR FHIP	
Fiscal Year	FHIP Funding
1994	\$ 21 million
1995	\$ 26 million
1996	\$ 17 million
1997	\$ 15 million
1998	\$ 15 million
1999	\$ 15 million *
2000	\$ 17 million *
2001	\$ 14 million *
2002	\$ 18 million *
2003	\$ 18 million *
2004	\$ 18 million *
2005	\$ 18 million *
2006	\$ 18 million *
2007	\$ 18 million *
2008	\$ 22 million *
2009	\$ 26 million *

\*actual funding level available for general FHIP activities, excluding set-asides

\$27.5 million for FHIP represents the highest appropriated level since its authorization in 1994. Still, funding for FHIP activities alone should be at least \$52 million and should expand to full funding of private fair housing organizations to conduct enforcement activity in each of the 363 Metropolitan Statistical Areas, at a cost of approximately \$109 million per year.

This figure should continue to exclude funding for the Housing Discrimination Study (HDS), industry training and other projects, which, while important, are inappropriate uses of FHIP funding.

Research is funded under HUD's Office of Policy, Development and Research. Congress specifically noted in its FY09 budget that funds may not be used to fund the HDS, following a request from the former administration that FHIP funds be used for this purpose. Rather, funding should go towards private non-profit fair housing groups to engage in educational campaigns and local, regional and national enforcement projects. A national multi-media/education campaign is also required by the statute.

### **Recommendations for the Fair Housing Initiatives Program (FHIP)**

**FHIP funding should be overhauled to focus on establishing comprehensive, full-service organizations.** These full-service organizations should address all types of discrimination, promote inclusive communities, and develop systemic cases that would lead to more broad scale change and address cutting edge issues, such as discriminatory advertising on the internet. Presently, FHIP's inconsistent funding methods and over-burdensome application process have led to a patchwork of funding from year to year, and its funding process is over-focused on numbers of tests completed and persons educated than on the development of cases and changing of behavior. It often funds new, and often unqualified, organizations at the expense of existing and experienced fair housing organizations. These are often one time grants that do little to promote fair housing, particularly as the organizations are unequipped to deal with any enforcement matters that may arise. Moreover, FHIP's funding mechanisms allow HUD to pass over higher ranked proposals in order to provide funding for geographic diversity or to pass over higher ranked proposals from organizations funded in past years to make awards to lower ranked proposals from organizations that have not been funded. When funding for fair housing groups is interrupted for even one year, there are negative consequences for staffing, training and program activities, all which take additional money to restore – money that is diverted from investigating housing discrimination and educating the community.

We recommend that (1) FHIP funds go towards experienced fair housing groups to conduct consistent enforcement, rather than coping with staff turnover; (2) HUD enhance its investment in the creation of new groups if additional funds are available; (3) HUD rely on performance rather than grant-writing ability in the selection of organizations to be funded; and (4) enforcement organizations be able to spend time on enforcement rather than on preparing time-consuming grant applications.

**Funding for FHIP should be \$52 million, and should expand to approximately \$109 million per year.** While part of the overall problem is related to HUD's inconsistent system of funding organizations, part is also related to insufficient funding levels. As new organizations are created in unserved areas and as training, systemic investigation units are developed and expanded, funding should be increased.

**FHIP should also fund a comprehensive, multi-faceted, coordinated national media campaign** over several years, in the amount of \$2.5 million each year, for two purposes: (1) to educate consumers about how to recognize and report housing discrimination and develop and

disseminate high quality materials that can be utilized on the local level; and (2) to promote inclusive communities.

**FHIP should incorporate a regional or national systemic investigation component in addition to the systemic work done on the local level.** There should be coordinated effort to work on systemic issues related to large housing providers, a regional or national specific issue, and identification of new forms of discrimination. For example, in the early 1990s, HUD provided \$1 million for an 8-city mortgage lending investigation and \$500,000 for a 10 city insurance investigation. Needs related to special circumstances, such as in the case of natural disasters like hurricanes, should be addressed as well.

**FHIP should provide the highest quality training, professional development, and capacity building opportunities** and develop cooperative relationships between private fair housing organizations, HUD, FHAP agencies, the Department of Justice, and representatives of the housing, lending, and insurance industries.

**Congress must pass the Housing Fairness Act of 2009.** Introduced initially in 2007 in both chambers, and then again in 2009 in the House, the Housing Fairness Act (H.R. 476) represents a significant rededication to fair housing funding by Congress. The legislation authorizes funds to root out housing discrimination through a \$20 million nationwide testing program, an increased funding authorization for the Fair Housing Initiatives Program to \$52 million, and the creation of a \$5 million competitive matching grant program for private nonprofit organizations to examine the causes of housing discrimination and segregation and their effects on education, poverty, and economic development. The nationwide testing program alone would allow for 5,000 paired tests, amounting to an average of fifty paired tests in each of the nation's one hundred largest metropolitan statistical areas (which contain 69 percent of the nation's population).

## **Section IV. Current Marketplace Challenges to Promoting Fair Housing**

The current housing market looks very different than it did only a few years ago. From searching for an apartment or a house to looking for a loan, housing transactions begin most of the time on the internet. The country is undergoing a major economic downturn due in large part to unprecedented foreclosures. And although our country remains segregated, there are some important efforts to combat this segregation and the discriminatory practices that perpetuate it, challenges that specifically address the duty to affirmatively further fair housing. This section discusses internet advertising, challenges to cities and counties that fail to affirmatively further fair housing and the foreclosure crisis.

### **A. Internet Advertising: How Fair Housing Laws Are Being Undermined**

The rapid growth of the internet has opened up new channels of communication and marketing. Cheap rates, instant circulation and the ability to reach a broad audience unconstrained by one's immediate geography have given rise to more and more rental and sales advertisements being posted and transmitted online. And with the foreclosure crisis forcing many people to seek or advertise housing quickly and cheaply, there is an even greater probability that discrimination is occurring under our radar.

Websites such as craigslist.com, roommates.com, and apartments.com enable advertisers to market housing availability to millions of potential renters and buyers across the country, generating many more prospects much more quickly than print advertising.<sup>18</sup> According to the 2008 National Association of Realtors Profile of Home Buyers and Sellers, more than 87 percent of home buyers used the internet to search for homes.<sup>19</sup> The web analyst firm Nielson Online reports that the number of unique visitors to real estate websites in June 2008 was 11 million more than visited during the same month in 2006.<sup>20</sup>

The Fair Housing Act has prohibited discrimination in housing advertisements since it was enacted in 1968. With the recent and rapid rise of internet real estate and rental listings websites, our laws and regulations have not kept pace with this technology. What we have on the internet today is an ever-increasing proliferation of widespread illegal and discriminatory housing advertisements which are strictly prohibited under the Fair Housing Act. As housing advertisers continue to shift from traditional print media to online classifieds, the protections from discriminatory advertisements provided by the Fair Housing Act are being eroded by court decisions involving the Communications Decency Act (CDA).

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<sup>18</sup> Investment Bank Goldman Sachs has described Craigslist as "a real menace" to newspapers, claiming that "all publishers face a significant threat to their profitability." See "Craigslist's Silent Emergence," BBC (Aug. 4, 2005). Available online at: <http://news.bbc.co.uk/2/hi/business/4724165.stm>.

<sup>19</sup> "NAR Home Buyer and Seller Survey Shows Rise in First-Time Buyers, Long-Term Plans," NAR (Nov. 8, 2008). Available online at: [http://www.realtor.org/press\\_room/news\\_releases/2008/11/home\\_buyer\\_and\\_seller\\_survey\\_shows](http://www.realtor.org/press_room/news_releases/2008/11/home_buyer_and_seller_survey_shows).

<sup>20</sup> "Real Estate from an Online Perspective," Nielson Online (Aug. 8, 2008). Available online at: <http://www.nielsen-online.com/blog/2008/08/08/real-estate-from-an-online-perspective/>.



Under the federal Fair Housing Act, it is illegal to make, print or publish statements or cause to be made, printed or published any notice, statement or advertisement related to housing transactions that indicate any preference, limitation or discrimination on the basis of race, color, national origin, religion, sex, disability, or familial status.<sup>21</sup> This plain language is intended to prevent newspapers and other publishing media from publishing classified advertisements that indicate a preference. In short, the Act holds publishers of discriminatory housing advertisements legally responsible for content provided by third parties.<sup>22</sup>

Examples of discriminatory language found in online advertisements for one, two and three bedroom units and single family homes include:

- I would love to house a single mom with one child; not racists, but white only
- Room available to single white mother with child or younger to middle-aged white couple
- Female only please
- Preference renting out to a couple
- A single person would be ideal (in an ad for a two bedroom apartment)
- Indoor pets ok, no kids
- No kids, no pets
- Prefer 2 adults no kids (in an ad for a two bedroom apartment)
- 1 or 2 adults only.<sup>23</sup>

Website bulletin boards are not being held to the same legal standard as print media with respect to discriminatory ads. Not only do such ads stigmatize and discourage people in protected groups from seeking housing, they also mislead all readers into thinking that it is normal, legal and acceptable to extend preferential treatment or deny housing on the basis of federally, state or local protected classes. In fact, several respondents to complaints filed by NFHA have stated that they found or copied the discriminatory language from advertisements by other landlords. The Second Circuit has recognized the harm these discriminatory advertisements cause to the targets of the advertisements.<sup>24</sup>

HUD reaffirms this argument in a memo dated September 2006, stating “this prohibition applies to all advertising media, including newspapers, magazines, television, radio, and the Internet.” HUD concludes that “it is illegal for Web sites to publish discriminatory advertisements.”

Some internet service providers cite the Communications Decency Act (CDA), *47 U.S.C § 230* as exempting them from liability under the Fair Housing Act. The Communications Decency Act of 1995 is Title V of the Telecommunications Act of 1996 and was intended to protect families from

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<sup>21</sup> 42 U.S.C. 3604(c).

<sup>22</sup> See e.g. *Ragin v. New York Times Company*, 923 F.2d 995 (2d Cir. 1991).

<sup>23</sup> Many examples of such discriminatory internet advertising were recounted as part of testimony before the National Commission on Fair Housing and Equal Opportunity. Written testimony is available online at: <http://www.prrac.org/projects/fairhousingcommission.php>. See especially the testimony of Foster Corbin, Executive Director of Metro Fair Housing Services (Atlanta), available online at: [www.prrac.org/projects/fair\\_housing\\_commission/atlanta/corbin.pdf](http://www.prrac.org/projects/fair_housing_commission/atlanta/corbin.pdf).

<sup>24</sup> *United States v. Space Hunters*, 429 F.3d 416 (2d Cir. 2005)



online pornography and other forms of indecency.<sup>25</sup> It states that operators of internet services that attempt to screen inappropriate and illegal user-generated content from their websites are not to be construed as publishers (and thus legally liable for the words of third parties who use their services). The CDA provides that it has no effect on federal criminal statutes or any intellectual property law. There is no such provision for the Fair Housing Act or other civil rights statutes. However, nothing in the CDA explicitly limits liability under the Fair Housing Act or other civil rights statutes. Craigslist.com was not attempting at the time to screen inappropriate and illegal user-generated content from its website. Despite this, in 2008 the Seventh Circuit found that craigslist was not liable under the Fair Housing Act because of its exemption as a publisher under the CDA.<sup>26</sup>

In its opinion, the Seventh Circuit stated that “[u]sing the remarkably candid postings on craigslist, the Lawyers’ Committee can identify many targets to investigate. It can ... collect damages from any landlord or owner who engages in discrimination. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979). It can assemble a list of names to send to the Attorney General for prosecution.”<sup>27</sup> While this is true, it is the least efficient or effective means to end discriminatory advertising.

Following the court’s direction, NFHA and over 25 of its members have been reviewing internet advertisements and filing complaints against the landlord or owner who posted the advertisement. To date, over 1,000 of these complaints have been filed in the past year. However, it has become clear that pursuing complaints against the thousands of discriminatory advertisers who use the internet expends an exorbitant amount of time and limited resources of non-profit fair housing organizations, federal, state and local government administrative agencies that process these complaints.

The solution instead is to treat the internet sites just like newspapers and hold them liable for publishing ads that violate the fair housing laws. Newspapers have screening systems to catch illegal ads; internet sites could create similar screening systems to prevent these discriminatory advertisements from ever reaching the public. NFHA will be releasing a report detailing this joint investigation later this year.

In addition to the difficulty in pursuing thousands of complaints against individual advertisers, in many instances, the identity of the person placing the discriminatory advertisement is not known. Many internet advertising websites have systems that shield the identity of the advertiser by creating a special email account for the advertisement. The advertising websites, however, can identify the advertiser because they have the email account and the specific IP address of the advertiser and can generally identify the owner of the specific computer used to place the advertisement.

NFHA has requested that HUD use its subpoena powers to compel websites such as Craigslist to identify the poster of the discriminatory advertisement. Unwisely, HUD recently issued a memo

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<sup>25</sup>Stephen Collins, Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act, 102 *Northwestern University Law Review* 1471 (2008)

<sup>26</sup> *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist*, 519 F.3d 666 (7th Cir. 2008)

<sup>27</sup> *Id.* at 672.

stating that it would no longer subpoena websites that do not obtain the names and addresses of its users. This ignores the fact that, aside from names and addresses, the websites have information that would identify with specificity the violator of the law. Since the passage of the Fair Housing Act, print media have screened their classified ads for discriminatory content or have been held accountable when they publish discriminatory ads.

### **Recommendations to Improve Internet Advertising**

**Internet sites that publish discriminatory ads should be held liable**, as are print media, so that they will implement effective screening systems to prevent these discriminatory advertisements from ever reaching the public. It has become clear that pursuing complaints against the thousands of discriminatory advertisers who use the internet is not an efficient use of the time and resources of non-profit fair housing organizations, federal, state and local government administrative agencies that process these complaints and even the landlords.

**HUD should use its subpoena powers to compel websites such as craigslist to identify an individual posting a discriminatory advertisement.** Advertising websites are able to identify the advertiser because they have the email account and the specific IP address of the advertiser and can generally identify the owner of the specific computer used to place the advertisement.

**The Communications Decency Act should be amended to carve out an exception for the Fair Housing Act.** An amendment should explicitly prohibit internet advertisements that violate the federal Fair Housing Act and state clearly that CDA does not limit any claim arising under the Act.

## **B. Affirmatively Furthering Fair Housing: It's the Law**

Cities, counties, and other entities nationwide receive funding from the federal government for housing and community development programs. With these funds comes the duty to “affirmatively further fair housing.” Although this provision is often associated with HUD’s significant Community Development Block Grant (CDBG) program, the duty applies to all recipients of federal funds.<sup>28</sup>

Over the past year the federal government has passed or implemented several programs designed to slow the deepening recession, including the Housing and Economic Recovery Act which passed with \$4 billion for the Neighborhood Stabilization Program (NSP), the \$700 billion Troubled Assets Relief Program (TARP), the \$789 billion American Recovery and Reinvestment Act (the “stimulus”) with an additional \$2 billion for the Neighborhood Stabilization Program, and the \$75 billion Making

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<sup>28</sup> This duty comes from the Fair Housing Act of 1968, which requires that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the Fair Housing Act (“FHA”)] and shall cooperate with the [U.S. Department of Housing and Urban Development (“HUD”)] to further such purposes.” 42 U.S.C. §3608(d). Executive Order 12892, signed on January 17, 1994, reiterates the responsibility of all federal agencies to administer their programs in a manner that affirmatively furthers fair housing.

Home Affordable (MHA) program. The federal government is now spending or preparing to spend unprecedented sums of money to address the foreclosure crisis and turn the economy around.

Although the effectiveness of these programs and their alternatives have been widely debated, the role of fair housing/fair lending laws and principles in the implementation of these programs have gone virtually unaddressed. All of these programs, and more, are covered by the duty to affirmatively further fair housing. This means that every federal agency involved in the process, i.e. Treasury, HUD and others, as well as the agencies' partners in carrying out the programs, such as banks, servicers, cities and insurance companies, must use these funds in a way that promotes diverse, inclusive communities.

In addition, there should be greater fair housing oversight in the disbursement and spending of the billions of dollars in CDBG funds. CDBG funds are used for numerous programs and activities that benefit low- and moderate-income families and communities. Jurisdictions that receive this funding are required to prepare an Analysis of Impediments to Fair Housing Choice (AI) including recommendations and plans to eliminate the barriers identified. Despite this mandate, NFHA estimates that less than 10 percent of the more than 1,100 CDBG entitlement jurisdictions in the country actually provide funding for meaningful programs to address fair housing concerns in their communities. Even fewer provide funding to private fair housing organizations serving their jurisdictions.

From the past year, there have been four notable examples of blatant disregard for the duty to affirmatively further fair housing. In none of these examples has HUD intervened in any way to promote fair housing – and in two of the examples, HUD has been complicit in violating fair housing law. In all of the examples, it has been up to private fair housing centers to carry out the business of enforcing fair housing. The four areas are: Zanesville, OH; Westchester County, NY; Louisiana; and Gulfport, MS.

#### ***Using Federal Funds to Perpetuate Segregation: Zanesville, OH and Westchester County, NY***

On July 10, 2008, the U.S. district court in Columbus, Ohio found the City of Zanesville, OH and Muskingum County guilty of racial discrimination for illegally denying public water service to persons who reside and/or have lived in the predominately African American neighborhoods of Coal Run Road and Langan Lane near the City of Zanesville.<sup>29</sup> The jury awarded the plaintiffs \$11 million in damages. The suit later settled.

The lawsuit stemmed from an investigation, begun in 2002 by the Fair Housing Advocates Association (FHAA) of Akron, Ohio, which confirmed that public water service was being denied to these primarily African American neighborhoods while being provided to primarily white homes surrounding the area. A lawsuit was brought by the FHAA and residents of Coal Run and Langan Lane that alleged that the city, county, and township intentionally denied the plaintiffs public water service on the basis of race. The plaintiffs live within one mile of public water lines, but were denied

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<sup>29</sup> *Jerry Kennedy, et al. v. City of Zanesville, Ohio, et al. Case No. 2:03-cv-01047, S.D. Ohio*

public water service for nearly fifty years. As a result, they had to haul water from the city, collect rainwater, and store water in cisterns, where it often became dangerous for consumption. During the same time period, white residents on the same street were provided with water.

The jury found that both the city and the county played a role in providing water service in ways that included, but not limited to, securing funding for water projects, determining what water projects were pursued, controlling who could tap into water lines and running water lines past Coal Run Road and Langan Lane in order to provide water to other cities, villages, or townships. Thus, despite its obligation as a recipient of CDBG funds to affirmatively further fair housing, the City and County had not engaged in programs to encourage inclusion and overcome the effects or conditions that had kept their community from being open to everyone.

In Westchester County, NY, a fair housing center has taken a unique approach to addressing local jurisdictions that take government funds but do not affirmatively further fair housing: a charge under the False Claims Act of 1863. In 2006, the Anti-Discrimination Center of Metro New York charged the County with making false claims to the federal government when it repeatedly certified that it had affirmatively furthered fair housing and accepted \$45 million in CDBG funds.<sup>30</sup> The lawsuit alleged that Westchester County is strongly segregated by race and national origin and that the County's HUD mandated Analysis of Impediments to Fair Housing Choice (AI) failed to address the residential segregation over a period of years. The lawsuit charted the numerous situations in which the County had failed to encourage or worked to oppose housing that would serve people of color.

On February 24, 2009, in an opinion and order granting in part the Center's motion for summary judgment, Judge Denise Cote ruled that Westchester County did in fact submit false certifications to the federal government when it misrepresented its efforts to affirmatively further fair housing.<sup>31</sup> The ruling found that the County made a false claim every time it made a request for payment to government, for requests totaling more than \$50 million over six years. The County failed in its obligation in part because during that period it never undertook a required race-based analysis in its AI. Judge Cote did not rule on whether Westchester County's claims were knowingly false, which is a requirement under the federal False Claims Act. The issue of whether Westchester County knowingly submitted its false certifications will be determined at trial, which is scheduled for May 2009.<sup>32</sup> The county said it would appeal the ruling.

### **Recommendations to Strengthen the Duty to Affirmatively Further Fair Housing**

**HUD must strengthen the regulations that implement the “affirmatively furthering” requirement and provide more effective oversight. If HUD does not act, Congress must step in.** CDBG funds are required to be spent in ways that affirmatively further fair housing, but the specifics of this mandate remain ambiguous. HUD should promulgate enforceable and meaningful regulations

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<sup>30</sup> *US ex rel, Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, NY.*

<sup>31</sup> Available online at: <http://www.antibiaslaw.com/sites/default/files/files/SJDecision.pdf>.

<sup>32</sup> “Judge Faults Westchester County on Desegregation Efforts,” *New York Times* (Feb. 27, 2009). Available online at: <http://www.nytimes.com/2009/02/27/nyregion/27westchester.html>.

requiring local jurisdictions to include fair housing in their comprehensive plans and their funding decisions. Those regulations should require that Analyses of Impediments to Fair Housing Choice (AIs): are prepared; accurately reflect the community's needs; describe strategies to improve fair housing compliance; are followed; and are updated at least every five years. If a state or local government fails to comply with these obligations, the regulations should require that HUD reduce or terminate CDBG funding. HUD's Office of Community Planning and Development (CPD) should require recipients to set aside adequate funding for fair housing education and enforcement staff and associated costs.

**HUD should enforce the requirement that CDBG recipients update their AIs to reflect new barriers.** Hurricanes Katrina and Rita caused major dislocation to the housing market in communities all along the Gulf Coast. Elsewhere, communities hard hit by foreclosures have experienced similar dislocations. In such situations, as part of the planning process for the use of federal funds – for disaster recovery, foreclosure prevention, neighborhood stabilization, and the like – HUD should require CDBG recipients to update their AIs, and to identify strategies to overcome barriers with the federal funding they receive. Further, HUD should monitor implementation of those strategies to make sure they are being carried out effectively.

### *How HUD Helped Louisiana and Mississippi Ignore Fair Housing Law*

Established in the aftermath of hurricanes Katrina and Rita in 2005, the Louisiana Road Home program was designed to compensate homeowners for the damage to their homes. This \$11 billion program was funded by federal Community Development Block Grant disaster recovery monies, which are administered by the State of Louisiana and overseen by HUD. HUD has the authority and the responsibility to ensure that the funds are used to promote equal housing opportunity and to affirmatively further fair housing, not perpetuate segregation. Instead, HUD allowed Louisiana to adopt a formula for allocating grant funds that is biased against New Orleans' African American homeowners and which acts as a serious post-hurricane impediment to the rebuilding of communities of color.

This problem arises because the Road Home program calculates benefits using a formula that links a family's compensation to the *lower* of the following two numbers: the pre-storm value of the home or the funds required to repair the home. Because pre-storm home values in predominantly African American neighborhoods were already depressed as a result of a history of housing, lending and insurance discrimination and segregation, these property values are often tens, or even hundreds of thousands of dollars less than the cost of repairing the home. Therefore, the Road Home grants for African American homeowners were more likely to be based on the pre-storm value of their homes than the cost of rebuilding. The grants for white New Orleanians, in contrast, were more likely to be based on the cost of repairs. This formula resulted in many white families receiving a larger rebuilding grant than those in predominantly African American neighborhoods, regardless of the

actual costs of rebuilding.<sup>33</sup> Clearly, use of this formula fails to comply with the mandate to affirmatively further fair housing.

On November 12, 2008, NFHA joined with the Greater New Orleans Fair Housing Action Center and four African American homeowners in New Orleans to file a federal lawsuit against HUD and the Louisiana Recovery Authority to redress this instance of discriminatory housing policy.<sup>34</sup> The plaintiffs are requesting that the Court certify the case as a class action, and estimate that there may be as many as 20,000 African Americans who have been harmed by the Road Home formula and could receive additional Road Home funds if the litigation is successful.

Additional concerns about fair housing violations in the use of CDBG funds have arisen in Mississippi. There, the Gulf Coast Fair Housing Center, the Mississippi State Conference NAACP, and several African American residents along the coast have filed suit against HUD to prevent the diversion of \$600 million in CDBG funds from addressing the region's severe shortage of affordable rental housing into a dramatic expansion of the Port of Gulfport.<sup>35</sup> The suit also challenges waivers issued by HUD that allow Mississippi to disregard regulations requiring it to spend 50 percent of its CDBG funds to benefit low- and moderate-income people.

### **Recommendations to Affirmatively Further Fair Housing in the Gulf**

**Congress must appropriate more funding to complete the task of rebuilding in a way that provides safe, decent and affordable options to all residents of the region.** Three and a half years after Hurricane Katrina, too many people of color and low- and moderate-income people in communities all across the Gulf Coast still have nowhere to live or insufficient funds to fully rebuild their homes. Very little rental housing has been restored or rebuilt, and increased demand has led to substantial rent increases in the existing rental housing stock. Further, HUD must provide better oversight and guidance to the hurricane-affected jurisdictions on the design and implementation of effective rental housing rebuilding programs.

**HUD must work with grantees to improve the CDBG reporting systems, and it must strengthen the fair housing reporting requirements.** While disbursing the funds, rather than reporting on them, is an understandable priority in the aftermath of a disaster the magnitude of the 2005 hurricane season, good public reporting systems are also critical to ensuring that those funds are spent appropriately. For CDBG grantees in the Gulf, there have been considerable time lags in making accurate, understandable information about their spending available to the public in a readily accessible form. Further, current regulations do not require grantees to make public any

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<sup>33</sup> Lisa K. Bates and Rebekah A. Green, "Housing Recovery in the Ninth Ward: Disparities in Policy, Process, and Prospects," in Robert Bullard and Beverly Wright (eds.), *Race, Place, and Environmental Justice After Hurricane Katrina* (Westview Press: 2009), pp. 229-248.

<sup>34</sup> Greater New Orleans Fair Housing Action Center, National Fair Housing Alliance, et al. v. United States Department of Housing and Urban Development and Paul Rainwater, Executive Director of the Louisiana Recovery Authority.

<sup>35</sup> *Mississippi State Conference NAACP, Gulf Coast Fair Housing Center, et al v. United States Department of Housing and Urban Development.*



information about the extent to which the funds benefit members of classes protected under the Fair Housing Act.

### C. Applying Fair Housing Principles to the Foreclosure Crisis

For several years now, fair housing advocates, neighborhood organizations and members of the wider civil rights community have warned of the foreclosure crisis and the heavy toll it has exacted in communities of color. Yet as the operation of an unregulated housing/lending market emerged publicly as the driving factor behind an historic economic downturn, the faces of those who were hit earliest and hit hardest faded into the background.

In this section of the report, we provide a brief overview of the role of racial discrimination in mortgage lending during the recent boom years and a snapshot of the ongoing foreclosure crisis, especially as it affects communities of color. We stress that this was an avoidable crisis, and we recount how warnings by fair housing organizations and scholars went ignored year after year until it was too late. Finally, we address some of the programs created and envisioned to address this crisis.

#### *The Ongoing Foreclosure Crisis*

The separate and unequal financial system that has flourished in communities of color, even after passage of the Fair Housing Act in 1968, laid the foundation for the current crisis.<sup>36</sup> Under this system, communities of color have been inundated with institutions offering products and engaging in practices that are high cost, high risk and diminish the wealth of the residents of those communities. The most recent illustration of this trend is subprime mortgages, which have been heavily concentrated in communities of color, particularly African American and Latino communities.

The tactics of many subprime lenders are by now familiar.<sup>37</sup> The subprime mortgage industry was built with financial incentives for all of the players, from mortgage brokers to lenders to investors, to put unsuspecting borrowers in loans that were more expensive – and riskier – than what the borrower actually qualified for. As a result, subprime lending went from a \$35 billion a year industry in 1994 to a \$600 billion industry in 2006.<sup>38</sup>

This explosive growth continued unabated despite the fact that subprime loans were eight times more likely to default than conventional loans and carried a 72 percent greater risk of foreclosure than fixed-rate mortgages.<sup>39</sup> Furthermore, many borrowers who ended up with subprime loans in fact

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<sup>36</sup> National Fair Housing Alliance, *2008 Fair Housing Trends Report* (April 8, 2008).

<sup>37</sup> These are documented more fully in *2008 Fair Housing Trends Report*, op. cit.

<sup>38</sup> Comments delivered by Ben S. Bernanke at the National Community Reinvestment Coalition Annual Meeting, Washington, D.C., March 14, 2008, available at: <http://www.federalreserve.gov/newsevents/speech/bernanke20080314a.htm>.

<sup>39</sup> Ellen Schloemer, Keith Ernst, Wei Li and Kathleen Keest, "Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners," December 2006, available at: [www.responsiblelending.org](http://www.responsiblelending.org). This applies to subprime loans originated in 2000, after controlling for credit score.

qualified for fixed rate loans in the prime market. Fannie Mae and Freddie Mac estimated that up to 50 percent of those who ended up with a subprime loan would have qualified for prime loans.<sup>40</sup> According to a study conducted by *The Wall Street Journal*, which analyzed over \$2.5 trillion in subprime loans, as much as 61% of those receiving subprime loans would “qualify for conventional loans with far better terms.”<sup>41</sup>

Several studies have documented pervasive racial discrimination in the distribution of subprime loans. One such study found that borrowers of color are more than 30 percent more likely to receive a higher-rate loan than white borrowers even after accounting for differences in creditworthiness.<sup>42</sup> Another study found that *high-income* African Americans in predominantly Black neighborhoods were three times more likely to receive a subprime purchase loan than *low-income* white borrowers.<sup>43</sup> More recently, an analysis of loan, credit, and census data has shown that even after controlling for percent minority, low credit scores, poverty, and median home value, “racial segregation is clearly linked with the proportion of subprime loans originated at the metropolitan level.”<sup>44</sup> This research supports the conclusion that racial segregation is itself an important determinant of subprime lending. The resulting flood of high cost loans in communities of color has artificially elevated the costs of homeownership for residents of those neighborhoods.<sup>45</sup>

African American borrowers and the communities in which they live have suffered devastating setbacks as foreclosures caused by unaffordable and unsustainable loans have stripped many residents of homeownership and depleted their other wealth as well. In all, it is estimated that persons of color will lose between \$164 billion and \$213 billion in total wealth due to the subprime loans originated in the past eight years.<sup>46</sup>

The most recent figures on foreclosures nationwide are grim. The Mortgage Bankers Association reports that one in every nine U.S. homeowners with a mortgage was either behind on a loan payment or in some stage of foreclosure at the end of 2008.<sup>47</sup> And according to RealtyTrac, a firm that tracks foreclosure filings, one out of every 440 homes received a foreclosure filing in February

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<sup>40</sup> See the Center for Responsible Lending’s *Fact Sheet on Predatory Mortgage Lending* at <http://www.responsiblelending.org/pdfs/2b003-mortgage2005.pdf>, and *The Impending Rate Shock: A Study of Home Mortgages in 130 American Cities*, ACORN, August 15, 2006, available at [www.acorn.org](http://www.acorn.org).

<sup>41</sup> “Subprime Debacle Traps Even Very Creditworthy,” *Wall Street Journal*, December 3, 2007.

<sup>42</sup> See Bocian, D. G., K. S. Ernst, and W. Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending, May 2006, p. 3. Available at [www.responsiblelending.org](http://www.responsiblelending.org).

<sup>43</sup> Center for Responsible Lending’s *Fact Sheet on Predatory Mortgage Lending*, *op. cit.* See also HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (Washington, D.C.: HUD, 2000), and *The Impending Rate Shock*, *op. cit.*

<sup>44</sup> Squires, Gregory D., Derek S. Hyra, Robert N. Renner, “Segregation and the Subprime Lending Crisis,” Paper presented at the 2009 Federal Reserve System Community Affairs Research Conference, Washington, DC (April 16, 2009) p.1.

<sup>45</sup> For a comprehensive analysis of the relationship between race and access to prime, near prime, and subprime loans in a representative metropolitan area, see Institute on Race and Poverty, *Communities in Crisis: Race and Mortgage Lending in the Twin Cities* (February 2009). Available online at [http://www.irpumn.org/uls/resources/projects/IRP\\_mortgage\\_study\\_Feb\\_11th.pdf](http://www.irpumn.org/uls/resources/projects/IRP_mortgage_study_Feb_11th.pdf)

<sup>46</sup> United for a Fair Economy, *Foreclosed: State of the Dream 2008* (Jan. 15, 2008).

<sup>47</sup> Alan Rappeport, “U.S. Foreclosures Surge in February,” *Financial Times* (March 12, 2009).



2009.<sup>48</sup> More than one million homes entered foreclosure in 2007, with 1.7 million more added in the first three quarters of 2008.<sup>49</sup> Current projections by the Center for Responsible Lending (CRL) indicate that there will be 2.4 million foreclosures in 2009, and as many as 8.1 million residential borrowers will go through foreclosure by the end of 2012.<sup>50</sup> CRL's projection is based on a Credit Suisse report which states that this represents 16% of all mortgages.<sup>51</sup> CRL estimates that a foreclosure occurs somewhere in the country once every 13 seconds.<sup>52</sup>

Foreclosures also have spillover effects that further harm neighborhoods and wider communities. Research by Dan Immergluck of the Georgia Institute of Technology shows that for "every foreclosure within one-eighth of a mile of a single-family home, property values are expected to decline by approximately 1 percent. For neighborhoods with multiple foreclosures, property values are impacted even more. In Chicago, we estimate the cumulative impact of two years of foreclosures on property values to exceed \$598 million, for an average of \$159,000 per foreclosure."<sup>53</sup> A 2004 study in Philadelphia found that each home within 150 feet of an abandoned home declined in value by an average of \$7,627; homes within 150 to 299 feet declined in value by \$6,810; and homes within 300 to 449 feet declined in value by \$3,542.<sup>54</sup>

Declining property values and increasing foreclosures are also associated with reduced property tax revenue and increased government costs such as fire and police services. This has a tremendous effect on funding for schools and provision of municipal services of all types. Municipalities are finding their departments of code enforcement burdened beyond capacity – cleaning and boarding up foreclosed properties, fighting rodent issues, mowing lawns, etc. Thus, since many communities of color are already lacking in essential services, the spillover effects of foreclosures serve to aggravate an already grave imbalance.<sup>55</sup>

### ***Unheeded Warnings from Fair Housing Organizations and Scholars***

In his October 2008 testimony before the National Commission on Fair Housing and Equal Opportunity, Dr. Calvin Bradford explained that "the community organizations that had been working on reinvestment for over twenty years warned Washington of the coming nightmare as

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<sup>48</sup> Stephanie Armour, "Despite Housing Help, Foreclosures Rose 6%," USA TODAY (March 12, 2009).

[http://www.usatoday.com/money/economy/housing/2009-03-11-higher-housing-foreclosures\\_N.htm](http://www.usatoday.com/money/economy/housing/2009-03-11-higher-housing-foreclosures_N.htm)

<sup>49</sup> Congressional Oversight Panel, Foreclosure: Working Toward a Solution (March 6, 2009), p. 7. Available online at:

<http://cop.senate.gov/documents/cop-030609-report.pdf>.

<sup>50</sup> Center for Responsible Lending, "United States Foreclosures: Impacts and Opportunities" (Jan. 2009). Available online at:

<http://www.responsiblelending.org/pdfs/us-foreclosure-fact-sheet.pdf>

<sup>51</sup> Foreclosure Update: Over 8 Million Foreclosures Expected, Credit Suisse (December 4, 2008). Available at:

<http://www.nhc.org/Credit%20Suisse%20Update%2004%20Dec%2008.doc>

<sup>52</sup> <http://www.responsiblelending.org/issues/mortgage/>

<sup>53</sup> Testimony of Dan Immergluck, Ph.D., before the Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, March 21, 2007.

<sup>54</sup> Mayor and City Council of Baltimore v. Wells Fargo Bank, *Complaint for Declaratory and Injunctive Relief and Damages*, p. 2.

<sup>55</sup> See NFHA, *2008 Fair Housing Trends Report*, op. cit., p. 31.

abusive lending progressed into massive foreclosures.”<sup>56</sup> Yet the government, including HUD, Justice and federal bank regulators, did not heed the warnings.

In the mid-1990s, for example, NFHA conducted an eight-city, 600 test lending investigation using testers who posed as first-time homebuyers. The African American and Latino testers were slightly superior to their White counterparts on all pertinent characteristics including income, credit status, length of employment, loan-to-value ratio, and asset levels. Despite this, the test results showed substantial differences in treatment 68 percent of the time. NFHA found that lenders:

- steered whites to superior loan products while African Americans and Latinos were steered to Federal Housing Administration (FHA) loans, even when their loan amounts exceeded the FHA loan limit;
- told African Americans and Latinos that the qualification standards were more stringent than those quoted to white borrowers;
- quoted higher closing costs to minority testers;
- gave whites significant assistance in qualifying for loans while not giving the same to their minority counterparts;
- provided more information in writing to whites.

In Detroit in 1999, Flagstar Bank was found liable under the Fair Housing Act for discriminating against minority borrowers. Flagstar was an FHA direct endorsed lender, yet HUD took no action to suspend or debar Flagstar from doing business with HUD even after Flagstar lost its appeal. Justice never initiated a full-scale investigation of the bank. In fact, its regulator the Office of Thrift Supervision’s actions were so incongruent with fair housing principles that they *increased* the Community Reinvestment Act rating of Flagstar Bank to “outstanding” *after* the federal court found it liable for racial discrimination in its lending activities.<sup>57</sup> In 2003, in a national class action suit, a federal court in Indianapolis found a written pricing policy developed by Flagstar management in 2001 so overtly discriminatory that the court ruled against the bank on summary judgment. The policy explicitly stated that pricing would be different for minority and non-minority borrowers. HUD, Justice and the OTS still failed to take any action against Flagstar Bank.

The tendency of the federal government and regulators to ignore warnings from scholars, fair housing practitioners and community based organizations continued even once predictions about subprime loans began to come true. For example, in April 2007, national civil rights groups, including NFHA, the Leadership Conference on Civil Rights, the NAACP, the National Council of La Raza, and the Center for Responsible Lending called on mortgage lenders, loan servicers and investors to institute an immediate six-month moratorium on subprime home foreclosures resulting from reckless and unaffordable loans in the subprime market. The proposed purpose of the moratorium was for the industry to work with the groups to establish benchmarks and set long-term goals for easing the foreclosure crisis and to assist borrowers. The moratorium was ignored by the Federal Reserve and portrayed as alarmist by the industry.

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<sup>56</sup> Testimony of Calvin Bradford, Ph.D., before the National Commission on Fair Housing and Equal Opportunity (October 17, 2008). Available online at: [http://www.prrac.org/projects/fair\\_housing\\_commission/atlanta/bradford.pdf](http://www.prrac.org/projects/fair_housing_commission/atlanta/bradford.pdf)

<sup>57</sup> Ibid., p. 6.

NFHA along with several other civil rights organizations met with Federal Reserve Chairman Ben Bernanke in July, 2007, to discuss fair lending and fair housing concerns related to the foreclosure crisis. The groups renewed their call for a foreclosure moratorium and the need for the Fed to use its authority under the Home Ownership and Equity Protection Act to prevent further abuses in the mortgage market. Four months earlier, Chairman Bernanke had declared that "the impact on the broader economy and financial markets of the problems in the subprime market seems likely to be contained."<sup>58</sup>

The groups expressed their concern that problems in the subprime sector were likely to affect other segments of the financial market including the prime mortgage market, the auto lending market, and the wider global economy. However, the Chairman asserted the following month that the crisis "has been restricted only to the subprime market," and forecasted "moderate growth for the remainder of 2007, with a turnaround into early 2008 for the economy."<sup>59</sup>

Despite nearly two decades of scholars and advocates documenting and exploring the presence and role of predatory lending in minority communities, many on the front lines were forced to watch as there emerged what Dr. Ira Goldstein describes as an "inverse relationship between the rise of subprime lending and HUD and Justice's record of targeting abusive lending and lending discrimination."<sup>60</sup>

HUD has the authority to initiate its own investigations of fair lending discrimination, but in FY08, initiated only four investigations into lending discrimination for race and national origin discrimination. HUD initiated a total of three other fair lending investigations in FY07 and FY06. In addition, HUD processed only 60 fair lending complaints in 2008 (see Section III of this report for more information).

In a similar vein, the Department of Justice also did not address predatory lending practices after 2000, in spite of its demonstrated lending expertise during the 1990s when it brought 14 fair lending cases. For example, a 1996 consent decree with Long Beach Mortgage detailed discriminatory policies and practices against borrowers who were African American, Latino, women and seniors. In addition, Justice brought a fair housing case in 1999 against Delta Funding in New York and filed an amicus brief in a case brought by private counsel against Capital City Mortgage Corporation. However, DOJ has brought few fair lending cases since 2000.<sup>61</sup> In 2008, DOJ brought only one case of fair lending (see Section III of this report for more information).

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<sup>58</sup> Testimony of Ben S. Bernanke before the Joint Economic Committee, U.S. Congress (March 28, 2007). Available online at: <http://www.federalreserve.gov/newsevents/testimony/bernanke20070328a.htm>.

<sup>59</sup> Stewart Douglas, "Federal Reserve Warns on Subprime Impact," Finance Markets (August 3, 2007). Available online at: <http://www.financemarkets.co.uk/2007/08/03/federal-reserve-warns-on-sub-prime-impact/>.

<sup>60</sup> Ira Goldstein and Dan Urevick-Ackelsberg, "Subprime Lending, Mortgage Foreclosures and Race: How far have we come and how far have we to go?," The Reinvestment Fund. Available online at: [http://www.prrac.org/projects/fair\\_housing\\_commission/atlanta/SubprimeMortgageForeclosure\\_and\\_Race\\_1014.pdf](http://www.prrac.org/projects/fair_housing_commission/atlanta/SubprimeMortgageForeclosure_and_Race_1014.pdf)

<sup>61</sup> Testimony of Cathy Cloud, Senior Vice President of the National Fair Housing Alliance, before the National Commission on Fair Housing and Equal Opportunity (July 31, 2008). Available online at: [http://www.prrac.org/projects/fair\\_housing\\_commission/houston/cloud.pdf](http://www.prrac.org/projects/fair_housing_commission/houston/cloud.pdf).

## Recommendation to Improve Fair Lending Enforcement by HUD, DOJ, and the Regulators

HUD, DOJ, the federal regulators, and others must rededicate themselves to fair lending enforcement and strict oversight of all financial players. The federal government's lax enforcement of fair housing and fair lending laws has contributed in large part to our financial downturn and economic crisis. Fair housing scholars and practitioners are still pushing to be heard as the federal government puts unprecedented resources into an economic and social structure that is unproven to meet basic civil rights standards (see more recommendations on this point in Section III).

### *One Federal Response to the Foreclosure Crisis: The Making Home Affordable Program*

As the crisis in our nation's neighborhoods widens and deepens daily, it is becoming clearer that the larger economic meltdown cannot be solved until the growing tide of foreclosures is stemmed. Voluntary mitigation efforts on the part of loan servicers have not worked, and the steps taken to date are not enough to solve the problem.<sup>62</sup> The time has come for bold, aggressive action on the part of the federal government.

The Obama Administration's new Making Home Affordable (MHA) program is a significant step toward sustaining communities by providing homeowners with affordable loans. NFHA applauds the Administration for its efforts to develop a program focused on the needs of homeowners. Among the program's strengths are that it: (1) makes loan modifications affordable by using modest debt-to-income ratios, and substantially decreasing payments and interest rates; (2) stops foreclosures while loans are being analyzed for possible modification; (3) requires participating institutions to apply the program to *all* loans they own, in whole or in part, and/or service; (4) waives any partial prepayment penalties when principal is modified;<sup>63</sup> and (5) permits more aggressive modifications when appropriate to achieve affordability and sustainability.<sup>64</sup> Just announced, the program will also address the problem of second liens.

While the MHA program has various strengths, there are also several key issues that warrant further attention and examination. For instance, MHA provides extra incentives for servicers or lenders who modify borrowers not yet delinquent on their mortgages. Presumably, this feature was included in the program to diminish the current practice of some servicers who will not assist a borrower until the borrower is delinquent. This is a laudable goal, however, one that may present a perverse incentive. Because the foreclosure crisis hit the African American and Latino communities first, a disproportionate percentage of Latinos and African Americans are already delinquent. But with such an incentive in place, they may be reached too late.

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<sup>62</sup> For an analysis of the shortcomings of various extant voluntary mitigation programs, see *Foreclosure: Working Toward a Solution*, op. cit., p. 16.

<sup>63</sup> Prepayment penalties serve to box subprime borrowers into high-rate loans even if they've bettered their credit and wish to refinance. For example, for a family with a \$150,000 mortgage at an interest rate of 10 percent, a typical prepayment penalty in recent years imposed a fee of \$6,000 for an early payoff—an amount *greater than the wealth owned by the median African American family*.

<sup>64</sup> March 25, 2009 letter signed by 19 civil rights and consumer groups to Secretary Timothy Geithner, Secretary Shaun Donovan, and NEC Director Lawrence Summers.

## **Recommendations for the Making Home Affordable Program**

**Transparency and accountability are critical to the success of this effort.** To achieve accountability, the fair lending enforcement machinery of the federal government – in the banking regulators, HUD, the FTC and DOJ – must be rebuilt and take an active role in monitoring fair lending and consumer compliance under the MHA program. With respect to transparency, the Administration has taken a major step forward by invoking the Equal Credit Opportunity Act and requiring participating loan servicers to collect and report information on the race, gender and national origin of applicants for Making Home Affordable loan modifications. Some of this information will be made available to the public, but not loan level information about the modifications made by specific servicers (comparable to the application level data disclosed for each lender under the Home Mortgage Disclosure Act). This is a significant shortcoming of the plan and should be reversed.

**The program guidelines must be clarified to eliminate questions about the eligibility of homeowners whose loans were unaffordable at the outset, but who have not yet defaulted.** Many homeowners with subprime Adjustable Rate Mortgages (ARM) never could afford their mortgage payment, even at the start, and have been depleting savings, forgoing basic necessities such as food and medicine, and running up credit card debt in order to make their mortgage payments. These homeowners have gone to extraordinary lengths to stay current on unaffordable loans, and should be eligible to be considered for loan modifications.

**Where needed, MHA should require forgiveness of loan principal.** It is a step forward that the program permits and provides incentives for principal. However, the program's primary reliance on principal forbearance greatly limits the effectiveness of the loan modifications. Homeowners with inflated appraisals – many of whom are people of color – and payment option ARMs are more likely to have inflated principal amounts, as are homeowners with significant delinquencies who have their arrears added back into their loan balance. While forbearance provides better payments today, it locks a homeowner in without options to sell or even refinance after the initial five year loan modification period has expired. It also robs the homeowner of any accrued equity, the main source of wealth in many low-income communities and communities of color.

**The interest rate increases that will phase in after five years should be capped or eliminated –** capped for homeowners with higher debt-to-income ratios and eliminated for homeowners on fixed incomes, such as the elderly or those facing disability. While the rate increases will step up gradually and will be capped at a reasonable market rate, for homeowners with low and moderate incomes, these changes still may result in significant—and unaffordable—debt load increases. Moreover, where a homeowner is on a fixed income at the time of the modification, or starts receiving benefits for permanent disability after the modification, the payment terms for the first five years should be made permanent.

**Homeowners who suffer an involuntary drop in income after an MHA modification should not be refused additional assistance under the program.** Even after a loan is successfully modified and is performing, homeowners may still become disabled, spouses may die, or homeowners may

suffer a job loss. When this happens and the homeowner defaults on the modified loan, the program should permit servicers to reopen the MHA modification, and adjust its terms. Once timely payment is re-established, program incentives should be restored. Foreclosing on homes where homeowners have suffered an involuntary drop in income without evaluating the feasibility of a further modification is punitive to homeowners already suffering a loss, does not serve the interests of investors, and will only sustain the current economic downturn.

**More resources are needed for foreclosure intervention services such as housing counseling and legal services** that provide critical assistance to homeowners facing foreclosure. Making Home Affordable does not eliminate the need for such support services; in fact, it may actually increase the need as some borrowers will be required to undergo counseling. In addition, many borrowers may not qualify for MHA, and they will need assistance negotiating alternative loss mitigation options. However, the current resources for these services fall short of the estimated need.

### ***The Neighborhood Stabilization Program: Rebuilding Communities?***

The new Neighborhood Stabilization Program (NSP) provides \$6 billion to states, communities, and soon to private entities, to acquire foreclosed homes for redevelopment or rehabilitation. NSP funds flow through HUD's CDBG program. By allowing states and cities across the country to acquire foreclosed homes for redevelopment, rehabilitation or demolition, NSP provides an opportunity for jurisdictions to curb the destructive community-wide impact of foreclosures on property values and tax base. It is also an opportunity to promote racially and economically integrated communities that can shield against targeted abusive lending and discriminatory housing practices.

HUD must work to assure that this program does not go the way of so called "urban renewal" programs from the past that removed people of color from certain neighborhoods. Because NSP funds flow through the CDBG program, NSP grantees are required to affirmatively further fair housing, whether through programs to address fair housing concerns or funding to sub-recipients who agree to affirmatively further fair housing. HUD has direct authority over these recipients.

### **Recommendations for the Neighborhood Stabilization Program**

**HUD should assure that each jurisdiction receiving NSP funds has a current Analysis of Impediments to Fair Housing Choice (AI)**, which assesses its community's needs, describes strategies to improve fair housing compliance, implements the strategies, and continues to be updated at least every five years. In particular, recipients should assess whether members of protected classes under the Fair Housing Act have been disproportionately affected by abusive lending practices and subsequent foreclosures, and establish policies and programs that enable those residents to become homeowners once again.

**All properties acquired through foreclosure must to be marketed and managed by real estate firms and professionals who have received comprehensive fair housing training**, as recommended by the National Commission on Fair Housing and Equal Opportunity. If in the course of review, fair housing violations are found, the Administration must take immediate remedial actions or



make appropriate referrals for enforcement. Such reviews should be coordinated with HUD and DOJ.

### ***Pending Legislation to Address the Crisis: Bankruptcy and Anti-Predatory Lending***

Bankruptcy is an option for those with few others. And because of the neighborhood spillover effects of foreclosures, allowing distressed homeowners access to the bankruptcy court system will help protect the property values of all homeowners. The Congressional Oversight Panel reports that court-supervised loan modification is “unlikely to result in more than a *de minimis* increase in the cost of mortgage credit or reduction in mortgage credit availability.”<sup>65</sup> And a new study of recently modified loans conducted by the Center for Community Capital at the University of North Carolina at Chapel Hill shows that distressed homeowners who receive reductions in both loan interest rates and principal were five percent less likely to re-default than those who received a reduction in interest rates alone.<sup>66</sup>

Anti-predatory lending legislation is another option pending in Congress. Today, too many individuals and families are targeted for abusive home loans that strip away their hard-earned home equity and put their homes at a high risk of foreclosure. People of color are at greater risk of losing hard-earned wealth—and even their homes—as a result of high-cost, risky lending and abusive servicing. These predatory practices also disproportionately impact the disabled, seniors and female headed-households. A strong bill would eliminate the market for predatory loans and provide consequences for those who break the law.

### **Recommendations for Bankruptcy and Anti-Predatory Lending Legislation**

**Congress should give judges the ability to modify unaffordable loans for homeowners facing foreclosure.** Empowering bankruptcy judges to modify mortgages on primary residences for financially strapped homeowners will compel lenders to work towards preventing avoidable foreclosures, at no cost to taxpayers. Voluntary programs in place during the past have not produced the modifications necessary to save American families and repair the faltering housing market.

**Congress must enact comprehensive anti-predatory lending legislation** that includes: effective rights and remedies; prohibitions against steering; a designation of “high-cost” that includes all loan fees; a ban on yield spread premiums; a ban on pre-payment penalties; no federal preemption; and advanced disclosure of costs and fees.

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<sup>65</sup> *Foreclosure: Working Toward a Solution*, op. cit., p. 55.

<sup>66</sup> See Center for Community Capital, *Loan Modifications and Redefault Risk* (March 11, 2009). Available online at: [http://www.ccc.unc.edu/documents/LM\\_March3\\_%202009\\_final.pdf](http://www.ccc.unc.edu/documents/LM_March3_%202009_final.pdf).

## Conclusion

2008 was a year for the history books and the annals of fair housing. The foreclosure crisis and the economic recession marked a dramatic downturn for the United States and the world. NFHA and other civil rights groups posit that with stronger enforcement of existing fair housing laws, much of this crisis could have been avoided. With additional legislation and programs currently being debated, including foreclosure prevention, anti-predatory lending legislation, and judicial loan modifications, a patchwork of protections may take us in the direction we need to go. But with more than 8 million people going into foreclosure in the next four years and hundreds of billions of dollars lost to communities of color, we need more.

That is why the National Fair Housing Alliance is joining the call of the National Commission on Fair Housing and Equal Opportunity for an independent fair housing enforcement agency. This agency would take on the bulk of the enforcement authority currently at HUD. In 2008, HUD processed only 2,213 fair housing complaints. Compare this to the 20,173 complaints processed by private fair housing groups. State and local agencies processed only 8,429 cases. ***Fair housing organizations processed almost twice as many complaints as all government agencies combined.*** While NFHA is proud of its members' work around the country in fighting housing discrimination, we are troubled that the federal government is not doing much more with its extensive authority, responsibility and resources.

One of HUD's main barriers to being a stronger force in fair housing enforcement is its inherent conflicts of interest. A new agency would eliminate those conflicts and get down to the business of eliminating discrimination and promoting diverse, integrated communities, as laid out by the dual purpose of the Fair Housing Act.