

NFHA

National Fair Housing Alliance

A Step in the Right Direction

2010 Fair Housing Trends Report

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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

2009 saw a rocky road for the fair housing movement. Advocates achieved significant success affirmatively furthering fair housing, epitomized by the successful resolution of the fair housing litigation against Westchester County, New York and by the administration's dedication to promoting integrated communities, yet the foreclosure crisis and its many civil rights implications continued to temper any gains. Fair housing issues came to the fore in public policy and the media more often than in many years past – due both to the diligent work of agencies dedicated to fighting housing discrimination and to the dramatic effects of the economic crisis on families with children, people of color, people with disabilities, and many others.

The federal Fair Housing Act protects everyone's right to live free from housing discrimination. Under the Act, it is illegal to discriminate on the basis of race, color, religion, national origin, gender, disability, or familial status in rental housing, real estate sales, lending, insurance, and any financial or other services related to housing.

Our country is in a time of transition. We continue to live through the worst economic era in decades, yet we have hope that with new legislation reforming our financial markets and a new focus on equality in our federal programs our neighborhoods will stabilize and we may see a fair and accessible housing market.

The US Department of Housing and Urban Development (HUD) and the US Department of Justice (DOJ) both showed a commitment to positive policy changes in 2009, especially with HUD's steps toward affirmatively furthering fair housing and integration and with DOJ's dedication to fair lending. Yet, fair housing groups still continue to investigate 66 percent of all complaints, with fewer resources than either of these much larger federal partners. A total of 30,213 complaints were filed this year – significantly higher than most years past, yet a drop in the bucket compared to the estimated 4 million violations of the law every year.

In this report we take a look back at 2009, highlight the ups and downs, and make some recommendations on how to improve the state of fair housing in America.

Section I of this report describes how federal enforcement of the Fair Housing Act has taken a step in the right direction. In the last year, HUD has demonstrated its willingness to challenge local jurisdictions that perpetuate segregation or otherwise fail to affirmatively further fair housing with federal housing and community development funding. However, this section also notes the need to move the continued focus of fair housing enforcement on individual cases towards broader, systemic investigations with nationwide implications, like the recent *NFHA v. AG Spanos Companies* design and construction settlement.

Section II contains the 2009 national data on fair housing and Section III describes trends in public and private fair housing enforcement. Notably, in 2009 HUD charged more fair housing cases and the DOJ filed more cases than past years. In order to improve enforcement of the Act, private, non-profit fair housing organizations need improved capacity for enforcement and education.

Section IV focuses on the fair housing implications of the foreclosure crisis, some of the potentially discriminatory policies that the housing industry has implemented as a result of the crisis, and a fair housing analysis of the Administration's Making Home Affordable program created to limit future foreclosures.

Section V explores some other marketplace challenges that show us the need to change national policy to address housing discrimination on the internet; to amend the Fair Housing Act to include discrimination on the basis of sexual orientation and gender identity and discrimination based on source of income; and to support the use of disparate impact analysis under the Act.

Protecting fair housing rights and promoting integration remains relevant today not only because of the reality on the ground, but also because of its impact on our nation's politics. As we struggle for an equitable America, others discount the importance of fair housing and attempt to turn back the clock on the progress that the Civil Rights movement has made. Rand Paul, the Republican nominee for the United States Senate seat in Kentucky, recently discussed his opinion that the government should not be able to keep private businesses from discriminating.¹ In a 2002 letter to the editor specifically regarding the Fair Housing Act, he wrote, "A free society will abide unofficial, private discrimination even when that means allowing hate-filled groups to exclude people based on the color of their skin. It is unenlightened and ill-informed to promote discrimination against individuals based on the color of their skin. It is likewise unwise to forget the distinction between public (taxpayer-financed) and private entities."²

There are also the recent Arizona immigration law SB 1070 and its copycat attempts in other jurisdictions³ that hide behind the fury of anti-immigrant sentiment to legalize sweeping civil rights violations.

We've taken a step in the right direction, but as our trends data and these political facts demonstrate, we've got a long road ahead.

¹ <http://www.npr.org/templates/story/story.php?storyId=126985068>

² http://voices.washingtonpost.com/right-now/2010/05/rand_paul_in_2002_i_may_not_li.html;
<http://pageonekentucky.com/2010/05/20/rand-paul-made-same-racial-comments-in-2002/>

³ Louisiana Taxpayer and Citizen Protection Act (HB 1205)

Section I. Federal Enforcement – A Step in the Right Direction

The Department of Housing and Urban Development (HUD) has three important jobs when it comes to fair housing: enforcing the federal Fair Housing Act, educating the nation about the Act, and assuring that the federal government's housing and community development programs – including its own – do not discriminate or increase segregation.

HUD is also the agency tasked with the bricks-and-mortar job of housing those most in need, whether they be senior citizens, people with disabilities or low and moderate income individuals and families. It works closely with mortgage lenders, municipalities, developers, and other private and public partners to build housing units or make affordable housing otherwise available through mortgage loan and rental assistance programs. In carrying out these activities, HUD and its partners have at times disregarded the important civil rights responsibilities demanded of them by the Fair Housing Act or overlooked program components that perpetuate segregation.

Some past and current examples of this conflict of interest include:

- at least one of HUD's mortgage lending partners in the Federal Housing Administration (FHA) program has discriminated against borrowers of color by providing them with more costly loan terms or conditions because of their race;⁴
- local municipalities and states have misspent HUD-provided housing and community development grants on projects that either perpetuate segregation or discriminate against members of protected classes; and
- cities and developers have continued to develop federally-funded affordable housing only in impoverished, mostly minority census tracts.

Each of these activities violates the federal Fair Housing Act and its dual purpose of both eradicating discrimination in the housing market and fighting segregation. In the Housing and Community Development Act of 1974, Congress specified that the federal government and its grant recipients "affirmatively further fair housing." Yet, in spite of its important fair housing duties, HUD has sometimes allowed its programs to continue to operate in discriminatory ways.

In the last year, HUD has taken positive steps to address its programs' fair housing implications. When HUD Secretary Shaun Donovan addressed attendees at NFHA's annual conference in June 2009, he pledged to affirmatively further fair housing, make fair housing relevant to people's lives, and collaborate with outside agencies to strengthen enforcement activities. Since then, we have seen tangible examples of HUD's willingness to apply fair housing principles to the work it does, and we have seen HUD take steps to ensure that its programs break down the discriminatory barriers of residential segregation. In particular, since the publication of its 2009 Fair Housing Trends Report, NFHA has been encouraged by public statements and administrative actions taken by the Department

⁴ See discussion of Flagstar Bank in *Fair Housing Enforcement: Time for a Change. 2009 Fair Housing Trends Report* available at <http://nfha.objectwareinc.com/LinkClick.aspx?fileticket=dsT4nlHikhQ%3D&tabid=3917&mid=5321>, p. 41.

to ensure that its grant recipients comply with their obligation to promote integration under Section 3608 of the Fair Housing Act (requiring HUD and other government agencies to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing]”).

Yet, this willingness is unfortunately not enough to overcome the segregation and obvious racial inequities that the current economic recession has exposed throughout our nation. Instead, in order to accomplish the dual purpose of the Fair Housing Act the federal government must rethink the way in which it addresses fair housing. It must develop a well-coordinated federal approach to promote integration that reaches within and outside of the four walls of HUD, it must strengthen its fair housing enforcement procedures in order to vindicate the rights of victims of discrimination, and it must challenge institutionalized policies and practices of housing discrimination to achieve systemic change in America. Over the next year, we urge the federal government to strengthen its enforcement program and support the enforcement efforts of private non-profit fair housing agencies so that both isolated incidents of private discrimination and systemic discrimination in the housing market do not remain unaddressed.

A. Promoting Integrated Communities

CDBG Funds: HUD’s Positive Steps Toward Affirmatively Furthering Fair Housing and Integration

Every year, close to 1,200 Community Development Block Grant (CDBG) entitlement jurisdictions rely upon HUD funds for community improvements. Jurisdictions use CDBG funds to improve housing and infrastructure, and to create economic opportunities. The funds are intended to benefit primarily people with low and moderate incomes, and they carry a substantial fair housing obligation. In order to receive funds, communities must complete a Consolidated Plan and conduct an Analysis of Impediments to Fair Housing Choice in which they identify barriers to fair housing in the community, develop a plan to overcome these impediments, and implement that plan.

Each recipient of CDBG funds certifies to HUD that it conducted this analysis; however, many communities do not take this important obligation seriously. In its 2009 Trends Report, NFHA reported on four notable instances in which CDBG recipients blatantly disregarded their obligation to affirmatively further fair housing and did so with near-impunity, as they continued to receive HUD funding. Fortunately, this year there are four examples in which HUD took action to ensure that its grantees lived up to their fair housing obligations. Problems with two of these jurisdictions – St. Bernard Parish, LA and Westchester, NY – were highlighted in last year’s Trends Report.

St. Bernard Parish, Louisiana: St. Bernard Parish, Louisiana, is a virtually all White parish that borders two virtually all African-American New Orleans neighborhoods. It was badly damaged by Hurricane Katrina in the summer of 2005. As it has recovered from the storm, the Parish has taken a number of well-documented steps to attempt to restrict families of color from moving into it. NFHA member Greater New Orleans Fair Housing Action Center (GNOFHAC) first sued St. Bernard Parish in October 2006 after the Parish issued an ordinance which allowed homeowners to rent only to “blood relatives,” a blatant attempt to limit the number of African Americans that could move into

the Parish. Faced with litigation brought by GNOFHAC, the Parish quickly repealed the ordinance and, in 2008, entered into a consent decree in which it agreed that it would not discriminate.

Subsequent to the consent decree, the Parish continued to engage in discriminatory actions. In March 2009, a federal judge found that the Parish's 12-month moratorium on all multi-family housing of more than five units was racially discriminatory, as it was enacted after a real estate developer initiated the construction of much-needed affordable housing. The ordinance halted this process which had a demonstrated disparate impact on the area's African-American population. The Parish showed that it had no intention of complying with the court's order and continuously erected barriers to keep the developer from proceeding. After the Parish failed to issue appropriate building permits, the court sanctioned the Parish on two occasions in August and September 2009. In November 2009, the Parish planned a special election for a referendum on whether the Parish should permanently ban the construction of multi-family housing with six or more units.

Throughout this entire period, St. Bernard Parish relied upon CDBG funds as it recovered from hurricane damage. As of March 2009, the Parish had received over \$91 million in HUD CDBG funding distributed by the Louisiana Recovery Authority.⁵ After the Parish set the special election and referendum, HUD made clear to the Parish that it risked losing this funding if the referendum proceeded. Following this, the Parish canceled the referendum with a number of parish council members telling the media that HUD's threat had forced their hand.⁶

Westchester County, New York: NFHA's 2009 Fair Housing Trends Report reported on an important victory for the Anti-Discrimination Center of Metro New York (ADC). The ADC charged that affluent Westchester County made fraudulent claims to the federal government when it certified that it had affirmatively furthered fair housing in order to receive \$45 million in CDBG funds. At the time that the 2009 Trends Report went to press, a federal judge had ruled that the County had in fact submitted false certifications to the federal government and that it had not met its obligation to affirmatively further fair housing in part because it never undertook a required race-based analysis of housing choice in the County. The case was headed to trial for a jury to determine whether or not the County made its false claims knowingly.

The case never went to trial. Instead, the United States government intervened in the case and brokered a settlement in which Westchester County agreed to construct 750 units of affordable housing at a cost of \$51 million in its communities with the highest concentration of White residents where it has historically not provided affordable housing. At the time of the settlement in August 2009, HUD Secretary Shaun Donovan said, "This is about expanding the geography of opportunity for families who may have been limited in their housing choices.... This agreement signals a new commitment by HUD to ensure that housing opportunities be available to all, and not just to some."

Joliet, Illinois: Advocates for civil rights and fair housing have raised concerns regarding the implications of the City of Joliet, Illinois' attempt to condemn private affordable housing while

⁵ <http://www.lra.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=529>

⁶ http://www.nola.com/politics/index.ssf/2009/11/st_bernard_parish_council_back.html

simultaneously reducing its public housing stock. In December 2009, HUD rejected Joliet's 2010 Consolidated Plan, arguing that the plan did not address fair housing principles. As part of this rejection, HUD has been withholding \$1.4 million in CDBG funds from the city. In correspondence to the City, HUD has indicated that it withheld funds because Joliet has continued its efforts to condemn Evergreen Terrace, a 356-unit development that is privately owned but government subsidized. In another letter, HUD Assistant Secretary Mercedes Marquez wrote, "In particular, the fact that the city is proceeding with the taking of Evergreen Terrace while simultaneously supporting and instructing the Housing Authority on plans to remove nearly all family public housing demonstrates a city policy to remove housing that disproportionately serves protected classes."⁷

State of Texas: On November 10, 2009, HUD rejected the State of Texas plan to spend \$1.7 billion in CDBG funds for disaster recovery, in part because Texas did not sufficiently meet its obligations to affirmatively further fair housing in the plan.⁸ Congress appropriated \$3.0 billion in CDBG funds to Texas for disaster recovery. In late 2008 and early 2009, HUD approved the Texas plan for distributing round one of the funds (\$1.3 billion.). When Texas amended its plan and applied for round two of funding (\$1.7 billion), two advocacy groups – Texas Appleseed and Texas Low Income Housing Information Service – lodged a complaint with HUD in which they alleged that Texas was not meeting program and civil rights requirements. In particular, these groups argued that Texas had not updated its analysis of impediments to fair housing choice following the hurricanes and also argued that the Texas formula for distributing funds did not serve the areas most in need of the funds. After HUD rejected the Texas amendment as "substantially incomplete," the two groups officially filed an administrative fair housing complaint against Texas with HUD, alleging that the plan discriminates against Texans on the basis of race and national origin. HUD has continued to withhold the \$1.7 billion as the parties seek to settle the matter through a conciliation agreement.

Room for Improvement in Affirmatively Furthering Fair Housing

Even though HUD has demonstrated a willingness to hold CDBG-recipient municipalities to a higher standard than it has in the past, it has not consistently applied fair housing principles to its programs. Below, we highlight examples from fair housing agencies that are NFHA members. In one, a recipient of federal housing funds has discriminated against families with children with no repercussions from HUD. In the second, HUD itself declined to fund a program that would bring fair housing principles to a homelessness-prevention project in New York City.

Cornerstone Residential Management in South Florida: In 2005, two families and NFHA-member HOPE, Inc. of Miami, Florida, filed suit against Cornerstone Residential Management alleging that the company's policy of "one heartbeat per bedroom" limits or denies apartments to families with children. Throughout litigation, Cornerstone has received federal funding, including most recently \$7.5 million in HUD federal stimulus funding through the Tax Credit Assistance Program (TCAP).

⁷ Okon, Bob. "HUD ALLEGES: Joliet cutting black housing," *The Joliet Herald*, January 23, 2010; Okon, Bob. "HAJ defends demolitions after HUD attack," *The Joliet Herald*, January 27, 2010; Okon, Bob. "HUD to city: Keep public housing," *The Joliet Herald*, January 31, 2010.

⁸ http://www.nlihc.org/detail/article.cfm?article_id=6618&id=72

At several of Cornerstone's apartment complexes, management instituted a policy limiting apartment occupancy to either "one couple per bedroom" or "one heartbeat per bedroom." Under this policy, adult couples could share a bedroom, but children were required to have their own bedrooms. This policy effectively screened out prospective applicants, including the two plaintiff families. One plaintiff – a single mother and two children – sought a two-bedroom apartment that she intended to rent with a Section 8 voucher. When a Cornerstone manager told her she needed a three-bedroom apartment so that each child would have his own room, she was forced to look elsewhere. The second plaintiff family – another single mother and her three children – applied for a three-bedroom apartment but was unable to rent it because Cornerstone refused to allow the children to share a bedroom. This behavior contradicts HUD guidance issued in 1998, which states that two people per bedroom is a reasonable occupancy standard.

A federal judge granted a preliminary injunction, finding "the printed occupancy policy published and promulgated by [Cornerstone Property] Sanctuary Cove discriminated against families on its face." The litigation in this case is on-going and HUD filed a Secretary-initiated complaint against the company in 2008.

However, HUD could do more but has not. Following the preliminary injunction issued by a federal court, HUD should have barred Cornerstone from receiving any federal funds and recaptured the federal funds for all units that were not available on a non-discriminatory basis. Instead, Cornerstone received federal dollars under HUD's federal stimulus program.

Providing Fair Housing Assistance to the Homeless? HUD Says Not in New York City: Each year, New York City receives \$74 million in Homeless Prevention and Rapid Re-housing Program (HPRP) funding. The city uses this funding to support the operation of ten homeless prevention centers that are all operated by non-profits.

The Fair Housing Justice Center (FHJC) attempted to enter into a sub-contract with HELP USA, a non-profit organization that operates two of the ten homeless prevention centers in New York City. Under the terms of the contract, FHJC proposed to provide fair housing services to the homeless prevention centers' clients in the form of (1) outreach and education to program participants and housing counselors; (2) complaint intake and counseling; (3) complaint investigations, including testing; and (4) administrative and legal service-referrals, as well as post litigation support to pro bono and legal services attorneys representing program participants. These services would affirmatively further fair housing for program participants and they also complied with the fair housing requirements in the HPRP notice of funding availability.

Yet, HUD's Office of Community Planning and Development (CPD) denied the application. In October, 2009, HUD CPD's regional director notified HELP USA that the services described by FHJC were not eligible program activities because they did not provide a direct service to participants, a decision upheld by HUD's national office. Of course, the services provided by FHJC would have indeed provided a direct service to homeless individuals by alerting them of their fair housing rights as they began to search for housing, and even by their treatment in homeless shelters, which are covered by the Fair Housing Act. In fact, a recent lawsuit filed by FHJC on April 23, 2010,

demonstrates a clear link between homelessness and housing discrimination. The lawsuit, filed on behalf of FHJC and Damion Cales, alleges ten New York City real estate agents refused to do business with Cales, a thirty-one year-old homeless man with a disability because of his disability and source of income. Mr. Cales receives public sources of income, including Supplemental Security Income (SSI) and Fixed Income Advantage Voucher (FIADV), because he is a person with disabilities and is unable to work. Real estate agents repeatedly told Mr. Cales that they would not rent to him because he was not working and because he received SSI and FIADV funds. Real estate professionals in New York City commonly understand that recipients of FIADV benefits have a disability or a household member with a disability. Discrimination against people with disabilities is illegal under the federal Fair Housing Act and state and local New York laws. Because of this discrimination, Mr. Cales has been unable to find an apartment in New York City and remains homeless.⁹

Recommendations to Affirmatively Further Fair Housing

Setting case-by-case and program-by-program examples isn't enough. Although the examples of HUD's positive efforts are encouraging in their indication of an important new perspective toward its fair housing responsibilities, more work must be done to institutionalize the congressional mandate to affirmatively further fair housing. Case-by-case enforcement of this obligation sends an important message to entitlement jurisdictions: it puts them on notice that HUD takes civil rights obligations seriously.

HUD should develop a strong affirmatively furthering fair housing (AFFH) regulation. Over the last year, HUD has been developing a regulation to define affirmatively further fair housing, and has indicated that a regulation should be released in December 2010. Any regulation must define "affirmatively furthering fair housing" as a proactive term. In order to affirmatively further fair housing, grant recipients should be required to develop housing policies that promote residential integration and expand geographic housing opportunities for all protected classes under the federal Fair Housing Act. It should not limit protection to just the groups in the federal law, however, because many states and localities provide protections to a broader group. The regulation must also include performance measures based upon HUD grantees' outcomes in increasing racial/ethnic and economic integration within jurisdictions and across metropolitan regions. Merely filing appropriate paperwork is not enough; this regulation should permit a municipality to be flexible enough to meet its population's needs but demand accountability for results and eliminate residency preferences that too often deny housing to members of the protected groups.

The regulations should also provide a procedure by which HUD will review and investigate grantee compliance. Rather than recommending routine review and approval of municipal fair housing plans (a process that undermines a meaningful analysis), we suggest that HUD's Office of Fair Housing and Equal Opportunity engage in its own targeted compliance investigations and also review and investigate compliance when it is in receipt of complaints

⁹ For more information, see the complaint found on the Fair Housing Justice Center's website http://www.fairhousingjustice.org/PDFs/Cales_Complaint_04_23_10.pdf.

or letters of inquiry from the public. There should be strict and mandatory penalties and sanctions for non-compliance.

Congress should amend the Fair Housing Act to allow aggrieved individuals and organizations to bring civil rights actions against HUD grantees for violating the obligation to affirmatively further fair housing. Local community groups, including private fair housing organizations, have their fingers on the pulse of their communities. They understand what impediments to fair housing exist - be they NIMBYism, exclusionary zoning, racial segregation or others. They recognize what must be done to overcome these impediments, and they also comprehend the dynamics of local politics that too often introduce new impediments to fair housing. These groups, which already enforce the Fair Housing Act, should be able to enforce the obligation to affirmatively further fair housing. After all with more than 1,200 CDBG recipients nationwide, it is unlikely HUD has the staff to effectively review every CDBG recipient for compliance with the AFFH obligation. Congress can provide this authority to community groups and fair housing organizations by expanding the definition of “discriminatory housing practice” found in 42 U.S.C. § 3602 to include the phrase, “a failure to comply with the obligations of section 3608(e)(5),” thereby making this obligation enforceable in court.

The President’s Fair Housing Council should be reconvened to promote an understanding of and compliance with fair housing obligations across the federal government. Segregation in the housing market has far broader implications than simply determining where a person lives, and government programs outside of HUD and the Justice Department have tremendous civil rights and fair housing implications. We have seen this most clearly in the last few years regarding the regulation of mortgage lenders and the ways in which economic recovery and foreclosure prevention programs are implemented. (See Section IV on the foreclosure crisis.) In addition, the housing and community development programs of other cabinet-level departments, such as the Departments of Homeland Security, Treasury, Agriculture, Transportation, Education, and Health and Human Services, are subject to the same obligation to affirmatively further fair housing. HUD must take a leadership role in educating other federal agencies of their fair housing responsibilities, and the President’s Fair Housing Council – an innovative inter-agency group established in 1994 under the authority of the Fair Housing Act to further fair housing principles in federal programs and activities – should be reconvened.

B. Improving Enforcement of the Fair Housing Act

When he addressed NFHA's annual conference in 2009, HUD Secretary Shaun Donovan said:

“Today I want to make HUD's commitment to fair housing under President Obama's leadership clear: I pledge that HUD, in partnership with [Fair Housing Initiative Program recipients] and [Fair Housing Assistance Program recipients], will recommit our agency to affirmatively further fair housing. HUD will work tirelessly to make fair housing more relevant to people's lives and we will continue to stand up for anyone who is unlawfully denied a home of their own.”

This Administration has taken important steps to affirmatively further fair housing, but actual enforcement of the Fair Housing Act is not yet intertwined in the HUD programs or planning.

Currently, enforcement efforts only begin to address the challenges to fair housing that exist in the market. (See Sections II and V on fair housing data and marketplace challenges.) Simply put, individual incidents of housing discrimination remain largely unaddressed, large-scale systemic housing discrimination continues to occur, the public remains unaware of its fair housing rights, and large swaths of the population, notably the LGBT community and recipients of government housing assistance, find themselves unprotected by federal law. Although many of these challenges demand legislative changes (including providing protections to Americans based upon their source of income, gender identity, and sexual orientation, and revamping the structure the federal government's fair housing enforcement by creating an independent agency), we can begin to address many of them within the current enforcement system.

In order to improve enforcement, better coordination is necessary between HUD, its regional offices, state and local partner agencies, non-profit fair housing professionals, and the Department of Justice to identify major sources of housing discrimination and address them systemically. Additionally, federal, state, and local employees receiving FHAP funds to investigate incidents of housing discrimination require continuous professional development so that they may effectively and consistently apply established legal standards to fair housing complaints they receive.

The Benefits of Systemic Investigations: Strong Private Enforcement Efforts Have a Large Impact

Over the past year, NFHA has settled two large design and construction/accessibility lawsuits that can serve as fair housing enforcement models. The first demonstrates the wide-reaching impact systemic pattern and practice cases are capable of achieving; the second demonstrates the need for coordination between private non-profit fair housing organizations and federal agencies and for compliance-based monitoring of fair housing consent decrees or conciliations.

Systemic investigations do not have to rely on a complaint being filed. When a complaint comes into a fair housing agency, staff reacts to the complaint by conducting an initial investigation/test based on the specific parameters of the complainant's profile. Systemic testing, rather, allows qualified fair housing agencies to be proactive by incorporating knowledge of emerging negative housing trends

into an investigation and developing a plan to determine if discrimination is driving this trend. In addition to sending out teams of testers, systemic testing often requires extensive investigative research and follow-up testing or investigation.

National Fair Housing Alliance v. A.G. Spanos Companies. Systemic enforcement work, with an emphasis on changing discriminatory business practices within the industry or eliminating particularly pervasive types of housing discrimination within geographic areas, is a proven way of achieving positive change within the industry and reducing discrimination. This has been made apparent in the past during the resolution of litigation against some of the nation's largest homeowners' insurance companies and currently in design and construction cases.

Although the Fair Housing Act has required developers to build apartments and other units accessible to people with disabilities since March of 1991, too many continue to ignore this obligation. In the process, they develop buildings that, due to inaccessible features, exclude people with disabilities from moving in, trap people with disabilities who already live from moving about the property or deny access to family or friends with disabilities who want to visit. Inaccessible architectural features, in essence, serve the same exclusive function as a posted sign that says, "No Kids," or "No Latinos."

NFHA and four of its member organizations conducted testing in 2006 of buildings developed by A.G. Spanos Companies (the nation's fifth largest developer). The investigation revealed pervasive design and construction barriers to accessibility dating back to 1991. The company's design and construction practices showed a pattern and practice of development that was out of compliance with the Fair Housing Act, and its implications were not confined to a specific region. We found 123 buildings in fourteen states that contained thousands of inaccessible units. This was truly a national issue.

NFHA and its member organizations announced in January, 2010, a settlement with A.G. Spanos – a settlement with national implications. Spanos not only embraced the terms of resolution to retrofit properties, but also agreed to increase housing opportunities for people with disabilities beyond retrofits. Based on the terms of the agreement, Spanos will retrofit 82 properties in eleven states. These retrofits will resolve fair housing violations in approximately 12,300 units at a cost of approximately \$7.4 million. However, Spanos is unable to retrofit units in 41 buildings due to a host of complicating factors. In order to make up for those lost housing opportunities, Spanos is funding a National Accessibility Fund to be administered by NFHA. This \$4.2 million fund will provide grants to disabled homeowners and renters who need to make their dwellings accessible. Additionally, Spanos agreed to establish local accessibility funds in each Plaintiff's service area: Atlanta, Melbourne FL, Marin and Napa, CA and the District of Columbia with \$750,000 and provide \$100,000 to support a national media campaign designed to promote residential integration.¹⁰

¹⁰ www.aricherlife.org

This systemic enforcement effort will increase accessibility for people around the country and also sends a strong message to other developers, large and small, reminding them that they cannot ignore their fair housing responsibilities without paying a high price in the end.

National Fair Housing Alliance v. Ovation Development Corporation: NFHA filed a federal lawsuit against Ovation Development Corporation in August, 2007, following an investigation of 11 of its apartment complexes in Las Vegas and Henderson, Nevada. These complexes contained 1,512 units in 368 buildings that were out of compliance with the Fair Housing Act's accessibility requirements. NFHA's investigation found that Ovation's buildings had inaccessible kitchens and bathrooms, narrow door widths and passage ways, and inaccessible switches, outlets and environmental controls within units. Outside of the units, Ovation's developments lacked appropriate curb cuts and accessible parking spaces. These violations effectively made Ovation's apartments inaccessible to people in wheelchairs or people with other mobility or vision impairments.

NFHA settled the lawsuit in October 2009 in an agreement that required Ovation to retrofit each of its out-of-compliance units and pay \$750,000 in damages and attorneys fees to NFHA. For the principal of Ovation, it was his third fair housing settlement of the decade. In 2001 and 2005, he had entered into agreements with the Department of Justice for similar violations as the principal of Pacific Properties and Development Corporation.

Although this fact primarily speaks to the intransigence and disregard for the law of Ovation's principal, it also highlights a failure on behalf of the federal government to guarantee future compliance and to coordinate and monitor both administrative and legal resolutions. There must be serious consequences for repeat offenders, but if the cost of the first violation is significant enough to act as a deterrent then there may never be repeat offense.

Systemic Investigations Demand Government-Wide Cooperation

In today's economy and housing market, there is a heightened need for systemic housing discrimination investigations. HUD, through its FHIP and FHAP funding programs and the Department of Justice using its testing program should conduct more frequent and more comprehensive systemic investigations. The expertise to conduct these investigations lies in the private fair housing organizations that should be funded to conduct local, regional and national systemic investigations.

The lack of fair lending enforcement provides a strong example of the need for systemic investigations. As the subprime lending crisis demonstrated, mortgage lenders disproportionately made their subprime loans to communities of color and brokers routinely charged African-American and Latino borrowers higher up-front fees. (See Section IV for numerous examples.) Yet, there was virtually no systemic effort to hold lenders accountable for this behavior until the Obama Administration made it a priority and the Justice Department's Civil Rights Division established a dedicated unit to investigate fair lending violations.

Although the Department of Justice and HUD investigated and filed fair lending cases in the early to mid 1990s, there were few enforcement efforts in the 2000s. Federal regulators responsible for monitoring lender compliance with the Equal Credit Opportunity Act (ECOA) failed to enforce the law in the face of strong evidence of mortgage lending discrimination. Between 2001 and 2009, the Office of the Comptroller of the Currency referred zero cases of potential pattern or practice cases regarding race or national origin discrimination to the Department of Justice; the Office of Thrift Supervision made nine such referrals over nine years. These are the federal regulators responsible for overseeing the nation's largest banks. All of the federal entities combined that refer ECOA cases to the Department of Justice – Federal Deposit Insurance Corporation, Federal Reserve, OTS, OCC, National Credit Union Association, and HUD – referred only 41 cases between 2001 and 2009.

As the regulators put it in a letter to the Government Accountability Office, while they did find areas of non-compliance with fair lending laws, almost all of the violations that they noticed were technical and did not amount to a pattern and practice violation.¹¹ When states have suspected illegal discrimination and sought to investigate lenders, federal regulators have preempted their authority and not allowed them to investigate.¹² Rather than cooperating and preventing a national foreclosure crisis, multiple arms of the government worked at odds against each other and left enforcement of civil rights laws in the lending arena up to the private sector, which lacked the resources and access of the government.

Today, as banks increase the size of their Real Estate Owned (REO) portfolios of foreclosed homes that they must maintain, market and sell, a new challenge is emerging. Will the real estate agents and servicers responsible for selling the homes maintain and market homes in communities of color in the same way that they maintain and market homes in White communities. Will they steer prospective buyers based upon the racial composition of the neighborhood in which the home is located and deny people the opportunity to choose the neighborhood where they live? In neighborhoods of color, will investors receive favorable treatment in the sales negotiation and win out over potential single family owners who will occupy the homes and provide stability to the community? These and other areas are ripe for sustained systemic investigations and litigation.

The Need for Government Support in Routine Fair Housing Investigations

While fair housing groups around the country address systemic issues of discrimination, they are also the first place to which individuals turn when they have been victims of discrimination. Often times,

¹¹ GAO-09-704. *Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts*. July 2009. Available at <http://www.gao.gov/new.items/d09704.pdf>.

¹² An especially notable example of this phenomenon made it all the way to the United States Supreme Court and was decided in June 2009. In *Cuomo v. Clearinghouse Association, LLC* the Court held that the Office of the Comptroller of the Currency did not act reasonably when it prevented the New York State Attorney General from prosecuting national banks for violations of state fair lending laws that were not federally preempted. However, in its decision, the Court only gave states limited abilities to enforce laws – although the OCC cannot prevent states from enforcing non-preempted laws, it can prevent Attorneys General from seeking information related to potential violations from national banks in the absence of a lawsuit.

fair housing groups and these individuals turn to the HUD administrative process and Fair Housing Assistance Program-funded local and state agencies to resolve their fair housing complaints. However, they cannot always be sure that they will get a fair shake when HUD reviews their complaints. HUD employees still do not interpret the law in a consistent manner across regions: what one region may consider to be discrimination might be dismissed by another region—in spite of federal court or HUD ALJ decisions.

Although impact litigation such as the Spanos or Westchester cases mentioned above can spur nationwide change, the rights of individuals as established by settled case law are being ignored on a regular basis. Take, for example, the case of Pointe Overlook. Pointe Overlook is an adult condominium community located in Hypoluxo, Florida. When an African-American woman who had allegedly applied for a condominium in the community was denied a unit after the condominium board found out that she was African-American, her realtor and lender contacted NFHA member Fair Housing Center of the Greater Palm Beaches. After a subsequent investigation by the fair housing center both the fair housing center and the woman filed a complaint of race discrimination with the Palm Beach County Office of Equal Opportunity, a HUD-recognized FHAP agency.

When the woman decided to withdraw her complaint, the fair housing center continued to pursue the matter. Unfortunately, in the summer of 2009, the FHAP promptly issued a Determination of No Reasonable Grounds. This determination was not made on the facts of the case; it was instead made because the FHAP disregarded settled fair housing case law and decided that the fair housing center lacked standing to bring the complaint on its own. The fair housing center disputed this finding with HUD, which subsequently reopened the case. This case is still pending.

Fair housing groups are client-driven and trained to recognize and test for discrimination. When they find it, they should be able to trust that FHAPs and HUD will appropriately handle the case.

Recommendations to Improve Fair Housing Act Enforcement

Strengthen federal funding for private fair housing enforcement and systemic fair housing enforcement. HUD relies upon private partners to assist in its enforcement of the Fair Housing Act. Private fair housing organizations are the first responders to housing, lending and insurance discrimination and sexual, racial, ethnic or religious harassment in fair housing enforcement. They operate on the front lines within their communities: they assist community residents, they test for housing discrimination, and they educate the public and industry as to their rights and responsibilities under the Fair Housing Act. It is the local fair housing organization that takes the calls, weeds out non-meritorious claims, structures and executes complex testing and investigation of complaints, counsels complainants, secures administrative and/or legal assistance, negotiates resolutions, monitors compliance agreements and provides education, outreach and research about the nature and extent of housing discrimination. Equally important, the fair housing organizations screen out complaints that are not meritorious; thereby, saving time and resources for FHAP agencies and HUD.

These groups rely primarily upon scarce federal funding allocated through HUD's Fair Housing Initiatives Program (FHIP). FHIP is a competitive grants program that provides qualified fair housing groups with funds to conduct enforcement activities and fair housing education and outreach programs. In FY2009, qualified groups submitted \$75.4 million in applications for only \$27.5 million in available federal funds. With the program unable to meet this demand, nearly a quarter of the nation's private fair housing organizations have closed or significantly reduced staff size in the past decade. The end result: landlords, managers, real estate and insurance agents engage in discrimination with impunity. An appropriation of \$52 million would significantly expand the FHIP program and begin to significantly address the pervasive housing discrimination these groups, individuals and neighborhoods face every day. The FHIP appropriation should be expanded to \$109 million annually to both create fair housing centers where none exist and enable fair housing centers to serve all 363 metropolitan statistical areas.

Pending legislation in the House of Representatives – HR 476, the Housing Fairness Act sponsored by Representative Al Green – 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). Of course, rural areas also suffer the impact of housing discrimination and funds are needed to mount investigations. If Congress supports fair housing funding through FHIP and passes the Housing Fairness Act, the effectiveness of fair housing enforcement will improve dramatically.

Improve fair housing organizations' ability to investigate lending investigations. Fair housing organizations have long depended upon the use of paired testing to identify housing discrimination and collect evidence of a pattern or practice of housing discrimination. Courts, including the United States Supreme Court in the case *Havens v. Coleman* 455 U.S. 363 (1982), have recognized the utility of testing, and today it is a routine tool. Generally in a test, fair housing organizations use pairs of individuals who pose as homeseekers. If the organization is testing for race-based discrimination, one tester will be Black and the other tester will be White. If the organization is testing for disability-based discrimination, one tester will have a disability and the other tester will not. The testers will be virtually identical in every other way, although most often the "protected" tester (i.e. the Black tester or the tester with a disability, to use the examples from above) will be slightly better qualified. Fair housing organizations compare the experiences of the testers to determine whether or not the housing provider discriminated.

Testing has been used in multiple contexts – for example, fair housing organizations have tested landlords and management companies who rent units to see if they provide truthful information about availability to all prospective renters or provide prospective renters with discriminatory terms or conditions for renting. They have tested real estate agents to determine if homes and neighborhoods are marketed to buyers regardless of their race, national origin, disability, religion, sex or because they have children. The testing can detect if agents are steering prospective buyers to certain homes based upon their protected characteristic; They have also tested mortgage lenders to determine if people of color are being charged higher fees and costs for a mortgage loan or being denied the opportunity to even apply for loan.

Unfortunately, under current federal law, fair housing organizations cannot test all the way through the application process for a mortgage loan.¹³ Although there is a plethora of evidence regarding the discriminatory practices of lenders, appraiser and mortgage insurance companies, fair housing organizations cannot collect evidence against these providers in the same way that they can against real estate agents and landlords. It is a felony to provide false information on a mortgage loan application—even for an organization using a tester with no intention of completing the deal or accepting the loan. One potential fix is to exempt fair housing organizations that have approval from the Justice Department’s Civil Rights Division to conduct lending testing. The testing methodology could be approved by the Justice Department and in a public/private partnership, they could create lending tester profiles in the credit bureau system which would enable the fair housing organization to test and investigate lending, appraisal and mortgage insurance practices all the way through the loan process. For full application testing to be feasible, testers must have immunity from prosecution for providing false information on the loan application.

Establish an independent federal fair housing enforcement agency. Internal conflicts of interest within various HUD departments have presented perpetual challenges to HUD’s Office of Fair Housing and Equal Opportunity’s ability to fully enforce the Fair Housing Act. Whenever HUD funded programs operate in a discriminatory way – be it public housing agencies or recipients of Community Development Block Grant funds – HUD can find itself in the awkward position of having to investigate itself or lender or builder partner that has been integral component is specific HUD projects or programs. When this happens, basic civil rights often lose in the face of other vested interests.

¹³ The Uniform Residential Loan Application reads as follows under Section IX - **Certification:** I/We certify that the information provided in this application is true and correct as of the date set forth opposite my/our signature(s) on this application and acknowledge my/our understanding that any intentional or negligent misrepresentation(s) of the information contained in this application may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq. and liability for monetary damages to the Lender, its agents, successors or assigns, insurers and any other person who may suffer any loss due to reliance upon any misrepresentation which I/We have made on this application.

In order to eliminate this conflict of interest and properly elevate in importance fair housing enforcement, specific responsibilities of the Office of Fair Housing and Equal Opportunity should be removed from HUD and given to 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 Data on Fair Housing

A. Housing Discrimination Complaints for 2009

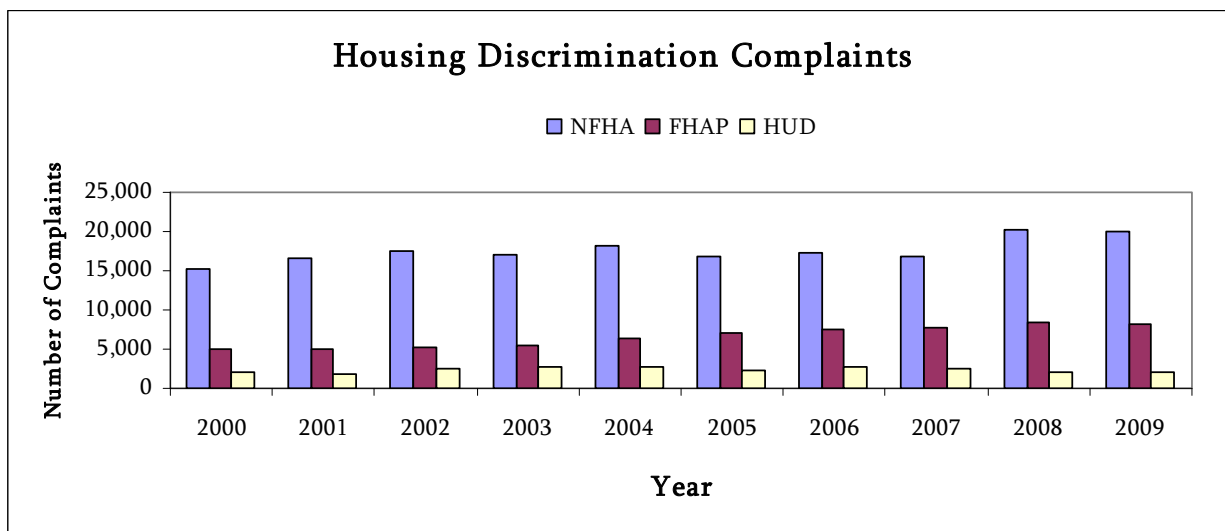
If 4 million people suffered from a disease every year, but only 30,000 received any help towards a cure, would that be a success? That's less than one percent of the victims and that's where we are as a nation with helping people who face housing discrimination annually.

Each year NFHA collects data from both private fair housing groups and government entities to present an annual snapshot of fair housing enforcement in America. Each year these numbers paint a disturbing 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.

TOTAL FAIR HOUSING COMPLAINTS FILED					
	NFHA Member Complaints	FHAP Claims & Complaints	HUD Claims & Complaints	DOJ Case Filings	Total
1999	11,531	3,676	2,198	48	17,453
2000	15,131	4,971	1,988	45	22,135
2001	16,550	5,041	1,902	53	23,546
2002	17,543	5,129	2,511	49	25,232
2003	17,022	5,352	2,745	29	25,148
2004	18,094	6,370	2,817	38	27,319
2005	16,789	7,034	2,227	42	26,092
2006	17,347	7,498	2,830	31	27,706
2007	16,834	7,705	2,449	35	27,023
2008	20,173	8,429	2,123	33	30,758
2009	19,924	8,153	2,091	45	30,213

* HUD, FHAP and DOJ data are for Fiscal Year 2009. 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 2009, there were 30,213 complaints of housing discrimination, a small decrease of 545 since 2008, yet still more than 3,000 above the 27,023 in 2007. Private fair housing groups continue to process the highest number of complaints –19,924, or 66 percent, of the total complaint load and with fewer groups still operating. In 2008, NFHA and its members conducted a year-long investigation targeting discriminatory Internet housing advertisements. NFHA and its members dedicated significant resources and the investigation resulted in the discovery of 7,500 discriminatory rental or sales advertisements and the filing of 1,000 complaints with HUD.¹⁴ In 2009, many of these complaints, amounting to thousands of dollars in staff time and resources, continued to be investigated by government agencies and the fair housing groups, leaving everyone with less time to pursue new complaints. This may be the reason the total number of complaints nationwide is lower.



Private fair housing groups have an average staff size of five professionals. While few in number and largely underfunded, year after year they continue to process more fair housing complaints, educate more consumers, and train more industry housing 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 186,308, or 66 percent, of the fair housing complaints in the United States, while Fair Housing Assistance Program agencies have processed 69,358, or 25 percent, and HUD 25,881, or 9 percent, of the cases. It is important to note that these data are from 93 private fair housing groups, 103 FHAP agencies and 10 HUD regional offices, and that many cases filed with HUD and FHAP agencies are the clients of private fair housing

¹⁴ *FOR RENT: NO KIDS! How Internet Housing Advertisements Perpetuate Discrimination*, August 11, 2009, National Fair Housing Alliance.

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 significant reduction in staff of 20 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	19.2%	28%	32%	24%
Disability	37.3%	50%	42%	47%
Family Status	15.1%	22%	19%	16%
National Origin	9.5%	9%	14%	2%
Sex	5.0%	9%	11%	7%
Religion	0.8%	2%	3%	2%
Color	0.6%	2%	3%	n/a
Other*	12.6%	5%	7%	7%

* The “other” category for NFHA complaints represents complaints arising from categories protected at the state or local level including sexual orientation, source of income, Section 8 voucher holder, marital status, medical condition, age, victim of domestic violence, or student status. The “other” category for HUD and FHAP complaints represents complaints of retaliation. The “other” category for DOJ represents cases based on military status. HUD, FHAP, and DOJ data are for Fiscal Year 2009. Totals may exceed 100 percent, because a single complaint may allege multiple bases of discrimination. Other than NFHA’s data, percentages are rounded to the nearest whole number.

This year people with disabilities continued to report the most claims of discrimination. At HUD, violation of the rights of people with disabilities amounted to half of the claims and complaints processed. DOJ’s race and disability numbers vary from last year’s: 39 percent and 36 percent respectively in FY08, to 24 percent and 47 percent in FY09 (however, with DOJ’s much smaller case load, a difference of only a few cases has a more significant impact on percentage distribution). Disability complaints remain high for several reasons. First, HUD has an office devoted solely to disability issues. Second, many apartment owners make direct comments refusing to make reasonable accommodations or modifications for people with disabilities so the discrimination is easier to detect. Third, builders, developers and architects 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. There are more than 54 million people in the United States with a disability, and this number is expanding rapidly as

the baby boomers age.¹⁵ Lastly, every state has a Protection and Advocacy System and every city has one or more non-profit agencies dedicated to assisting people with cognitive, mental, sensory, and physical disabilities.

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

Rental Market—Public & Private Groups Report 23,744 Complaints¹⁶

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 and most fair housing groups have to assign staff to rental complaints, leaving a shortage of trained staff to initiate sales, lending or insurance investigations. Private fair housing groups reported 15,624 complaints of housing discrimination in the rental market, close to the 16,041 reported in 2008 which was a significant jump of 21 percent from the previous year; FHAP agencies reported 6,464 and HUD reported 1,656 complaints. One explanation for the increased number of rental market complaints from previous years is the current foreclosure crisis. Many families and individuals were evicted from apartment complexes and duplexes when the owner defaulted on the mortgage—evictions occurred even when the families were current in their rent payments. Millions of 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. Up to 12 million foreclosures are still expected in the next five years.¹⁷ Unfortunately, most families do not know refusing to rent to families with children is illegal because when they sought housing on the Internet many advertisers said “No Kids” or “one child OK.” When you repeatedly see advertisement saying “No Kids,” you begin to think it must be legal.

Home Sales— Public & Private Groups Report 1,702 Complaints

Private groups reported 649 complaints in the home sales market; FHAP agencies reported 868 and HUD reported 185 complaints. Private groups reported 526 complaints in 2008 and 636 complaints in 2007. Many of these complaints dealt with questions about foreclosures rather than buying a home.

Mortgage Lending— Public & Private Groups Report 1,880 Complaints

Private groups reported 1,538 complaints of mortgage lending discrimination in 2009, up from 1,499 complaints in 2008; FHAP agencies reported 253 (compared to 220 in 2008) and HUD reported 89 (compared to 60 in 2008) fair lending complaints. HUD has the authority to initiate its own investigations of discriminatory practices. In FY09 it initiated one investigation into lending

¹⁵ Matthew Brault, “Americans with Disabilities: 2005,” *Current Population Reports* (Washington, DC: U.S. Census Bureau, 2008), p. 3.

¹⁶ 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.

¹⁷ Center for Responsible Lending <http://www.responsiblelending.org/mortgage-lending/research-analysis/snapshot-of-a-foreclosure-crisis.html>

discrimination. HUD initiated a total of seven other fair lending investigations from FY06 to FY08. To date, the results of these investigations have not been made public.

Homeowners Insurance— Public & Private Groups Report 39 Complaints

Private fair housing groups reported 35 complaints of discrimination in the insurance market, compared to 32 in 2008; FHAP agencies and HUD each 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 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 or insurance scores to price insurance products, or canceling policies due to claims’ filing. Insurance testing now requires the ability to make an application for coverage which limits the number of tests one tester can complete because of inquiries on their personal credit report and the impact on their personal credit score.

Harassment—Private Groups Report 1,221 Complaints

Private fair housing groups reported 1,221 complaints of harassment. Ninety percent of the complaints were filed on the basis of national origin (26 percent), familial status (25 percent), race (18 percent), sex (11 percent) and disability (10 percent). 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. Harassment can rise to the level of a criminal violation under the Fair Housing Act.

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 publishes and distributes educational materials that provide information on how to report unlawful discrimination; administers and manages the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP); establishes fair housing and civil rights regulations and policies for HUD programs; publishes guidance on complying with the requirements of fair housing and various civil rights laws; and monitors and reviews HUD programs and activities for compliance with federal nondiscrimination requirements and the requirement to affirmatively further fair housing.

As mentioned in Section I, HUD has taken a new aggressive stance on "affirmatively furthering fair housing," by asserting that housing segregation affects the government's programs as a whole, not just its housing programs.¹⁸ Secretary Donovan and Assistant Secretary John Trasviña consistently discuss the importance of promoting diverse, inclusive communities in their nationwide events. In addition to talking, they intervened in the Westchester County case and have asserted their authority in cases in Louisiana and Texas.

Unfortunately, when it comes to fair housing complaints, HUD's numbers remain low.

¹⁸ Prepared Remarks for HUD Secretary Shaun Donovan at the HUD Fair Housing Month Event Washington, D.C., April 6th, 2010.
http://portal.hud.gov/portal/page/portal/HUD/press/speeches_remarks_statements/2010/Speech_04062010

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
2009	2091

While it is estimated that there are at least 4 million fair housing violations annually, only 30,213 complaints were filed in 2009. Private fair housing groups processed 19,924 of the 30,213 complaints and cases filed in 2009 – a total of 66 percent of all complaints. HUD processed 2,091 complaints, a small decline from last year’s figure. As shown in the chart above, the number of cases that HUD processed in 2009 amounts to less than one-third of its 1992 high of 6,578 complaints. While some of this decline can be attributed to FHAPs taking on most cases overall, it remains distressing that the primary federal agency responsible for enforcing the Fair Housing Act has filed little more than 2,000 of the millions of violations nationwide.

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. The majority of complainants and respondents continue to elect federal court.

In 2009, HUD issued 54 charges following a determination that there was reasonable cause to believe that unlawful discrimination occurred. Many of these charges stem from complaints carried over from previous years. This is an increase from last year's 48 charged cases; however it amounts to only 3 percent of HUD's total complaint load.

FAIR HOUSING ACT CASES IN WHICH HUD ISSUED A CHARGE								
2001	2002	2003	2004	2005	2006	2007	2008	2009
88	69	23	43	47	34	31	48	54

Aged Cases

With the exception of complex or systemic cases, the Fair Housing Act regulations require that HUD complete an investigation of 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 state or 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, or a list of other reasons as asserted by HUD laid out in the chart below. One of these actions must be taken within 100 days of a complaint being filed.

It should be noted that there are some cases which may merit more than 100 days to investigate, especially cases including real estate sales steering, lending, or insurance discrimination.

HUD routinely carries an “aged” case load; that is, cases that have surpassed the 100 day benchmark without an outcome. In FY09, there were 942 cases at HUD that passed the 100 day mark, an increase of almost 100 from FY08, but still a marked decrease from the 1,353 aged cases in FY07. There were 3,874 aged cases at FHAP agencies (HUD's counterparts at the state/local levels), a decrease of 353 since FY08. According to a Government Accountability Office 2005 report, only 31 percent of cases met the 100 day deadline; 14 percent take more than 130 days.¹⁹

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.²⁰ The failure to complete a timely investigation leaves the complainant and respondent in limbo—one wondering when they will be helped—the other wondering when they might be exonerated. It is an

¹⁹ Government Accountability Office. *Fair Housing, HUD Needs Better Assurance that Intake and Investigation Processes Are Consistently Thorough*. October 2005.

²⁰ *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.”

injustice to both parties to allow a complaint to languish. If more staff is needed to complete timely investigations, then it behooves HUD to ask for the funds and the Congress to provide the money.

Administrative Closures and No Cause Cases

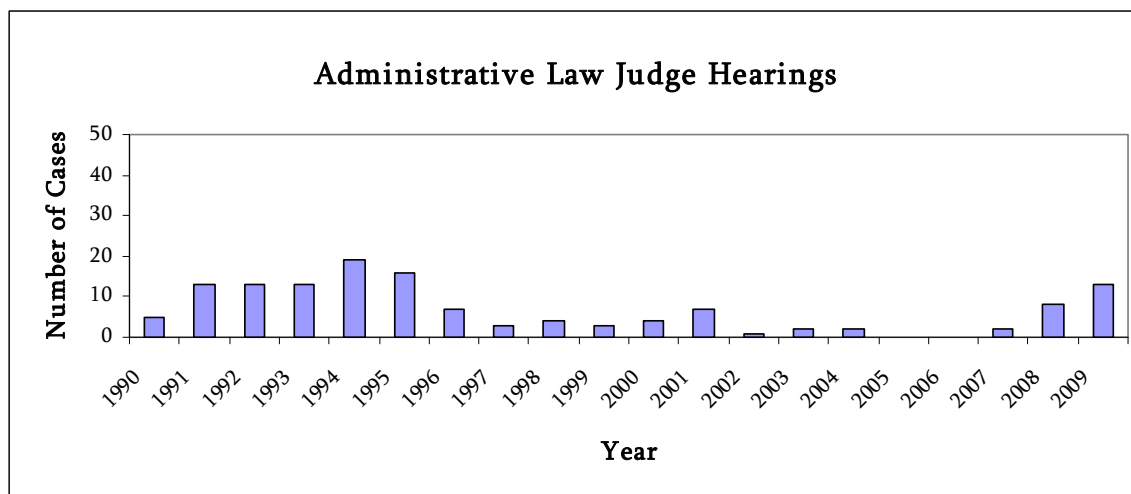
In FY09, HUD closed 620 cases and found no cause to believe discrimination occurred or the complaint was not timely in 801 cases, totaling 1,421 cases. FHAP agencies closed 1,042 cases and found no cause in 4,214, totaling 5,256. Together, HUD and its FHAP agencies closed 6,677 cases in FY09. Remember these closed cases can be from previous years' complaints. The chart below lists the number of closed cases by HUD and FHAPs, followed by a breakdown of reasons for administrative closures at HUD.

2009 FHEO CASES CLOSED NATIONWIDE			
	HUD	FHAP	Total
Administrative Closure	620	1,042	1,662
Conciliation/Settlement	882	2,478	3,360
No Cause	801	4,214	5,015
ALJ Consent Order	11	n/a	11
DOJ Dismissal	10	n/a	10
DOJ Election for Court	36	n/a	36
Judicial Consent Order	n/a	130	130
Judicial Dismissal	n/a	78	78
Litigation – Discrimination Found	n/a	10	10
Litigation – No Discrimination Found	n/a	3	3
Hearing – Discrimination Found	n/a	21	21
Hearing – No Discrimination Found	n/a	8	8
Total Closures	2,360	7,984	10,344

2009 HUD ADMINISTRATIVE CLOSURES	
Reason for Closure	Cases
Untimely filed	13
Dismissed for lack of jurisdiction	123
Unable to locate complainant	70
Complainant failed to cooperate	186
Unable to identify respondent	24
Complaint withdrawn by complainant without resolution	194
Unable to locate respondent	8
Closed because trial has begun	2
Total	620

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 a civil penalty and awards compensatory damages, affirmative relief, and attorneys' fees. The ALJ cannot award punitive damages according to the law. In 2009, there were 13 ALJ hearings that concluded with either a consent order or some form of relief. This is an improvement from prior years, when eight ALJ proceedings were heard in 2008, two in 2007, and none in 2005 and 2006. The following chart illustrates the number of HUD ALJ proceedings since 1990.



Secretary Initiated Complaints

“HUD files a Secretary-initiated complaint when it has evidence that a discriminatory housing practice has occurred or is about to occur. HUD also may file a Secretary-initiated complaint when it has received an individual complaint, but believes there may be additional victims of the discriminatory act, or wants to obtain broader relief in the public interest.”²¹ HUD filed 11 Secretary-initiated complaints in FY09.

2009 Bases and Issues of Secretary Initiated Complaints	
Major Bases	Filed Cases
Race	3
National Origin	2
Disability	7
Total Cases	11
Issues	
Discriminatory refusal to rent	1
Discriminatory advertising, statements and notices	1
Discriminatory financing (including real estate transactions)	1
Discrimination in the terms/conditions for making loans	1
Discrimination in the terms, conditions, privileges, or services and facilities	1
Discrimination in terms/conditions/privileges relating to rental	3
Steering	2
Otherwise deny or make housing available	2
Non-compliance with design and construction requirements	6

B. U.S. Department of Justice

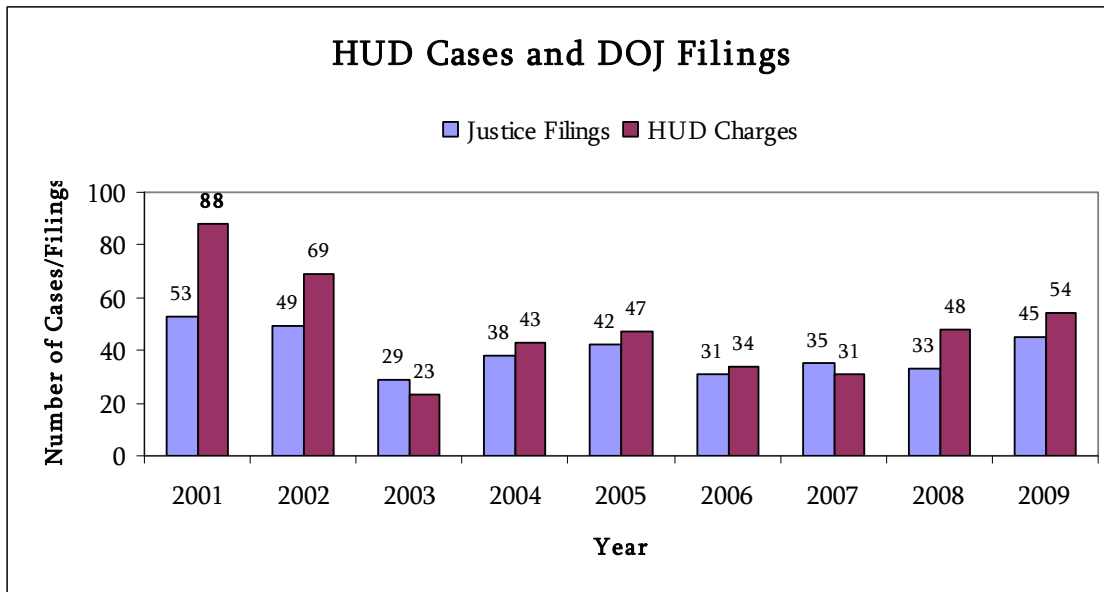
The Department of Justice filed 45 cases in FY09, a 36 percent increase from the previous year, and a tie with the number of cases in FY00. (See charts below.) The breakdown of cases in FY08 by protected class was: 24 percent race, 47 percent disability, 16 percent familial status, 7 percent sex, 2 percent national origin and 2 percent religion. Seven percent of the cases were based on military status. The case breakdown varies from 2008, particularly in the two highest categories. In 2008, the percent of race cases was 39 percent (the Department’s highest) and disability was 36 percent, the second highest. It is also noteworthy that these are not all fair housing cases; one case is an auto lending case and another was brought under the Servicemembers Civil Relief Act.

The first chart below shows the number of cases filed by DOJ between FY99 and FY09. The second

²¹ *The State of Fair Housing FY08 Annual Report on Fair Housing*, US Department of Housing and Urban Development, p.24.

chart below compares the numbers of DOJ cases and HUD charges.

TOTAL DOJ CASES FILED BY YEAR										
FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06	FY07	FY08	FY09
48	45	53	49	29	38	42	31	35	33	45



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. ECOA prohibits creditors from discriminating against credit applicants on the basis of race, color, national 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.” The 1988 Fair Housing Amendments Act (FHAA) increased the Department’s authority and now the Department can 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.

FHAA also empowered the Justice Department 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.²² 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 about their obligations under the Fair Housing Act and Amendments.

During FY09, DOJ reviewed and responded to more than 900 written complaints from individuals. Because most of them were not in DOJ's jurisdiction – i.e. they did not constitute pattern or practice cases – most of the complainants were given information on how to file a complaint with HUD and/or a local fair housing organization.

DOJ's Recent Record

The 45 cases filed by the Department of Justice in FY09 mark an improvement from recent years; in fact, this is the highest number of cases since 2002. Attorney General Eric Holder has asserted time and again that the Civil Rights Division is “open for business.”²³ The Division has changed some of its policies from recent years, which most likely have an effect on its numbers. Also, the 2010 budget includes funding for eleven new positions in the Housing and Civil Enforcement Section, including six new attorneys. Some of the new positions will be in the newly created fair lending unit.

In FY09, the number of HUD election cases was up to 24 from 14, the highest number since FY02. Election cases are those for which 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. During the last Administration, DOJ continued to assert that it was not required to file these cases, opting instead to perform additional investigations, thereby duplicating HUD's activities and prolonging the process. In some instances the Justice Department refused to file the case.

In addition, the Department has announced its renewed dedication to prosecuting disparate impact cases. In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination.²⁴ The federal government is often the only entity with the capacity to investigate and litigate the most complex 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 the Fair Housing Act. An example of disparate impact is ordinances and laws that place a limit on the number of persons per bedroom, which has a disparate impact against families with children.

In March, 2010, the Department announced a disparate impact settlement in the case of *United States v. AIG Federal Savings Bank (D. Del.)*. The Department obtained a \$6.1 million settlement with two

²² 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. 47.

²³ Attorney General Eric Holder at the Installation of Assistant Attorney General Thomas E. Perez Washington, D.C., November 13, 2009

²⁴ HUD HUB Directors' meeting (Rhode Island, 2003).

subsidiaries of American International Group Inc. (AIG) to resolve a complaint alleging pattern or practice discrimination against African American borrowers through broker fees.

Mortgage Lending Enforcement

The Department is dedicating additional resources to pursuing lending discrimination. As mentioned above, the Housing and Civil Enforcement Section will have a total of eleven new positions, including six new attorneys, this year. Many of these positions will be at the newly created fair lending unit, and the Department has hired a Special Counsel for Fair Lending in the Office of the Assistant Attorney General for Civil Rights.

The Justice Department is also the lead agency for the Financial Fraud Enforcement Task Force, created in November, 2009, which includes a steering committee of HUD, the Treasury Department, and the Securities and Exchange Commission. Assistant Attorney General Tom Perez co-chairs the task force's Non-Discrimination Working Group. The task force will work with a broad range of federal agencies, regulatory authorities, inspectors general, and state and local partners to "investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets and recover proceeds for victims."²⁵

C. Private, Non-Profit Fair Housing Efforts

Many 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 investigations, 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 other enforcement activities; the Education and Outreach Initiative (EOI) that funds groups to engage in initiatives that educate the general public 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 2009, private fair housing organizations processed 19,924 complaints, 66 percent of the total 30,213 complaints. There are fewer private fair housing organizations than federal, state and local government groups yet these private fair housing organizations continue to process nearly twice as

²⁵ "President Obama Establishes Interagency Financial Fraud Enforcement Task Force." November 12, 2009. <http://www.justice.gov/opa/pr/2009/November/09-opa-1243.html>

many complaints with far less money. During the past five years, one-fifth 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.

In 2009, the President and Congress agreed that FHIP needed a significant increase and raised the FY10 FHIP budget from \$27.5 million in FY09 to \$42.5 million. Because of the delay in announcing the recipients for the FY09 funds until January, 2010, fair housing organizations are only just starting to receive their FY09 funding. Then, in February of this year, the President unfortunately proposed to cut the FY11 budget to \$32.6 million.

The demand by fair housing groups for FHIP funds is nearly three times greater than the funding available: in FY09, when \$27.5 million in funding was available, eligible and qualified organizations applied for a total of \$75.4 million. Many more groups would apply if they knew that more funding was available. In addition, with more funds, organizations could receive both enforcement and education funding simultaneously. In the longer term, FHIP should expand to full funding of qualified 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.

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	\$ 25 million *
2010	\$ 42 million *
2011	\$30.6 million +

*actual funding level available for general FHIP activities, excluding set-asides;
 + President's proposed budget, excluding set-asides

The FHIP funding 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 FHIP 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 fair housing multi-media/education campaign is also required by the statute.

Section IV. Fair Housing Implications of the Foreclosure Crisis

A. Foreclosure and Financial Crises Disproportionately Affect Underserved Groups

The foreclosure crisis remains one of the most critical civil rights issues facing the nation. Many of the loans whose failure has fueled the crisis were concentrated in communities of color. The result is a tremendous loss of homeownership among people of color, with the attendant loss of hundreds of billions of dollars in wealth in the form of home equity. Families who have suffered foreclosure will feel the impact for many years, in the disruption of their lives, the reduction in their credit scores, the higher cost and limited availability of future credit, and other ways. Communities of color have been disproportionately devastated by this crisis, suffering a loss of community members, the disruption of community institutions, a decline in property values, and an increase in vacant and abandoned properties with an attendant increase in crime. Ultimately, the impact of the foreclosure crisis is being felt far beyond the immediate home and neighborhood. The failure of millions of subprime mortgages sparked a meltdown in the financial sector that has spread across other sectors of the economy, causing home prices to plummet, unemployment to skyrocket, and budget crises at all levels of government.

This crisis is rooted in the failure of federal regulators to carry out their fair lending enforcement responsibilities. Beginning in the mid-1990s, financial regulators allowed risky subprime loans to proliferate in communities of color and for senior citizens while simultaneously failing to ensure that residents of those communities had access to safe, affordable forms of credit. By failing to address these risky loan products when they were first introduced, regulators provided brokers and lenders the time needed to perfect the marketing and the expansion of these products into mainstream America.

A July 2009 report by the Government Accountability Office (GAO)²⁶ examined the steps that federal banking regulators had taken between 2005 and 2008 to ensure that the lenders they regulate comply with ECOA. The report shows that during the height of subprime lending, a fragmented regulatory system undermined consistent oversight: fair lending responsibility was spread across five federal banking regulatory agencies, each of which had competing obligations to address banks' safety and soundness and consumer compliance, including fair lending compliance. Of these obligations, fair lending enforcement was a low priority. In addition, differing examination procedures among the agencies meant that fair lending laws were not enforced consistently.

The system's failure is demonstrated by the dearth of fair lending cases referred to the Department of Justice during this time. Between 2005 and 2009, the Office of the Comptroller of the Currency – the regulator which oversees the nation's largest banks – referred only one case to the Department of

²⁶ GAO-09-704. *Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts*. July 2009. Available at <http://www.gao.gov/new.items/d09704.pdf>.

Justice for investigation.²⁷ During this period, subprime lending in communities of color flourished. Today, we recognize that this lending, overlooked by federal regulators, paved the way for the foreclosure crisis.

B. Long Lasting Effects of Restricted Credit Access

Equal access to affordable, quality credit has been a major fair lending issue throughout the history of our nation. Underserved groups, including African Americans, Latinos, Native Americans, persons with disabilities, immigrants and women, have long been subject to various forms of lending bias. Recent data reveal that many underserved groups still lack access to mainstream credit.

Borrowers of color are more often denied conventional home purchase loans. In 2008, the denial rate for conventional home purchase loans for African-American borrowers (36.1 percent) was more than 2.5 times higher than the denial rate for non-Hispanic White borrowers (13.6 percent); the denial rate for Hispanic borrowers (31.1 percent) was more than twice as high.²⁸ Similarly, the market share of home purchase loans made to African-Americans dropped from 8.7 percent in 2006 to 6.3 percent in 2008; Hispanic borrowers accounted for 12.1 percent of the market in 2006, but only 8.5 percent by 2008.

Disparities exist even after accounting for differences in creditworthiness or income. A 2009 of data from 14 large lending institutions found that high-income African-American and Hispanic borrowers were three times more likely than high-income White borrowers to pay higher prices for loans.²⁹

People of color are more likely to receive subprime loans, higher cost loans, and loans with extra fees. African Americans and Latinos are more likely to receive subprime, payment-option and/or interest-only mortgages than their White counterparts.³⁰ Roughly 54 percent of African-Americans and 47 percent of Latinos received subprime loans compared to approximately 17 percent of Whites.³¹ Because these unaffordable loans failed at such a high rate, it should be no surprise that foreclosure rates in these same communities are inordinately high.

²⁷ *The Attorney General's 2009 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976*, Submitted by Thomas E. Perez Assistant Attorney General, April 27, 2010.

²⁸ Avery, et. al; *The 2008 HMDA Data: The Mortgage Market during a Turbulent Year*. The Federal Reserve Bulletin, October 12, 2009.

²⁹ Jakobovics, Andrew and Chapman, Jeff, *Unequal Opportunity Lenders? Analyzing Racial Disparities in Big Banks' Higher Priced Lending*. Center for American Progress, September, 2009. See also 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; and *The Impending Rate Shock: A Study of Home Mortgages in 130 American Cities*. ACORN 2006.

³⁰ *Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders*. Consumer Federation of America, May, 2006.

³¹ Avery, Robert, et. al. *The 2006 HMDA Data*, *The Federal Reserve Bulletin*, December 21, 2007. See also Bocian, D.G. and R. Zhai, *Borrowers In Higher Minority Areas More Likely to Receive Prepayment Penalties on Subprime Loans*, Center for Responsible Lending, January 2005; and Stein, Kevin, et. al. *Foreclosure to Redlining: How America's Largest Financial Institutions Devastated California Communities*.

In addition to the data, other evidence illustrates how some in the lending industry targeted communities of color for risky, high cost loans. For example, in the *Mayor and City of Baltimore v. Wells Fargo Bank*, affidavits filed by two former employees revealed that the lender:

- Specifically targeted African-American communities in Baltimore and in Prince George's County Maryland for subprime loans. Wells Fargo did not target White communities for subprime loans;
- Gave employees substantial financial incentives for steering borrowers who actually qualified for prime mortgages into the subprime market;
- Targeted Black churches for the purpose of selling subprime loans. Employees of color were tapped to make presentations to the churches. A White employee was told she could only attend the presentations at Black churches if she "carried someone's bag;"
- Used derogatory language to refer to Black consumers. Blacks were referred to as "mud people" and "niggers." Employees referred to loans in Black neighborhoods as "ghetto loans." Comparatively, Wells' employees felt that predominantly White counties, like Howard, were bad places for subprime mortgages.

Some common lending practices have a disparate impact on communities of color and women. As market conditions have deteriorated along with the foreclosure crisis, some industry players have responded by adopting policies designed to reduce risk. Some examples include declining markets policies, larger cash reserves, higher down payments, appraisals, and credit scoring.

Declining Markets Policies: Some lending industry players have identified geographic areas which they believe are in "decline" based on patterns in property market values, over-supply of housing, longer selling/marketing times and other characteristics. They require borrowers in these neighborhoods to pay higher rates or fees and/or to make larger down-payments in order to secure a loan. These "declining markets" policies can disproportionately affect communities of color, which have had higher rates of subprime lending and foreclosure.

Larger Cash Reserves: Some lenders are requiring borrowers to have more money on hand in order to secure a loan. These cash reserve requirements are more difficult to accumulate for borrowers of color and women who have lower incomes and less accumulated wealth. A recent study revealed that African-American women aged 36 - 49 have a median wealth of 5 dollars while their White counterparts have a median wealth of \$42,600.³² White women in this age group, in turn, have only 61 percent of the median wealth of their male counterparts. Moreover, Census data reveal that the earning power of minorities and women continues to lag.

Higher Down Payments: In the previous years of lax lending, it was not uncommon for lenders to originate loans with loan-to-value ratios (LTVs) of 100 percent or even more. Higher LTVs, coupled with other heightened risk factors, have been shown to have a negative impact on loan quality. In response, lenders are requiring higher down payments from borrowers. Some have

³² Chang, Mariko, et. al.: *Lifting as We Climb: Women of Color, Wealth, and America's Future*, Insight Center for Community Economic Development, Spring 2010.

expressed concern that lowering LTVs too much will exclude thousands of quality borrowers who would otherwise perform well on their mortgages. Requiring higher down payments will also exacerbate credit access issues for underserved borrowers. Latinos and African-Americans generally earn less than their White counterparts, and women generally earn less than their male counterparts. While LTVs above 100 percent may in fact be risky, there is concern that lenders may be going too far with the new, higher down payment requirements.

Appraisal Issues: Declining property values may also limit credit availability for borrowers of color and women. It is important to note that even if a borrower has sterling credit, sufficient income and adequate cash reserves, a loan can be denied based on the lender's assessment of how much the home is worth. Lenders rely heavily on the appraisal report; yet, historically, appraisers have often missed the boat when attempting to appraise properties in urban areas. As a result of the financial crisis, and following declining markets policies, we are likely to see appraisers considering the number of foreclosures, sheriff sales, vacant and abandoned properties, and even REO properties in a given area. Without clear standards supported by relevant data, interpreting the impact of these conditions may become highly subjective and susceptible to racial bias.

Credit Scoring: Credit scoring issues continue to raise fair lending concerns. One major challenge has been the secretive nature of the scoring models. Because the scoring models are considered proprietary, it is difficult for consumers to understand how their own personal circumstances and decisions might affect their credit scores. According to Fair Isaac Corporation, creator of the FICO score, there are five primary factors that have a major impact on a FICO score: payment history, account balance, length of credit, new credit and types of credit used.³³ Some of the major components that have an impact on the FICO score have fair lending implications. For example, as illustrated above, certain demographic groups have been wrongly steered to the subprime and fringe lending market – even when they qualify for credit in the mainstream market. Any credit scoring system that gives a lower score to a consumer simply of a subprime loan could have a discriminatory effect.

Additionally, the financial sector is raising the bar on what constitutes a credit-worthy borrower. Just five years ago, a borrower with a 620 FICO score was deemed a low risk borrower. Today, the score needs to be closer to 700 for a prime loan. Because of the disparate impact of foreclosures, which cause a large drop in the borrower's credit score, for minority and female borrowers, this much higher standard may, in turn, have a disparate impact on these borrowers.

Some of the policies that have been implemented in response to the foreclosure crisis will restrict credit even further and may not be related to risk. The market should not react based on perception or prejudice, but rather on loan performance and objective evidence.

³³ <http://www.myfico.com/crediteducation/whatsinyourscore.aspx>

C. The Nature and Scope of the Foreclosure Crisis

In 2009, 2.8 million American families received foreclosure filings, an increase over the 2 million foreclosures filed in 2008.³⁴ During the first quarter of 2010, the problem continued to grow, as 257,944 homes were foreclosed on, an increase of 35 percent over the first quarter of 2009.³⁵ The percentage of outstanding mortgages that were seriously delinquent (90 days or more overdue) hit record highs. This was true for prime mortgages, subprime mortgages, FHA loans and Veterans Affairs (VA) loans.³⁶ The number of homes taken back by banks as the result of foreclosure reached 1.1 million, a 20 percent increase over the previous year. Another 4.8 million homes could be added to that inventory. That is the number of mortgages on which borrowers are 60 days behind on their payments or actually in the foreclosure process. At the current rate of home sales, it would take 103 months to sell these properties,³⁷ undermining recovery in the housing market.

Subprime mortgages, which made up the first wave of the foreclosure crisis, continue to fail at a high rate, and seem likely to continue to do so. Fourteen percent of outstanding subprime adjustable rate mortgages are 90 days or more delinquent. However, because virtually no new loans of this type have been originated since 2007, they represent a declining share of overall foreclosures in the country. As described above, these loans were heavily targeted to borrowers and communities of color and have had a devastating impact on homeownership and wealth accumulation for this segment of our country.

During 2009, a growing share of foreclosures involved other types of loan products— often referred to as “exotic” loans because they were initially developed for very high income households that could support nontraditional loan terms. Option ARMs (the so-called “pick a payment” loans) and interest only loans experienced very high failure rates and thus became another wave in the foreclosure crisis. These loans were concentrated in high housing cost markets, such as California, Nevada, Arizona and Florida. Option ARMs often had initial low teaser rates and allowed the borrower to choose whether to make a minimum payment each month, pay interest only, or make a payment that would cover the interest charge and also pay off some of the loan principal. The options for low payments meant that many people purchased homes that were ultimately beyond their means. This type of loan also helped to artificially inflate home prices.

The vast majority of Option ARM borrowers chose to make the minimum payment option each month. Not only did this mean they were not paying down any of their *principal* balance, they were also not covering the full amount of the *interest* owed. The shortfall was added to the outstanding principal, so that the loan balance was actually increasing each month. At a certain point, the loan documents required that the mortgage interest rate be reset to allow it to be fully paid off at the end of the loan term, resulting in significant – often unaffordable - payment increases.

³⁴ Special Inspector General for the Troubled Asset Relief Program (SIGTARP), “Factors Affecting Implementation of the Home Affordable Modification Program (SIGTARP-10-005),” March 25, 2010.

³⁵ Merle, Renae. “Foreclosures Rise as Banks Repossess More Homes,” *Washington Post*, April 16, 2010.

³⁶ Mortgage Bankers Association, “Delinquencies, Foreclosure Starts Fall in Latest MBA National Delinquency Survey,” February 19, 2010, available at www.mortgagebankers.org/NewsandMedia/PressCenter/7189.htm.

³⁷ “Number of the Week: 103 Months to Clear Housing Inventory,” *Wall Street Journal*, April 24, 2010.

In normal circumstances, borrowers in this situation would attempt to refinance their mortgage or sell their home and pay off the remaining mortgage balance. However, falling home prices in the markets where Option ARMs were prevalent precluded this option: the homes were worth less than the outstanding mortgage balance. Thus, these “underwater” borrowers were trapped in unaffordable loans, resulting in high foreclosure rates. Evidence indicates that Hispanic borrowers were nearly twice as likely as their White counterparts to have received Option ARMs, and African-American borrowers were more than 30 percent more likely than Whites to have received interest only loans.³⁸ Therefore, it is likely that the failure of these loans has imposed a heavy cost on Hispanic and African-American homeowners, resulting in lost wealth, destruction of credit, and the disruption of both lives and communities.

As housing prices dropped and unemployment levels rose to record rates during 2009, foreclosures spiraled among prime, 30-year fixed-rate mortgages. These “plain vanilla” mortgages would generally be considered safe and responsible, and were likely perfectly affordable when they were originated. However, as the economic crisis has progressed, many people have experienced reduced income as their work hours have been cut back and jobs have been eliminated. This reduced income has made it impossible for many homeowners to keep up with their mortgage payments. In past recessions, borrowers in this situation have been able to sell their homes to avoid foreclosure. They were also able to sell their homes if they needed to move to find new job opportunities. But because of the nationwide decline in home prices, many under- or unemployed workers have found themselves underwater, unable to sell their homes for a price high enough to pay off their mortgages. These underwater, unemployed borrowers represent the current and largest wave of the foreclosure crisis.

As with the wave of foreclosures in the Option ARM market, we lack demographic data about under- or unemployed homeowners facing foreclosure. However, we do know that the unemployment rate is much higher among people of color, particularly African-Americans, than among White workers. For example, as of March, 2010, the unemployment rate for African-Americans was 16.5 percent, as compared to 8.8 percent for Whites. Nineteen percent of African-American men over 20 years of age were unemployed, compared to 8.9 percent of White men of the same age. For Hispanic workers, the overall unemployment rate in March, 2010, was 12.6 percent, also considerably higher than the rate for Whites.³⁹ Therefore, it is likely that this current wave of the foreclosure crisis is also having a disproportionately greater impact on African-American and Hispanic homeowners, further increasing the racial divide in homeownership and wealth and reinforcing the need to make sure that efforts to solve the foreclosure crisis address these racial and ethnic disparities.

³⁸ Allen J. Fishbein and Patrick Woodall, “Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders,” Consumer Federation of America, May 2006.

³⁹ Bureau of Labor Statistics, Economic News Release, April 2, 2010. Available at www.bls.gov/news.release/empsit.t02.htm and www.bls.gov/news.release/empsit.t03.htm.

D. An Attempt to Address the Crisis: The Home Affordable Modification Program

In fall 2008, Congress passed the Emergency Economic Stabilization Act (EESA). Commonly known as the bank bailout bill, EESA authorized the federal government to spend up to \$300 billion through the Troubled Assets Relief Program, or “TARP.” In addition to stabilizing the financial system, Congress specified that the funds authorized under EESA were to be used to protect home values and preserve homeownership.

Not until the Obama Administration took office did the federal government take any steps to address this Congressional mandate. In February, 2009, President Obama announced the Making Home Affordable program, the centerpiece of which is the Home Affordable Modification Program (HAMP).⁴⁰ HAMP was projected to help three to four million homeowners avoid foreclosure by making it possible for them to modify their mortgages so they would have an affordable monthly payment. The program utilizes a series of incentive payments to encourage and reward participation by loan servicers, investors and borrowers. It requires participating servicers to bring a borrower’s mortgage payment down to 31 percent of gross monthly income through a combination of lowering the interest rate, extending the loan term and forbearing or forgiving part of the loan principal. For the first five years, the federal government shares the cost of the interest rate subsidy with the servicer. After that point, the interest rate increases by a maximum of one percent per year until it reaches a market rate, currently around five percent.

While HAMP has encountered a number of problems, as described in more detail below, it has accomplished two important things. First, it embodied the notion that loan modifications should result in lower monthly payments, and set a standard for affordability at 31 percent of the borrower’s gross monthly income. Previously, servicers might have modified loans for borrowers in default, but those modifications often resulted in higher – not lower – monthly payments, and often required borrowers to allocate much higher portions of their monthly income to their mortgage payment. These non-HAMP loan modifications were not sustainable, and borrowers often defaulted again.

Second, as part of its data collection and monitoring system for HAMP, the Treasury Department required participating servicers to collect information on the race, gender and national origin of applicants for HAMP loan modifications. The purpose of this data collection is to enable a range of government agencies with fair lending enforcement responsibilities to monitor the performance of HAMP servicers for fair lending compliance. This is the first time that such a data collection and oversight effort has been applied to loan modifications, and it represents a significant step forward for fair lending enforcement.

⁴⁰ For a description of the Administration’s other efforts to stabilize the housing market, see the Making Home Affordable Servicer Performance Report through March, 2010, released April 14, 2010. Available at <http://www.makinghomeaffordable.gov/docs/Mar%20MHA%20Public%20041410%20TO%20CLEAR.PDF>

Fair Housing and HAMP

As mentioned in Section I, the Fair Housing Act requires that government agencies spend funds dedicated to housing and community development in a manner that “affirmatively furthers fair housing.” This requirement was reiterated and clarified in a series of subsequent Executive Orders. This obligation is not limited to the Department of Housing and Urban Development; it applies broadly and means that government agencies spending housing and community development funds – and recipients of government grants – must use those funds in ways that help create integrated, healthy neighborhoods.

TARP, with its stated goal of stabilizing the nation’s housing markets, is the single largest housing program in our history. In fact, HAMP alone, a \$50 billion component of TARP, constitutes the largest housing program ever launched in the U.S. Because the foreclosure crisis and resulting recession have hit communities of color the hardest, any attempts to ease the recession and stabilize the housing market must involve explicit plans to increase residential and economic opportunities for the residents of those neighborhoods.

If TARP funds are to be administered in a way that affirmatively furthers fair housing, the federal government must: (1) analyze its own programs for racially disparate impacts and adjust programs to eliminate those impacts, (2) identify ways in which grantees and recipients of its funds can affirmatively further fair housing and evaluate their performance based upon these criteria, and (3) allocate funds to community groups with experience connecting people to economic and residential opportunities. The financial services industry can also take specific steps to meet its fair housing obligations by offering responsible loans that enable community choice, assuring fair marketing of REO properties, sponsoring non-discriminatory foreclosure prevention efforts, and financing fair economic development opportunities.⁴¹

Problems with HAMP

A year into HAMP’s four-year lifespan, it has become clear that the HAMP initiative faces a number of problems and limitations that preclude it from solving the on-going foreclosure crisis. Much attention has been given to servicers’ lack of capacity to handle the volume of calls and paperwork associated with HAMP, train and supervise their staff, and communicate with borrowers clearly and in a timely manner. There have also been numerous complaints about servicers’ compliance with the program requirements.

While these capacity-related problems should be under control by now and compliance problems should recede over time, many of HAMP’s problems are structural. Most fundamental of these is that HAMP is a voluntary program. Servicers can choose whether or not to participate, and while many do, as of March 2010, some 900,000 troubled borrowers nationwide were prevented from applying for

⁴¹ For more in depth coverage of this issue, see *Fair Housing and the Troubled Asset Relief Program: How TARP Funds Could (and Should) Be Used to Improve Our Neighborhoods*, National Fair Housing Alliance, November 2009.

a HAMP loan modification because their servicer did not participate in the program.⁴² Similarly, investors are not compelled to allow the loans they own to be modified through HAMP. In cases where the servicer is a HAMP participant, if the servicer's contract with the loan investors limits or prohibits loan modifications, the servicer must ask for permission to make the modification, but has no recourse if the investor declines. Counselors report that "investor does not participate in the program" is a common reason their clients are denied a modification, although in many cases it is not clear the servicer ever requested permission from the investor to make the modification.

A related problem is the lack of sanctions available to the Treasury Department when participating servicers fail to follow HAMP program guidelines. The failure to incorporate a range of sanctions in the servicer contracts may have stemmed from a concern that too many sanctions would discourage servicers from participating in HAMP. The result is that the program has lots of carrots, in the form of various incentive payments to servicers, borrowers and investors, but few sticks to use to address non-compliance.

Another structural problem with HAMP is its approach to achieving affordability, which was designed to deal with subprime, adjustable rate mortgages. To establish an affordable loan payment, HAMP relies heavily on reducing the interest rate for five years. This approach is not effective for Option ARMs, which currently have low interest rates. To date, HAMP has not emphasized principal reduction, which is the tool needed to help homeowners who are underwater bring their mortgage debt in line with their current property values. HAMP does not help under- or unemployed homeowners. Because their incomes are low, a payment set at 31 percent of the gross monthly income of these borrowers is generally too low to make it worthwhile for investors to modify the mortgage rather than foreclose on the property. These borrowers need a different type of solution. One potential model is the Homeowners' Emergency Mortgage Assistance Program (HEMAP) in Pennsylvania which provides bridge loans to unemployed homeowners to help make their mortgage payments for up to three years while they search for new jobs.

A third major problem facing HAMP is the number of troubled mortgages with second liens, and the reluctance of the second lien holders – many of whom are major banks with large mortgage servicing operations – to eliminate or reduce those loans. This has prevented many mortgages from being modified. The Treasury Department developed a program, known as 2MP, to buy down or eliminate second mortgages. However, until recently, no servicers had agreed to participate.

Another weakness of HAMP is that it does not address the overall debt carried by the borrower, only the first mortgage. While the payment on the first mortgage is reduced to 31 percent of the borrower's income, the average total post-modification debt load for HAMP borrowers is 70 percent of their gross monthly income.⁴³ While much lower than the average total debt before the loan modification (which was 87 percent), this is still a very high level of debt, and if borrowers suffer any

⁴² "Making Home Affordable Program Servicer Performance Report Through March, 2010," US Department of the Treasury, April 14, 2010, page5. Available at www.makinghomeaffordable.gov.

⁴³ Congressional Oversight Panel, "April Oversight Report, Evaluating Progress on TARP Foreclosure Mitigation Programs," April 14, 2010.

further loss of income or any unexpected expenses, they are vulnerable to defaulting on the modified loan.

The Treasury Department recently announced changes to HAMP to address some of these problems by, among other things, increasing the emphasis on principal reduction and providing short-term forbearance to unemployed homeowners.⁴⁴ However, it is not clear that either of these changes will have the impact needed. Principal reduction will remain optional, and it is not clear how often, or for which borrowers, servicers will exercise that option. Given how long it is currently taking unemployed workers to find new jobs, and with predictions that high rates of long-term unemployment will persist for several more years, advocates for unemployed homeowners believe that the proposal to offer a 3-6 month forbearance will not be sufficient to address their needs. The recent proposals also include an increase in the incentives available for eliminating or reducing second mortgages. Again, it is not clear how successful this effort will be, although it is a very hopeful sign that the four banks which hold the largest number of these loans have now agreed to participate in 2MP.⁴⁵

Given the problems experienced to date, it is no surprise that as of March, 2010, HAMP had extended trial offers for loan modifications to only 1.4 million borrowers, and “permanent” (five-year) modifications to some 230,000. The Special Investigator General for TARP (SIGTARP) points out that, based on the Treasury Department’s estimate of the number of trial plan offers expected to be successfully converted to five-year modifications,⁴⁶ the program will provide longer term modifications to 1.5 to 2 million homeowners. That is a relatively small fraction of the 8-10 million foreclosures projected to be filed over the next three years. So far, HAMP does not appear to be slowing the pace of foreclosures. The Congressional Oversight Panel notes that, in the first quarter of 2010, foreclosures increased 21 percent over the same quarter of 2009. During this quarter, for every homeowner helped by HAMP, another ten lost their homes to foreclosure.⁴⁷

Fair Lending Enforcement

The cornerstone of fair lending enforcement for HAMP is the data that are being collected on the race, gender and national origin of applicants for the program. These are part of a much larger data collection effort, which also includes data on the credit characteristics of the borrower and any co-borrowers, the original mortgage loan, the factors used to evaluate the potential modification, whether or not the modification was granted, the reason for denial, the terms of the modification, the

⁴⁴ For details, see the March 26, 2010 press release from the Treasury Department, “Housing Program Enhancements Offer Additional Options for Struggling Homeowners,” available at http://www.makinghomeaffordable.gov/pr_03262010.html.

⁴⁵ Bank of American, Citigroup, JPMorgan Chase and Wells Fargo have signed up for 2MP. According to the April Oversight Report of the Congressional Oversight Panel, as of the third quarter of 2009, these four institutions held a combined total of \$442.1 billion in second liens. See Congressional Oversight Panel report at p. 76.

⁴⁶ SIGTARP, “Factors Affecting Implementation of the Home Affordable Modification Program,” SIGTARP-10-005, March 25, 2010, p. 14.

⁴⁷ Congressional Oversight Panel, Op. Cit., p.3.

borrower's performance under the modified terms, and payments made to the borrower, servicer and investor. Together, these data should allow for a robust fair lending analysis.

Although HAMP was launched in March, 2009, participating servicers were not required to begin collecting and reporting data on the race, gender and national origin of applicants for loan modifications until December 1, 2009. The delay was due to the time needed by the Treasury Department to establish the data reporting system. Initially, Treasury intended to require servicers to collect the data and maintain them in their files until the reporting system was up and running. At that point, servicers were to be required to report the data for all borrowers whose applications had been processed during the interim. However, servicers complained that such a process was unworkable, and Treasury pushed back the start of the data collection requirement. In some cases, the pre-December, 2009, data may be in the files, as borrowers have been asked to provide this information on the Hardship Affidavit form that all applicants must submit. However, the pre-December data would not be part of any electronic database that might be used to target compliance reviews or analyze fair lending patterns.

In response to advocacy by the National Fair Housing Alliance and others, Treasury has committed to making detailed, loan-level data – including race, gender and national origin – about HAMP applicants available to the public. The data will include geographic information, generally the census tract number. However, based on its interpretation of various terms in the contracts with participating servicers, Treasury will not link this loan-level data to specific servicers. Aggregate information about the performance of each servicer will be made public, so that it will be possible to see the overall performance of each servicer by certain variables, but not the individual loan modification applications that contribute to that overall performance. This will make it difficult for fair housing groups or other non-governmental agencies to conduct fair lending analyses for individual servicers participating in HAMP. The public will, however, be able to ascertain overall patterns and to identify problems with the program that cut across all servicers or that affect individual neighborhoods.

Treasury has indicated that it expects to make the first set of HAMP data available to the public by the end of the second quarter of 2010, or sometime around June 30. It has not finalized details of the data distribution system. Because Treasury is still working with servicers to improve their fair lending reporting, these data may be spotty in the initial release of the file. However, the public file will be updated quarterly, and over time the fair lending data should become available for a larger number of HAMP applications.

Treasury's decision not to allow the public access to loan level data linked to specific servicers – precluding the kind of “regulation from below” that has been possible with the HMDA data – makes it all the more critical that the federal government develop a timely and effective system for monitoring fair lending compliance under HAMP. Although the Treasury Department administers HAMP and enforces compliance with other requirements of the program, it is not taking on the responsibility for fair lending monitoring and enforcement. Whether and how Treasury is monitoring servicers' compliance with the fair lending data collection requirements of HAMP is not clear. Actual fair lending enforcement will be shared among a number of federal agencies that have

such authority, including the federal banking regulators, HUD and DOJ. It is not yet clear what role state enforcement agencies may play.

Unlike the public, the government enforcement agencies will have access to the fair lending data, including all the data fields for each HAMP application for every servicer they regulate. However, there is a question about how well prepared the agencies are to carry out their fair lending enforcement responsibilities with respect to HAMP. Given the time-limited nature of the program, with an expiration date set for December 2012, there is no time to lose.

Coordination is underway among some of the agencies to consider how best to analyze the data, focus oversight of servicers' operations, and target servicers for more detailed investigation. They are not starting completely from scratch, since the federal banking regulators currently conduct fair lending examinations of the institutions they regulate, and their exam procedures do address loan servicing, although not in great detail. But never before have the regulators had data on the race, gender or national origin of borrowers seeking modifications. The exam procedures should be updated to reflect this important new fair lending enforcement resource. Further, not all of the responsible agencies are involved in the interagency effort. This may result in the use of different standards and approaches by different agencies and for different servicers. It is particularly important for the Office of the Comptroller of the Currency (OCC) to participate, since it regulates the nation's largest loan servicers.

Another critical aspect of HAMP fair lending oversight is the assessment of any racial, ethnic or gender bias in the Net Present Value (NPV) model that is the decision-making engine for the program. The NPV model is used to determine whether the investor in a particular loan will gain greater financial benefit if the loan is modified, or if it goes to foreclosure. If the former is true, the modification is granted. If not, it is denied. While borrowers provide some of the data that goes into the NPV model calculations, much is provided by the servicer and not made available to the borrower. For example, the servicer determines the value of the property, the amount of time it would take to sell the home in foreclosure and the losses likely to be associated with that period during which the home is vacant. From a fair lending perspective, the method used to determine the property value is of particular concern. A few thousand dollars more or less in home value can make the difference between granting or denying a modification. HAMP allows servicers to use so-called AVMs (automated valuation models) which use statistical analysis to determine housing values in particular geographic areas rather than assessing the characteristics of an individual house. Servicers who use AVMs are required to verify that they have a certain degree of accuracy, but nonetheless they allow for a significant amount of variation from a more individualized form of determining property value, such as an appraisal or broker's price opinion (BPO).

Some organizations that provide assistance to borrowers seeking HAMP modifications are beginning to report more frequent denials for their minority clients than for their White clients.⁴⁸ Housing counselors and borrower attorneys also report that their clients are frequently told they are ineligible for HAMP because they fail the NPV test. It is essential to determine whether minority borrowers

⁴⁸ HAMP Mortgage Modification Survey 2010. National Community Reinvestment Coalition, March 2010.

are being denied HAMP loan modifications because of bias in the NPV model. If so, the model must be revised to eliminate any bias, and remedies must be provided to any affected homeowners.

To date, no federal agency has evaluated the NPV model to assess whether the variations in property values it allows, or any of the other factors it uses, have a racial, gender or ethnic bias. This is an essential step for ensuring that the HAMP program is operating in a non-discriminatory manner.

Another open question is the frequency and timing of HAMP-related fair lending exams. The federal banking regulators have different schedules for conducting fair lending examinations. Some institutions may go three years between exams, and even when they are conducted more frequently, servicing issues may not be covered in each exam. Unless the agencies make it a priority to assess fair lending compliance under HAMP, the program may be over and the time for taking enforcement action may have expired before compliance by all participating servicers is assessed. If violations have occurred, it may be too late to help the affected homeowners.

HUD and the Department of Justice face an additional set of challenges in carrying out their fair lending enforcement obligations with respect to HAMP. Unlike the banking regulators, these agencies do not have the authority to go in and examine the books or operations of loan servicers. They will have to rely on problems flagged during data analysis, through complaints and other outside sources of data, or in referrals from the banking regulators.

Some HAMP funds are being disbursed to homeowners through state housing finance agencies, creating another area of ambiguity in the HAMP fair lending compliance system. In February 2010, the Treasury Department announced that it was diverting \$1.5 billion of HAMP funds to the five states hardest hit by declining home prices and rising unemployment. In March, it announced the allocation of another \$600 million to an additional five states. These 10 states will be able to design their own programs to address the problems of negative equity, unemployed homeowners, and other aspects of the foreclosure crisis. The guidelines for this new program state that the housing finance agencies receiving the funds must comply with the Fair Housing Act and Equal Credit Opportunity Act, and should ensure that their programs do not provide less favorable treatment for members of classes protected under either Act. But it is not clear how Treasury will ensure that the states comply. No compliance plans have been announced. Apparently, the states will be required to collect information on the race, gender and national origin of applicants for their programs, but the data they report to Treasury will be aggregated at the state level. This level of detail will not be sufficient to enable Treasury or any enforcement agency to assess fair lending compliance effectively. Further, it is not clear whether even the state-level aggregate data will be made available to the public.

The picture that is emerging of a fractured approach to HAMP fair lending oversight and enforcement raises grave concerns about how effective the system will be, whether it will be deployed in a timely manner, and how much confidence the public can have that the HAMP is operating in a fair and unbiased manner, as required by law. Given the amount of federal funding going to HAMP, the impact of the foreclosure crisis on borrowers of color, and the long-term

implications of foreclosure for individuals, communities, the housing market and the economy, HAMP fair lending compliance deserves greater priority than it is currently receiving,

Recommendations to Improve HAMP

To address these concerns about fair lending oversight and compliance under HAMP, Treasury and other federal government agencies should take a number of steps to increase the transparency of the program to promote compliance, and to expand the tools for accountability to support a strong enforcement effort.

Treasury should take additional steps to improve the quality of fair lending data collected under HAMP to increase the program's transparency and support enhanced compliance.

These data are the foundation of the HAMP compliance effort, which will be severely impaired if the data are incomplete or inaccurate. To accomplish this goal, Treasury should provide training to servicers about their obligation to collect the required fair lending monitoring data and the best methods for doing so consistently. It should also establish HAMP compliance procedures to ensure that servicers are taking the appropriate steps to collect and report the data, and closely monitor their adherence to these procedures. Further, Treasury should require state housing finance agencies receiving funds through the Hardest Hit States Fund to collect, report to Treasury, and make available to the public applicant-level data on the race, gender and national origin of applicants for their programs. Other information about the borrower, property, loan and modification, comparable to that collected under HAMP, should also be collected and disclosed.

Treasury should provide the public with access to the full range of data collected under HAMP.

Given the limited time of the program and the late start of the federal enforcement effort, it makes sense to give the public the tools to monitor fair lending compliance by program participants and bring fair lending enforcement actions where needed. In addition to requiring full data disclosure by states participating in the Hardest Hit States Fund, as described above, Treasury should reconsider the decision to exclude the name of the servicer from the loan level data made available to the public.

The Administration should appoint a lead agency for HAMP fair lending enforcement, preferably either HUD or DOJ.

Since Treasury doesn't actually have enforcement authority beyond the HAMP data collection requirements, it is critical for some other government agency to coordinate and oversee this effort. Among its tasks should be coordinating data analysis, establishing program metrics in the fair lending areas, and developing examination procedures. The lead agency should be responsible for assessing the fair lending implications of the NPV model to ensure that neither the model itself nor the way it handles the various inputs has any bias based on protected class. Finally, the lead agency should coordinate information sharing among the various agencies involved in the fair lending enforcement effort so they can learn from each others' experiences and coordinate enforcement actions, where appropriate.

All federal agencies with fair lending enforcement authority should make HAMP compliance a priority throughout the length of the program. The federal banking regulatory agencies should revise their fair lending examination procedures to incorporate use of the HAMP data. Given the need for speed and the time-limited nature of HAMP, this could be done through a bulletin or letter to examiners, rather than a formal amendment to the exam procedures. In addition, each federally-regulated institution participating in HAMP should undergo at least one, and preferably two, fair lending exams that cover their activities under HAMP before December 2012. The fair lending compliance of non-federally regulated HAMP servicers should be evaluated on a similar schedule. That would enable the agencies to take appropriate steps to remedy any fair lending violations they uncover, including providing appropriate remedies for affected homeowners.

E. Consumer Financial Protection Agency

On May 20, the United States Senate passed S. 3217, the Restoring American Financial Stability Act of 2010. This bill followed passage of a similar bill, H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, which the House of Representatives passed in December 2009. Both pieces of legislation establish an independent consumer protection agency that will be responsible for ensuring the financial service industry's compliance with consumer and civil rights laws.

This independent consumer protection agency will correct systemic and pervasive flaws that exist in America's current financial regulatory framework, and will have authority over virtually all lenders. These flaws have been most clearly demonstrated by the credit card industry's abuse of cardholders and the proliferation of foreclosure-bound high-cost subprime mortgages in communities of color and nationwide. The consumer protection agency as passed in both chambers will have substantial implications for the ways in which financial services are provided in communities of color and for protected classes because it will elevate long-ignored civil rights obligations through a newly created Office of Fair Lending.

The consumer agency will streamline consumer protection regulation by taking consumer protection responsibilities away from five disparate regulators that almost always ignored consumer protection while looking out for banks' and lenders' "safety and soundness," and focusing them in an independent agency that is only tasked with consumer protection. The agency will have no other responsibilities aside from writing consumer protection rules and enforcing them. The agency will have no other consumer regulator with which it has to compete, so the conflict of interest that diminishes consumer protection to a low priority at prudential regulators would be erased. And perhaps most importantly, the agency will also have jurisdiction over non-bank financial entities that have long been guilty of abusive practices but which have not been federally regulated in the past. This includes the non-bank mortgage providers, mortgage brokers, and payday lenders that have striped wealth and equity from communities.

The agency will specifically address violations of the Equal Credit Opportunity Act and analyze data gathered under the Home Mortgage Disclosure Act in its Office of Fair Lending, which will be headed by an assistant director who reports directly to the chief of the agency. With this structure in

place – a devoted fair lending office inside of an agency devoted solely to consumer protection – it is our hope that the federal government will address fair lending violations as they emerge rather than turn its back on lenders’ discriminatory behavior, as regulators like the Office of the Comptroller of the Currency did for the past decade.

Section V. Additional Challenges to Promoting Fair Housing

A. Internet Advertising Update

In August, 2009, NFHA released a report titled *FOR RENT: NO KIDS! How Internet Advertisements Perpetuate Discrimination* and called upon Congress to stop the flood of discriminatory housing advertisements on the internet by amending the Communications Decency Act of 1996. The report documented how thousands of illegal housing advertisements appear with impunity on the internet every day on sites such as craigslist.

Although newspapers have been held liable under the Fair Housing Act for publishing discriminatory housing advertisements with statements such as “no kids,” or “couples only,” the publishers of similar ads on the internet have not. A loophole in the Communications Decency Act of 1996 has allowed internet advertising providers to escape liability under the Fair Housing Act by holding them to a different standard than print media.

Examples of internet housing advertisements discriminating against families with children and with other illegal preferences include:

- 2BR: “Mature couple or single with no children” Brooklyn, NY
- 3BR: Duplex: “Christian atmosphere” Evansville, IN
- 2BR: “PERFECT FOR 2 ADULTS....seeking a maximum of 2 tenants” New Haven, CT
- 2BR: “Couples preferred” Chicago, IL.

Since our report was issued, state and local FHAP agencies have issued charges of discrimination against people who posted discriminatory ads in complaints filed by NFHA. This means that the FHAP agencies found probable cause to believe that the advertisements violated fair housing laws. After a hearing, an Indiana Administrative Law Judge found that an advertisement that stated in part “perfect for professionals, professional students, couples” would indicate to an ordinary reader an illegal preference or limitation for tenants who have children. This decision was based upon the Indiana Fair Housing Act (IFHA) section prohibiting discriminatory advertisements, and that section of the IFHA is identical to the federal Fair Housing Act. The decision also orders the respondent in this case to cease from posting any advertisement that indicates a preference for couples. In addition, another state FHAP agency is actively pursuing NFHA’s complaint against craigslist itself as the “publisher” of discriminatory advertisements and is attempting to resolve that complaint.

In October, 2009, the Civil Rights Division of the Massachusetts Attorney General announced the results of its investigation into discriminatory advertisements on craigslist. That statewide effort resulted in:

- 25 demand letters to property owners and real estate brokers;
- 20 cases resolved;
- 5 complaints against individuals settled;
- \$18,250 in payments to the Commonwealth;

- an agreement to remove lead from a property in lieu of payment;
- 15 agreements to attend fair housing training; and
- 60+ individual posts on Craigslist from these defendants stating that the Attorney General monitors Craigslist for discriminatory advertisements and that it is against the law of Massachusetts to state a discriminatory preference in housing.

While decisions and actions by state and local FHAP agencies are a good start, more needs to be done to stop the proliferation of discriminatory advertisements on the internet. Under current conditions, individuals and non-profit organizations like NFHA are compelled to pursue each discriminatory advertisement like a steady drip escaping from a faucet. It would be much more efficient to turn the faucet off and prevent the drops from escaping and flooding the internet. If interactive internet providers, such as Craigslist, were liable for preventing these advertisements from reaching the public, then efficient filtering and notification systems would be in place to prevent them from being posted in the first place. In addition, HUD FHEO needs to issue updated national guidance consistent with the Fair Housing Act and legal decisions related to discriminatory advertisements; unfortunately, not all HUD regions or headquarters staff currently would reach the same conclusion as the Indiana Administrative Law Judge and a federal district court in Illinois that “perfect for couples” indicates an illegal discriminatory preference in violation of the Fair Housing Act.

B. Updating the Fair Housing Act

The federal Fair Housing Act must be strengthened in a number of ways to ensure that the entire public enjoys the protection of the law, to ensure that their complaints of housing discrimination are resolved fairly and expeditiously, and to ensure that federal programs and federal funds relating to housing and community development promote integration and reduce segregation. In order to strengthen the law, Congress must amend the law. Representative Jerrold Nadler (D-NY), chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties has held two recent hearings on the current state of fair housing and intends to hold additional hearings. He, along with Representative John Conyers (D-MI), has also introduced a bill to extend the Fair Housing Act to prohibit discrimination based on gender identity and sexual orientation. Both Representatives Edolphus Towns (D-NY) and Joe Sestak (D-PA) have offered similar pieces of legislation. We commend these representatives for taking an important and overdue first step, urge other members of congress to support their efforts, and also offer the following additional suggestions.

Add Protections Based on Gender Identity and Sexual Orientation

As reported, Congress is beginning to address this important issue. HUD has announced plans to ensure that its own programs do not discriminate against the LGBT community and plans to conduct a national study of discrimination against the LGBT community in the real estate sales and rental housing markets. As Rea Carey, Executive Director of the National Gay and Lesbian Task Force Action Fund testified, the LGBT community has long suffered from housing discrimination – “[The LGBT community] may experience resistance or outright hostility from a variety of sources including landlords, lenders, and realtors. When we

disclose our sexual orientation or gender identity, voluntarily or involuntarily, we may be subjected to violence or property damage.” Testing evidence verifies that callers describing themselves as gay or lesbian are likely to be given false information about housing availability. Today, over 20 states and the District of Columbia offer protection to people on the basis of sexual orientation and 13 states and the District of Columbia offer protection on the basis of gender identity.⁴⁹ It is time to offer federal protections as well.

Add Protections Based on Source of Income

Today, unless stronger local or state laws exist, it is perfectly legal for housing providers to discriminate against people on the basis of their source of lawful income. For example, under current federal law, landlords can refuse to accept applicants who intend to pay rent with federal or state rental subsidies, social security benefits, or child support. Often times, these refusals to rent act as a proxy for illegal discrimination: a landlord may refuse to accept Section 8 vouchers as a way of screening out African Americans, Latinos, or families with children, or may refuse to accept other vouchers as a way of denying housing to people with disabilities (for example, the recent case brought by the Fair Housing Justice Center in New York City referenced on page 7). Although this lawful income puts prospective tenants in a position where they can afford available housing, they are denied housing because of their source of income. This cannot remain the status quo.

Allow individuals and organizations to bring Section 3608(c) claims under the Fair Housing Act

As referenced in Section I, HUD has notably improved its commitment to Affirmatively Furthering Fair Housing over the last year, but individuals and groups committed to fair housing lack a trustworthy avenue to bring complaints when grantees fail to affirmatively further fair housing. In order to advance this important priority, the Fair Housing Act should be amended to provide them with a legal cause of action so AFFH complaints can be dealt with directly and quickly.

Create an Independent Agency

In order to eliminate this conflict of interest and properly elevate in importance fair housing enforcement, specific responsibilities of the Office of Fair Housing and Equal Opportunity should be removed from HUD and given to 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

⁴⁹ Testimony of Rea Carey, Executive Director of the National Gay and Lesbian Task Force Action Fund, before House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Hearing on Protecting the American Dream: A Look at the Fair Housing Act. March 11, 2010.

and other federal departments to advance proactively all of the fair housing issues that are critical to building stronger communities.

C. Disparate Impact⁵⁰

Four decades of litigation have developed a unanimous view among federal courts that disparate impact claims may be brought under the Fair Housing Act. This means that aggrieved persons can challenge policies that, while appearing to be neutral at face value, have the effect of discriminating against a protected class. Fair housing advocates and the federal government consistently rely upon this legal test to fix damaging policies and business practices. However, the Supreme Court has never directly addressed the question of whether the Fair Housing Act includes a disparate impact standard, and has issued recent opinions analyzing impact claims under other civil rights statutes on the basis of the statutes' particular text and purposes.

The Supreme Court has often relied on interpretive regulations of the agency charged with enforcing particular civil rights statutes in deciding whether those statutes include an impact standard. If analyzing the viability of a disparate impact claim under the Fair Housing Act, the Supreme Court might turn to HUD's regulations. Furthermore, the Court has held that HUD's regulations interpreting the Act are entitled to substantial deference in determining the meaning of the Act.

For many years, HUD has expressed its view that the Act includes an impact standard in staff guidance and handbooks. These HUD endorsements of an impact standard under the Act have been clear and consistent, but they have not yet taken the form of a regulation applicable to the entire statute.

Issue a Disparate Impact Regulation

In order to bring additional clarity to this issue and to support the application of a disparate impact analysis in judicial and administrative decisions, HUD should adopt a clear regulation that authorizes an impact standard under the Fair Housing Act.

⁵⁰ This portion of the report on disparate impact borrowed substantially from *Commentary: HUD and the Impact Standard under the Fair Housing Act* by Professor Robert G. Schwemm and Sara K. Pratt, December 2009. For an in depth analysis of this issue, including a detailed history of disparate impact in fair housing law, please see this document at www.nationalfairhousing.org under Public Policy.

Conclusion

Over the last ten years, we have seen enormous changes in our housing and financial markets, and we expect to see more changes as the economy continues to recover. Each step in this process -- from crisis, to response, to recovery -- has had substantial fair housing implications that cannot be ignored. As we move ahead in 2010 and beyond, the fair housing movement must have the ability to address challenges as they emerge in a meaningful way. This will take improved capacity of the non-profit sector and an invigorated determination by the public sector to assure equality in housing. Although small steps and individual cases are important, these challenges require systemic interventions if we are to meet this goal.