



MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY

2018 FAIR HOUSING TRENDS REPORT

50 years
CELEBRATING EQUALITY
THE FAIR HOUSING ACT
1968 - 2018
NATIONAL FAIR HOUSING ALLIANCE

NFHA
National Fair Housing Alliance

ABOUT THE NATIONAL FAIR HOUSING ALLIANCE

Founded in 1988 and headquartered in Washington, DC, the National Fair Housing Alliance (NFHA) is the only national organization dedicated solely to ending discrimination in housing. NFHA is the voice of fair housing and works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, community development initiatives, advocacy, and enforcement.

NFHA is a consortium of more than 220 private, nonprofit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. NFHA recognizes the importance of home as a component of the American Dream and aids in the creation of diverse, barrier-free communities throughout the nation.

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PROLOGUE

Imagine the house you grew up in, the local pool you swam in, shopping in a grocery store full of fresh fruits and vegetables, the great school you attended with your friends, and the doctor nearby who took care of you when you were sick. That's how all of us would like to remember our childhoods and think of our communities. But for many people, the experience of their neighborhood is nothing like that. Where you live determines your access to good schools, parks and recreation, quality health care, fresh food, clean air, affordable credit, and even how long you are likely to live.

Not all neighborhoods were created the same. The long history of housing discrimination and segregation in the U.S. has created neighborhoods that are unequal in their access to opportunities. They are not unequal because of the people who live there. They are unequal because of a series of public and private institutionalized practices that orchestrated a system of American apartheid in our neighborhoods and communities, placing us in separate and unequal spaces. These practices and systems resulted in the development of neighborhoods of color that have been starved of investment, affordable credit, good schools, quality health care, fresh food, and much more. It also resulted in the creation of thriving, predominantly White communities with abundant resources, federal support, and quality amenities and services. While many low-income communities, no matter their racial composition, suffer from disinvestment and lack of resources, even wealthier, high-earning communities of color have fewer bank branches, grocery stores, healthy environments, and affordable credit than poorer White areas.

Imagine now that every neighborhood was a place of opportunity, no matter the race or ethnicity of the people who lived there and that people were not illegally barred from moving to a community because of a protected characteristic. If everyone had access to affordable housing, fair credit, a good school, healthy food, a decent job, green space, and quality health care, how would our nation and our economy look then? Better, by every meaningful measure. Better for all of us, because this is not a zero-sum game in which providing opportunity to one person or in one neighborhood means taking it away from another. Rather, ensuring that every community has the resources and amenities its residents need to thrive results in a win-win outcome, exponentially increasing our chances for a stronger, more robust economy.

If we make quality credit available to people of color and in neighborhoods of color, the prospects of those people and those neighborhoods improve. They accumulate more wealth, they pay more taxes, and they invest more in the community. If people are given the opportunity to live near their jobs, regardless of their race or income, we reduce carbon emissions, costly transportation infrastructure, and time spent away from helping kids with their homework and preparing healthy meals. If we send kids to

a quality school, they are more likely to graduate from high school and go to college or trade school, equipping them with the knowledge and skills they need to fully participate in a global economy. If people breathe clean air, eat healthy food, and have a place to exercise and relax, we reduce health care costs for all. It is not just individuals who pay the price when people and communities are unfairly deprived of these opportunities, but our nation as a whole suffers as well.

How do we ensure that future generations of all backgrounds live in neighborhoods rich with opportunity? Fair housing. Fair housing can ultimately dismantle the housing discrimination and segregation that caused these inequities in the first place. Fifty years after the passage of the Fair Housing Act in 1968, we have yet to fully utilize its power and potential. Let us make a commitment to changing that in the next 50 years and ensure that every neighborhood becomes a place of opportunity.

SPECIAL RECOGNITION

30th
ANNIVERSARY

This year also marks the 30th anniversary of the establishment of the National Fair Housing Alliance. We would like to take this opportunity to honor and recognize NFHA's founding director, Shanna Smith, who retired in March. Without her leadership, NFHA would not have become the voice of fair housing and the organization that guides the fair housing movement. We would also like to thank those who work in fair housing, at both private and public agencies. You are the heart and soul of the movement, and we are grateful to be working with you as we enter the next 50 years under the Fair Housing Act.

INTRODUCTION

“The centrality of housing to people’s opportunities and life chances guarantees that virtually every issue concerning social justice is in some way a fair housing issue.”

George Lipsitz

The central message our nation needs to understand about fair housing is captured in the subheading of Professor George Lipsitz’ chapter in *The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act*.¹ In his beautifully-rendered chapter about the prominent role housing discrimination plays in our society, Lipsitz captures the message that has been missing too often from the fair housing narrative: **Fair housing is a matter of life and death**. Where one lives determines the likelihood you will attend and graduate from a good school; if you have access to healthy food, clean air, and healthcare; if affordable credit is available for homeownership and investment in the community; and your life expectancy.

Fifty years ago, the federal Fair Housing Act was passed in the wake of the assassination of Dr. Martin Luther King Jr. The dual goals of the act were to eliminate housing discrimination and promote residential integration. We would argue that a third goal is instrumental to fair housing: that every neighborhood should be a place of opportunity, regardless of the race or national origin of its residents. Neighborhoods should not be deemed unworthy of investment, homeownership, quality education, and all the amenities of life because of who lives there. We must stop thinking of current American landscapes as inevitable. A long history of systemic and institutionalized racism, of *social engineering*, created and perpetuated residential segregation (of Blacks, Latinos, Native Americans, and Asian Americans) and undermined the viability of neighborhoods of color. That legacy must be rectified.

Studies from civil rights organizations, journalists, academics, affordable housing advocates, and others have tried to paint a picture of how far we have come as a nation to achieving the goals of the Fair Housing Act. Often, these articles have focused on just how little has been done – on how very similar the state of disinvested, segregated neighborhoods are to the conditions that were described 50 years ago by the Kerner Commission of 1968. Black homeownership rates, for example, remain almost exactly the same as they were in the 1960s, despite gains in the late 1990s that were

¹ *The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act*. 2018. Gregory D. Squires (ed.). New York: Routledge.

subsequently erased during the foreclosure crisis.² A recent investigation by the Center for Investigative Reporting showed that, in 61 metro areas, mortgage loan denial rates are still much higher for Black and Latino applicants than for White applicants.³ Many of the demographic data points on access to fresh food, quality schools, clean air and water, transportation, and jobs still show staggering disparities, due in large part to continued residential segregation.⁴

Progress is an important part of the story too. While the original Fair Housing Act of 1968 only covered discrimination based on race, national origin, religion, and color, fair housing advocates have fought for and won added protections – making housing discrimination against women, families with kids, and people with disabilities illegal. We’ve built an infrastructure across private, nonprofit organizations and government that serves to protect fair housing rights. Within that infrastructure, we have achieved thousands of legal victories that have provided housing choice for millions of Americans, including several landmark Supreme Court cases. We have changed discriminatory behaviors in the housing, mortgage lending, and insurance industries and improved neighborhoods through major systemic fair housing enforcement efforts.

Doors of opportunity have certainly been opened. But with every step forward, there have been nearly as many forces pushing us back. We experienced this in an enormous way just a decade ago with the foreclosure crisis, a phenomenon that harmed families and communities of color most acutely because of rampant housing discrimination in the lending industry and the targeting of predatory, unsustainable loans primarily in communities of color. Within the past year, we have experienced even more hurdles as the Trump administration rolls back important rules and guidance at HUD, as consumer protections continue to be stripped away, and as Congress continues to put forward bills that threaten our ability to fight for racial justice and equality. We continue to lose ground as racists and bigots are emboldened by hateful rhetoric coming from the White House on down to local government officials, resulting in a dramatic uptick in hate activity, particularly housing-related hate activity that is illegal under the Fair Housing Act. Without a government that supports the creation of inclusive communities and is committed to ending housing discrimination, we are bound to lose even more ground in our fight for a more just, equitable, and open society.

We are a nation fundamentally committed to equality and opportunity for everyone; as such, it is clear that we need to do better. This 50-year milestone for the Fair Housing Act offers us a much-needed opportunity to reflect on where we are, to double down on our efforts to end housing discrimination and residential segregation, and to make fair housing a reality for every American.

2 <http://www.nareb.com/african-american-homeownership-falls-50-year-low/>.

3 <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.

4 For a summary of these data points, see Section II of NFHA’s 2017 Fair Housing Trends Report, available online here: <http://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf>.

In this report, we outline some of the key obstacles to achieving the goals of the Fair Housing Act, while acknowledging many of the achievements made under the act in the past 50 years. In our *2017 Fair Housing Trends Report: The Case for Fair Housing*,⁵ we provided significant information about the history of segregation and differential access to credit and other opportunities. We encourage you to read the 2017 report as it sets the stage for this report at the 50th anniversary of the Fair Housing Act. In this 2018 report, we assess some of the progress that has been made, lay out the ways in which the Fair Housing Act has been undermined in recent years, and outline some of the newer and emerging issues we must address as we move forward. These newer issues are in addition, of course, to ongoing work to educate consumers and industry about their fair housing rights and responsibilities and efforts to enforce fair housing laws by assisting those who experience discrimination and by dismantling discriminatory systemic and institutionalized barriers.

To get a sense of where we are in the fight to end housing discrimination, Section I highlights the many areas of progress and accomplishment of the last 50 years. In Section II, we acknowledge ways the Fair Housing Act has come under attack. Section III of this year's Trends Report contains 2017 data on fair housing complaints that NFHA collects from state and local Fair Housing Assistance Program (FHAP) agencies; private, nonprofit fair housing organizations (FHOs);⁶ the Department of Housing and Urban Development (HUD); and the Department of Justice (DOJ). Section IV highlights important cases that were filed or resolved in 2017 to further illustrate contemporary fair housing issues. In Section V, we use the 50th anniversary of the Fair Housing Act as an opportunity to reflect and lay out ways that the fair housing movement can proceed in achieving the original goals of the act in the next 50 years. Section VI contains the most immediate recommendations for achieving the goals of the Fair Housing Act.

Note on language in this report: As a civil rights organization, we are aware that there is not universal agreement on the appropriate race, ethnicity, gender identity and sexual orientation label for the diverse populations in the United States or even on if particular labels should be capitalized. We intend in all cases to be inclusive, rather than exclusive, and in no case to diminish the significance of the viewpoint of any person or to injure a person or group through our terminology. For purposes of this report, we have utilized the following language (except in cases where a resource, reference, case, or quotation may use alternate terminology): Black, Latino, Asian American, White, and LGBTQ+. In prior publications, we have utilized the term “African American,” but there are some who argue that this term is exclusive and we intend to be as inclusive as possible. We are also aware that many persons prefer the term “Hispanic.” We intend in this report to include those who prefer “Hispanic” in the term “Latino” and intend no disrespect. We refer to “neighborhoods of color” or specify the predominant race(s) of a neighborhood, rather than utilizing the term “minority.” We also use the term “disability,” rather than “handicap” (the term used in the Fair Housing Act”).

⁵ <http://nationalfairhousing.org/2017-fair-housing-trends-report/>.

⁶ Most nonprofit fair housing organizations are members of the National Fair Housing Alliance; however, not all are NFHA members. When we reference “NFHA member” organizations in this report, we refer specifically to member organizations, while a more general reference to nonprofit fair housing organizations includes non-NFHA members as well.

CHAMPION OF FAIR HOUSING

DR. MARTIN LUTHER KING JR.
1964 NOBEL PEACE PRIZE WINNER

Photo by
Bernard J. Kleina

50 **fifty**years™
CELEBRATING EQUALITY
THE FAIR HOUSING ACT
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NATIONAL FAIR HOUSING ALLIANCE

INSPIRING US TO ACT ON THE 50TH ANNIVERSARY OF THE FAIR HOUSING ACT

The Fair Housing Act was signed into law on April 11, 1968, just seven days after the assassination of Dr. Martin Luther King Jr. Today, over 4 million acts of housing discrimination still occur each year. Our neighborhoods are more segregated than they were in 1918. And a child's zip code still determines his or her opportunities in life. The fight for fair housing continues, but together we can—and will—make a difference for our communities.

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BE A CHAMPION OF FAIR HOUSING.

Visit nationalfairhousing.org to make fair housing a reality for everyone.

SECTION I. THE STATE OF FAIR HOUSING AT 50: PROGRESS AND ACCOMPLISHMENTS

While segregation persists and housing discrimination continues, significant work has been done to combat discrimination in housing, lending, and insurance markets, and millions of persons have benefitted. It is often easier to itemize the failures of enforcement and to lament the ongoing costs of segregation, but it is important to understand how much good the Fair Housing Act has wrought. In this section, we highlight some of the many accomplishments and achievements under the Fair Housing Act. One of the most important achievements in recent years is the long-awaited release of HUD's Affirmatively Furthering Fair Housing Rule. However, due to the length of our reporting on that issue, this subsection appears at the end of Section I, on p. 32, and we also report on the virtual suspension of the rule in January 2018 in Section II, on p. 35.

Expanded Protections and Significant Improvements to the Fair Housing Act

When the Fair Housing Act of 1968 was passed, it prohibited discrimination because of race, national origin, religion, and color, and HUD had limited enforcement authority to ensure compliance with the act. However, the act has since been amended to provide protections for additional groups and to strengthen the enforcement mechanism that HUD can use to implement the law. Congress amended the law to prohibit discrimination on the basis of sex with the passage of the Housing and Community Development Act of 1974,⁷ and in 1988 Congress amended the act to prohibit discrimination on the basis of disability and familial status with the passage of the Fair Housing Amendments Act of 1988 (FHAA).⁸

One of the signature components of the FHAA was the requirement that most new multi-family housing of four or more units be built to standards that make the housing accessible to persons with disabilities. The FHAA also requires housing providers to allow reasonable modifications and reasonable accommodations for persons with disabilities so they may fully use and enjoy their home and the amenities of the housing development. The FHAA added acts of interference, coercion, and the intimidation and threatening of individuals who assert their rights under the Fair Housing Act to the definition of discriminatory housing practices. It also created an administrative complaint mechanism that now makes it easier for individuals to file housing discrimination complaints, and granted HUD the power to take enforcement actions and impose sanctions for violations of the Act. In prohibiting sex, disability, and familial status discrimination under the Fair Housing Act, Congress extended the promise of housing choice to a larger cross-section of the American population. With expanded enforcement powers, HUD is now better equipped to remediate harm done to victims of housing discrimination.

⁷ Pub. L. No. 93-383, 88 Stat. 633.

⁸ Pub. L. No: 100-430.

Assistance to Victims of Housing Discrimination

Since 1996, when NFHA began collecting complaint data, NFHA members, HUD, FHAPs, and DOJ have assisted 561,472 persons with complaints of housing discrimination. The chart below shows the number of complaints filed per year.

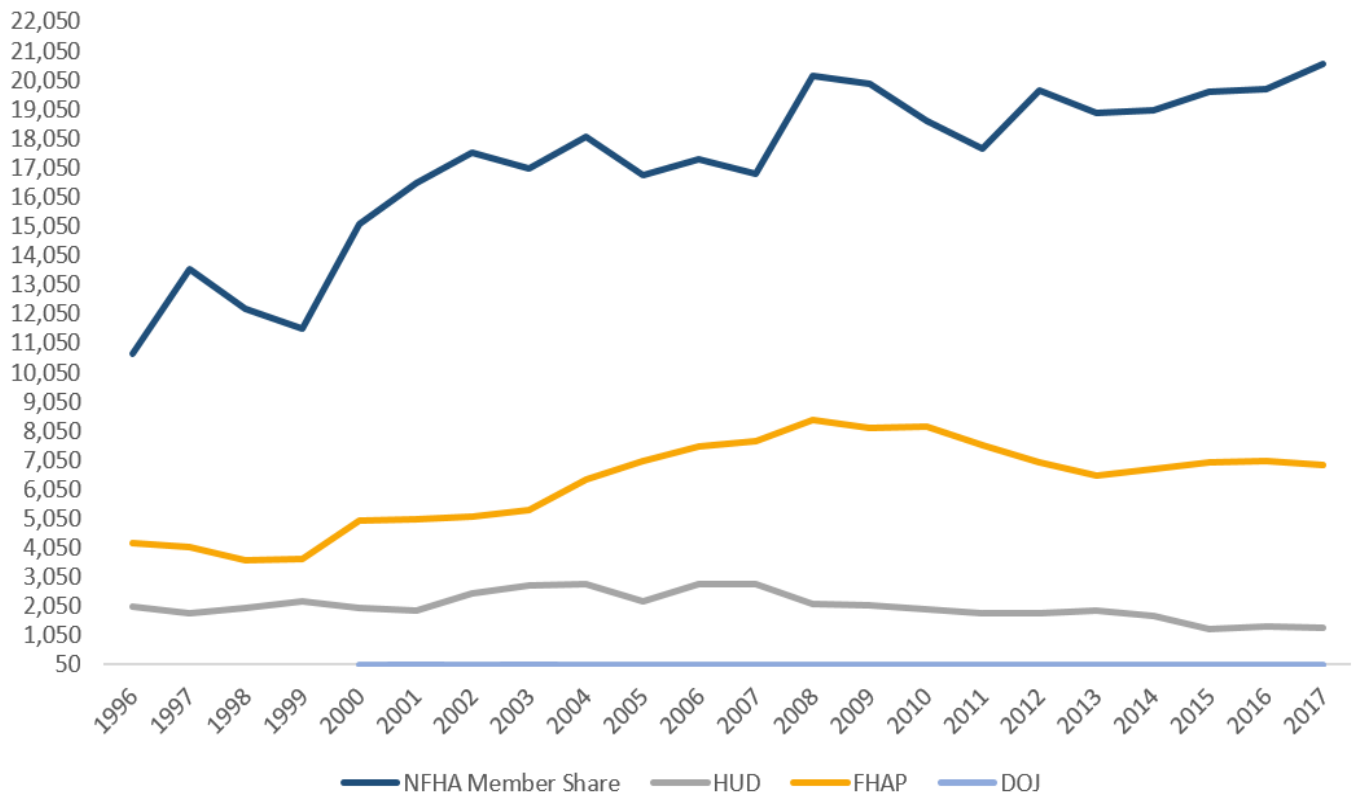
Number of Housing Discrimination Complaints Reported 1996 - 2017⁹

Year	FHOs	HUD	FHAP Agencies	DOJ	TOTAL
1996	10,692	2,054	4,216	-	16,962
1997	13,584	1,808	4,072	-	19,464
1998	12,212	1,973	3,634	-	17,819
1999	11,531	2,198	3,676	-	17,405
2000	15,131	1,988	4,971	49	22,139
2001	16,500	1,902	5,041	64	23,507
2002	17,543	2,511	5,129	49	25,232
2003	17,022	2,745	5,352	29	25,148
2004	18,094	2,817	6,370	38	27,319
2005	16,789	2,227	7,034	42	26,092
2006	17,347	2,830	7,498	31	27,706
2007	16,834	2,830	7,705	35	27,404
2008	20,173	2,123	8,429	33	30,758
2009	19,924	2,091	8,153	45	30,213
2010	18,665	1,943	8,214	30	28,852
2011	17,701	1,799	7,551	41	27,092
2012	19,680	1,817	6,986	36	28,519
2013	18,932	1,881	6,496	43	27,352
2014	19,026	1,710	6,758	34	27,528
2015	19,645	1,274	6,972	46	27,937
2016	19,740	1,371	7,030	40	28,181
2017	20,595	1,311	6,896	41	28,843
TOTALS	377,360	45,203	138,183	726	561,472

⁹ DOJ does not conduct intake of complaints from individuals; it processes "election" cases charged by HUD and brings pattern and practice cases.

Most complaints have been processed by private nonprofit fair housing organizations, as evidenced in this graph:

**Fair Housing Complaints by Reporting Agency
1996 - 2017**



While not all complaints of housing discrimination can be substantiated, a tremendous number of individuals and families have benefited from the service of public and private fair housing organizations.

Fair Housing Education

The education and outreach component of the Fair Housing Initiatives Program (FHIP) has allowed for implementation of local fair housing educational programs, as well as the nationwide dissemination of public education and training materials that can be replicated and modified by local organizations across the nation. Education serves a vital role in fair housing enforcement: It both informs consumers about their rights and how to recognize and report possible discrimination, and it teaches housing providers how to comply with fair housing laws to avoid fair housing violations.

The FHIP statute requires a national media campaign component that serves to both educate consumers and industry throughout the United States and to create materials that may be customized for use on the local level. In addition, local and regional education campaigns support efforts in communities to provide direct education to units of local government, other service organizations, the corporate community, consumers, and the housing industry. These efforts are tailored to local needs and address specific housing market dynamics.

National media campaign materials include print products (for magazines and newspapers) and Out-of-Home posters (for transit, malls, airports, movie theaters, etc.), as well as television and radio PSAs and social media marketing. These creative assets are marketed and distributed to media outlets and organizations throughout the United States. Many of the campaigns have also included educational materials in the form of videos, brochures, and Power Point training presentations that include the trainer text and references. There are dozens of print PSAs available in 8 languages, and all recent TV and radio PSAs are available in English and Spanish. Educational materials also include 12 videos on fair housing and fair lending for persons who are deaf or hard-of-hearing. These videos feature actors communicating in American Sign Language, and they are also captioned.

Technology advances have significantly enhanced the ability to customize these products for use at the local level. This reduces the need to reinvent the wheel locally or to invest unnecessary resources into creating duplicative products. There is an incredibly comprehensive and robust set of materials available to serve the public and housing industry. These materials also reflect state-of-the-art marketing industry professionalism and standards.

The national media campaigns have generated an enormous return on investment (ROI). FHIP dollars utilized to create these multiple campaigns in the past ten years total just under \$8 million in investment. Not all this amount was utilized to create media-generating support; much of it was used to create the videos and other educational materials. The media component during this time frame has led to more than **\$102 million in donated media**, which significantly undervalues the work as much of it remains placed or continues to run long beyond the time during which such data is tracked and reported. The **ROI** for the national campaigns since FY2008 is more than **1200 percent**. The result of this exceptional ROI is that a more educated and engaged citizenry has been created. The campaigns have generated well over **4 billion audience impressions** (the estimated number of times PSAs have been seen or heard).

Brief Overview of Enforcement under the Fair Housing Act

Thousands of cases have been filed to address discriminatory practices and policies that violate the federal Fair Housing Act. They have challenged discrimination in every

type of housing transaction – rental, sales, lending, insurance, appraisal, servicing, real estate owned, harassment, and more – and discrimination on the basis of every protected characteristic. Each year, NFHA’s Fair Housing Trends Report provides highlights of some of the key cases of the last year, and each month NFHA publishes the journal *Fair Housing-Fair Lending* (available by subscription) which provides information throughout the year of almost all cases brought under the Fair Housing Act. In this section we provide an overview of key enforcement efforts, including a section on “Bedrock Jurisdiction,” which features highlights of some of the most important precedent-setting cases. Other enforcement highlights include the following:

Increasing the Stock of Housing Accessible to Persons with Disabilities

The Department of Justice has filed more than 90 cases against multi-family housing developers and owners, alleging they built housing that was non-compliant with the design and construction requirements of the Fair Housing Act. These cases have affected more than 50,000 units of housing and resulted in more than \$28 million in funds to compensate victims of this failure, as well as to make additional units of accessible housing. NFHA has filed eight cases, sometimes in partnership with its member organizations, addressing the construction of multi-family housing that is noncompliant with the design and construction requirements of the Fair Housing Act. These cases have resulted in more than 20,000 units now being accessible and more than \$5 million invested throughout the country to make additional homes accessible. Many fair housing organizations have brought additional cases forcing housing providers to alter housing to make it accessible.

Addressing Barriers to Quality Homeowners Insurance

In the 1990s, NFHA and several of its member organizations filed discrimination complaints or lawsuits against six of the nation’s largest insurance companies. These cases resulted in a transformation in the industry by eliminating, to a substantial extent, underwriting guidelines based on age of housing, value of housing, and the ratio of replacement cost to market value of a home. All these guidelines had a discriminatory disparate effect on neighborhoods of color throughout most of the country. Due to the changes from these cases, millions of homes in neighborhoods of color became eligible for high quality homeowners insurance at a fair price. In addition, more than \$3 million was made available to provide grants to homeowners in neighborhoods of color.

Securing Relief for Victims of Lending Discrimination

Since 1988, the Department of Justice alone has filed more than 60 lending discrimination cases, most of them alleging violations of the Fair Housing Act. The mortgage lending discrimination cases have resulted in close to \$1 billion in payments to victims of

discrimination, investment in communities, loan subsidies, education of and marketing to consumers, and opening of new bank branches in underserved neighborhoods. Details of some of these cases are provided in a subsequent section, *The Fair Housing Act is a Necessary Tool to Increase Access to Fair Mortgage Credit*.

Challenging Discrimination by Bank- and Investor-Owners of Foreclosed Homes

For the past eight years, NFHA and 22 fair housing organizations have conducted a wide-scale, nationwide investigation into the marketing and maintenance of bank- and GSE-owned foreclosed properties. These properties, also known as Real Estate Owned (REO) properties, were found to be well-maintained and professionally-marketed in predominantly White communities. However, REO homes in comparable communities where residents were largely Black or Latino were likely to be unsecured, with boarded windows, overgrown grass and weeds, and usually without signage indicating that they were for sale. This collaboration produced thousands of photos documenting differences in treatment.

This investigation culminated in several housing discrimination complaints against nearly all of the largest owners of REO inventory. In 2012, NFHA and the local fair housing groups filed a HUD administrative complaint against Wells Fargo Bank for its disparate treatment of REO properties. Shortly thereafter, Wells Fargo took a leadership role and entered into an agreement with NFHA, its partners, and HUD and provided \$27 million to foster homeownership, assist with rebuilding neighborhoods of color impacted by the foreclosure crisis, and to promote diverse, inclusive communities.

With the \$27 million in community relief that was awarded to the fair housing organizations, the organizations generated an additional \$17.3 million in leveraged funds for communities of color. In addition to other programs, the grant funds allowed over 700 families to access homeownership for the first time, over 800 families to remain in their homes because of foreclosure prevention or home repair grants, and 685 abandoned or blighted properties to be rehabilitated. Additionally, 182 homes were made accessible for persons with disabilities, and over 10,000 individuals completed financial literacy or homeownership training workshops.

In 2012, NFHA and the local fair housing groups filed a HUD administrative complaint against Bank of America for its disparate treatment of REO properties in communities of color. In 2016, NFHA and 20 of its local fair housing partners filed a federal lawsuit against Fannie Mae in federal district court in San Francisco, Cal., for its disparate treatment of REO properties in communities of color in 38 metropolitan areas. In 2017, NFHA and 19 of its local fair housing partners filed a federal lawsuit against Deutsche Bank, Ocwen Financial Corp, and Altisource Portfolio Solutions in federal district court in Chicago, Ill., for its disparate treatment of REO properties in communities of color in 31 metropolitan areas. These cases are pending.

Fair Housing Milestones: Bedrock Jurisprudence

Thousands of significant cases have been filed in the past 50 years to address both discriminatory conduct and the discriminatory effects of policies and practices. This has resulted in providing redress to victims of housing discrimination and has eliminated numerous policies and practices affecting substantial numbers of persons and neighborhoods of color. As implementation of the requirements of the Fair Housing Act developed, many important legal precedents were established in key cases. In this report, we summarize some of the most significant cases, while recognizing that these represent only a fraction of those brought under the act.

***Jones vs. Alfred H. Mayer Company*¹⁰ (U.S. Supreme Court 1968)**

In a case of discriminatory real estate sales practices, which alleged that a seller refused a sales transaction because the prospective homebuyer was Black, the U.S. Supreme Court held that Congress could regulate the sale of private property in order to prevent racial discrimination, finding that the Civil Rights Act of 1866 prohibited both private and state-backed discrimination and that the 13th Amendment authorized Congress to prohibit private acts of discrimination to address “the badges and incidents of slavery.”

***Shannon v. HUD*¹¹ (3rd Cir. 1970)**

In a case which alleged HUD’s approval of the construction of low-income housing without consideration of the effects on racial concentration in the area violated fair housing laws, the 3rd Circuit held that the law not only prohibits HUD from discriminating based on race, but also gives the agency the responsibility to counteract residential segregation. In addition to discriminatory intent, the case affirmed the principle that fair housing law protects against discriminatory effects.

***Trafficante v. Metropolitan Life Insurance Company*¹² (U.S. Supreme Court 1972)**

In a case brought by both White and Black tenants of an apartment complex alleging they were denied the benefits of living in an integrated community because of the proprietor’s discriminatory rental policies, the U.S. Supreme Court held that “persons aggrieved” under the Fair Housing Act should be construed broadly to conclude that tenants in the apartment complex had standing to sue and that, in response to the recommendations of the Kerner Commission, the Fair Housing Act sought to replace racially segregated ghettos with “truly integrated and balanced living patterns.”

***Arlington Heights v. Metropolitan Housing Corp.*¹³ (U.S. Supreme Court 1977)**

In this case, a nonprofit developer challenged the Village of Arlington Heights’ denial of requests for rezoning, alleging that the denials were racially discriminatory. The U.S. Supreme Court held that, while Arlington’s zoning denial may result in a racially

¹⁰ 392 U.S. 409 (1968), available at: <https://www.law.cornell.edu/supremecourt/text/392/409>.

¹¹ 436 F.2d 809 (3d Cir. 1970), available at: <https://openjurist.org/436/f2d/809/shannon-v-united-states-department-of-housing-and-urban-development>.

¹² 409 U.S. 205 (1972), available at: <https://www.law.cornell.edu/supremecourt/text/409/205>.

¹³ 429 U.S. 252 (1977), available at: <https://supreme.justia.com/cases/federal/us/429/252/case.html>.

disproportionate impact, the evidence did not prove that discriminatory purpose was a motivating factor in Arlington's denial to rezone. The case detailed a set of factors used to determine whether an official acted with discriminatory intent: 1) impact of the decision; 2) historical background; 3) events leading up to the decision; and 4) legislative history involving statements made by the body in question.

***Gladstone Realtors v. Village of Bellwood*¹⁴ (U.S. Supreme Court 1979)**

In a case where the Village of Bellwood, residents, and local fair housing centers alleged brokers steered Black homebuyers into segregated areas, thereby denying the buyers the benefits of living in an integrated neighborhood and inducing lower property values and erosion of the tax base, the U.S. Supreme Court held that residents of an integrated neighborhood had standing to file suit against real estate companies engaged in the practice of steering. The court reasoned that discriminatory practices, documented by the residents' testing, deprived them, as residents of the adversely affected area, of the social and professional benefits of living in an integrated society, therefore giving them standing under the Fair Housing Act.

***Havens Realty Corp. v. Coleman*¹⁵ (U.S. Supreme Court 1982)**

In a case brought by a prospective renter, two testers, and a fair housing organization to challenge discriminatory rental practices, the U.S. Supreme Court held that both testers and fair housing organizations had standing to sue, and where fair housing violations are continuous, the statute of limitations runs from the date of the last occurrence of discrimination. The Court held that fair housing organizations had standing to sue because the owner's racial steering practices impaired the organization's ability to provide housing counseling and referral services, such that the identified discrimination had a consequent drain on the organization's resources and frustrated its mission.

***Shellhammer v. Lewallen*¹⁶ (6th Cir. 1985)**

In the first federal case to hold that sexual harassment in housing violates the Fair Housing Act, the 6th Circuit affirmed a decision that an eviction was in response to the tenant's rejection of sexual advances – where the owner of the tenant's building asked her to pose for nude photos and, when she refused, she and her husband were evicted – and that the owner's conduct constituted both quid pro quo and hostile environment discrimination. The decision established the framework for analyzing sexual harassment claims in the housing market.

***Ragin, v. New York Times Co.*¹⁷ (S.D.N.Y. 1993)**

In a case where Black housing seekers sued the New York Times' publisher for violating the Fair Housing Act by running housing advertisements indicating racial preferences based on human models used, the Court held the New York Times violated the Fair

14 441 U.S. 91 (1979), available at: <https://supreme.justia.com/cases/federal/us/441/91/>.

15 455 U.S. 363 (1982), available at: <https://supreme.justia.com/cases/federal/us/455/363/case.html>.

16 770 F.2d 167 (6th Cir. 1985), available at: <https://openjurist.org/770/f2d/167/thomas-shellhammer-v-norman-lewallen-jacqueline-lewallens>.

17 726 F. Supp. 953 (1989), available at: <https://law.justia.com/cases/federal/district-courts/FSupp/726/953/1740484/>.

Housing Act by engaging in longstanding and continuing practices of publishing racially discriminatory advertisements for housing because the ads used White human models almost exclusively and did not contain the equal housing opportunity logotype.

***United States ex rel. Anti-Discrimination Center v. Westchester County*¹⁸ (S.D.N.Y. 2009)**

In the first case to employ the federal False Claims Act to enforce a County's obligation to "affirmatively further fair housing," the U.S. District Court in the Southern District of New York approved a historic \$62.5 million settlement agreement, combining False Claims Act remedies with those traditionally used in housing desegregation litigation. This case alerted local and state entitlement jurisdictions to the potential liability they face if they fail to properly conduct their fair housing planning activities.

***Inclusive Communities Project v. Texas Dept. of Housing and Community Affairs*¹⁹ (U.S. Supreme Court 2015)**

In a case challenging the discriminatory effects of Texas' plan to allocate tax credits to build affordable housing, the U.S. Supreme Court held the disparate impact standard of liability to exist under the Fair Housing Act. The court commenced its analysis of disparate impact liability by identifying that the vestiges of de jure residential segregation are intertwined with the country's economic and social life and found that disparate impact liability has an important, ongoing role to play in moving the nation toward a more integrated society.

The Fair Housing Act is a Necessary Tool to Increase Access to Fair Mortgage Credit

Access to a safe, sustainable mortgage to purchase a home in the community of one's choice, and without regard to race, sex, national origin, family status or disability, is an essential element of truly open communities. The lack of such access has been a central pillar in the societal structures that created and perpetuate segregation in this country, and helped give rise to the conditions that ultimately led to the passage of the Fair Housing Act. See more about the systemic and structural discrimination in real estate and mortgage lending in the *2017 Fair Housing Trends Report: The Case for Fair Housing*.²⁰

The Fair Housing Act made it illegal to discriminate against members of protected classes in mortgage lending and related services, such as appraisals, mortgage insurance, and homeowners insurance. Since its passage in 1968, the act has been a powerful tool for combatting discriminatory practices that constrict the flow of mortgage credit to borrowers and communities of color, and to members of other protected classes. In this section, we highlight a few of the many successful lending discrimination cases brought under the Fair Housing Act.

¹⁸ <http://www.relmanlaw.com/civil-rights-litigation/cases/westchester.php>.

¹⁹ 135 S. Ct. 2507 (2015), available at: https://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf.

²⁰ <http://nationalfairhousing.org/2017-fair-housing-trends-report/>.

One early case under the act was *Laufman v. Oakley Building & Loan Co.*²¹ Mr. Laufman, who was White, was seeking to purchase a home in an integrated neighborhood in Cincinnati, Ohio. He sued Oakley Building & Loan Co. in 1976, alleging that it had turned down his application because of the racial composition of the neighborhood. That case, the first in what turned out to be a long line of cases spanning many years, established the use of the Fair Housing Act to combat redlining, the refusal of lenders to make loans in certain neighborhoods because of the race or national origin of their residents.

Denial of loans is not the only way lenders discriminate against members of protected classes. They also charge higher fees and interest rates, making credit less affordable. An early case on this point was *U.S. v. Huntington Mortgage Company*. In this 1995 case, DOJ found that Huntington Mortgage charged Black borrowers in Cleveland higher points over a period of several years than similarly situated White borrowers. Affected borrowers received compensation under the terms of the settlement agreement.

Other cases have involved institutions charging higher points and fees for loans to borrowers of color through their wholesale channels. One such case was *U.S. v. AIG Federal Savings Bank and Wilmington Finance, Inc.* in 2010. Under the terms of that case, the lenders agreed to pay \$6.1 million in compensation to Black borrowers who had been charged higher fees than comparable White borrowers, and to invest \$1 million in consumer financial education efforts.

In 1977, the DOJ successfully challenged the practice of real estate appraisers who factored the racial make-up of neighborhoods into home value assessments in certain areas. This practice was built into the code of ethics for the industry until DOJ sued the American Institute of Real Estate Appraisers to end the practice.

The Fair Housing Act has also been used to combat discrimination based on factors other than race. For example, in 2012, DOJ sued Bank of America Home Loans for requiring people with Social Security Disability Income to provide a letter from their doctor and, in some cases, more detailed medical information, as part of their mortgage applications. DOJ's 2016 case against Evolve Bank and Trust involved similar allegations. In both cases, the Fair Housing Act's prohibition against discriminating on the basis of disability allowed the government to provide remedies to individual borrowers and obtain policy changes by the lenders to prevent future discrimination.

The 2016 case *U.S. v. First Federal Bank of Florida* challenged that bank's policy of requiring women on maternity leave to return to work before they could close on their mortgage loan. This policy forced women to cut short their leave to obtain a mortgage. DOJ alleged that this policy violated the Fair Housing Act's protection based on familial status. This was another settlement that included both compensation to the victims and injunctive relief that required the lender to change its policies to protect future applicants. In the early 1990s, DOJ brought a series of redlining cases that were of a somewhat

²¹ 408 F. Supp. 489 (S.D. Ohio 1976).

different nature than the *Laufman* case, beginning with 1992's *United States v. Decatur Federal Savings & Loan*.²² There was no individual plaintiff in this case; rather, the case was based on the analysis of data disclosed under the Home Mortgage Disclosure Act, as well as other evidence, which showed that Decatur Federal deliberately and systematically built its branch network to serve White communities, marketed its products and services in those communities, drew its Community Reinvestment Act assessment area boundaries to include those communities, declined to offer FHA or VA loans, and had virtually no loan officers, appraisers, or loan underwriters who were people of color. As a result, Decatur Federal made the vast majority of its mortgage loans to White borrowers and in White neighborhoods, excluding Black borrowers and communities of color in Atlanta. Further, it discriminated against those Black applicants who did apply for mortgages. The settlement agreement called for the institution to create new lending programs, build new branches in Black neighborhoods, take very specific steps to market its products and services in those areas, and undertake a variety of other changes to its policies and practices designed to expand access to credit for Black borrowers in Atlanta. Other redlining cases that followed built upon this model of more systemic remedies to neighborhoods that had been denied access to credit because of the race or national origin of their residents.

An important breakthrough in helping to ensure that borrowers and communities of color have access to fair, sustainable lending came in a case that established the use of the Fair Housing Act to combat so-called “reverse redlining,” the targeting of communities of color for abusive, predatory loans whose unfair terms and unaffordable payments were designed to fail. In *Hargraves v. Capital City Mortgage*,²³ filed in 1998 and settled seven years later, the court ruled that this practice violated the Fair Housing Act, and that the fact that a lender did most of its business in communities of color could not shield it from scrutiny under the law.

Another important case that used the Fair Housing Act to address predatory lending practices was *U.S. v. Delta Funding Corporation*, brought in 2000. Delta was a subprime lender that did not have a retail lending operation, but obtained loans through brokers. The company allowed the brokers to charge higher fees to Black women than they charged to similarly situated White men, in violation of the Fair Housing Act and other federal laws. The settlement agreement provided \$12 million to compensate victims, required the company to refuse to fund future loans with discriminatory or unearned broker fees, and to ensure that no loans were made to borrowers who could not afford to pay them.

Federal banking regulators have an important part to play in enforcing the protections offered under the Fair Housing Act and other federal fair lending laws. However, gaining their participation in enforcing these requirements was not easy. In 1971, a coalition of civil rights organizations, led by the National Urban League and the NAACP, and

²² Civil Action No. 1 92-CV-2198-CAM, US District Court for the Northern District of Georgia, Atlanta Division.

²³ 140 F. Supp. 2d 7 (2000).

including a number of local fair housing organizations, the National Association of Real Estate Brokers (NAREB), and the Rural Housing Alliance, petitioned those agencies to adopt rules, regulations, and procedures that ensure against discrimination by the lending institutions they supervised and regulated. The regulators, at HUD's insistence, surveyed lenders about their mortgage lending practices with respect to borrowers, communities of color, and women, both single and married. In those surveys, many lenders reported – to their federal regulators and several years after passage of the Fair Housing Act – that they discriminated on the basis of the race or gender of the borrower or the racial composition of the neighborhood when evaluating applications for mortgages and in the terms and conditions of mortgages they made.

This concrete evidence of widespread discrimination and the unwillingness of the regulators to take action to eradicate it led the coalition to sue the federal regulators²⁴ in 1976 for their failure to enforce the Fair Housing Act. The complaint listed 22 different ways in which lenders discriminated and described the impact of such discrimination on individuals and communities. In settling the lawsuit, the agencies agreed to set up a regulatory infrastructure for fair lending enforcement that remains in place to this day. This included requirements for lenders to collect and report relevant data about the race and other characteristics of applicants for mortgage credit, to create systems for analyzing that data, to institute examination procedures designed to uncover potential discrimination, and to train bank examiners in conducting fair lending exams. Several of the cases cited above were based on referrals to the DOJ from banking regulatory agencies.

While there is much more work to be done to eliminate a wide range of discriminatory practices from the mortgage market, the Fair Housing Act has proven time and again over the last 50 years to be an important vehicle for addressing discrimination, providing relief to affected individuals and communities, and expanding access to safe, sustainable mortgage loans. It should be noted that DOJ has brought dozens of systemic mortgage lending discrimination cases and continues to address discriminatory mortgage lending practices in its work today.

Consumer Financial Protection Bureau and Its Office of Fair Lending

The first domino to fall in the chain of events leading up to the Great Recession of 2008 was the tsunami of foreclosures in communities of color. These occurred because subprime lenders targeted communities of color for toxic loans that were designed to be unsustainable and unaffordable for the homeowners, but very profitable for lenders, brokers, institutions that packaged the loans into securities, and the investors that purchased those securities. While the impact of the foreclosure crisis ultimately spread to many communities and nearly crippled the entire U.S. economy, communities of color were Ground Zero, and many are still struggling to recover. Many of the most active subprime lenders were subject to little, if any, regulatory

²⁴ *National Urban League et. al. v. Office of the Comptroller of the Currency et. al.*, Amended Complaint 76-0718 (D.D.C., 1976).

oversight, so there were virtually no checks on either the unsustainable products they peddled or their deceptive marketing practices. Federal banking regulators failed to exercise the regulatory authority they had, despite early and repeated warnings from advocates about the problems they were seeing and the dangers ahead. Because of this regulatory failure, taxpayers had to ante up \$700 billion²⁵ to shore up big banks. To prevent another taxpayer bailout of the financial services industry and ensure better protections for consumers in the financial marketplace in the future, Congress enacted a sweeping regulatory reform bill, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁶

The centerpiece of Dodd-Frank was the creation of a new federal agency whose sole mission is to protect the interests of consumers in the financial marketplace, a key departure from the other federal financial regulatory agencies, which have tended to view financial institutions, rather than individual borrowers, as their customers. A central element of the new Consumer Financial Protection Bureau (CFPB) is the Office of Fair Lending and Equal Opportunity, an office for whose establishment NFHA and other fair housing and civil rights organizations advocated.

The Office of Fair Lending is tasked by Congress to:

- Provide oversight and enforcement of federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the CFPB, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act;
- Coordinate fair lending efforts of the CFPB with other federal agencies and state regulators, as appropriate, to promote consistent, efficient, and effective enforcement of federal fair lending laws; and
- Work with private industry, fair lending, civil rights, consumer, and community advocates on the promotion of fair lending compliance and education.

While the CFPB does not have direct authority under the Fair Housing Act, the Bureau and its Office of Fair Lending represent a significant advancement in fair lending, and the laws under which the CFPB does have direct authority, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act, are important fair lending tools. It has had a substantial impact on the marketplace, helping to uncover and eliminate unfair and unscrupulous practices in home mortgage and other types of lending. In its first seven years of existence, the Office of Fair Lending has helped the Bureau achieve an impressive record, winning \$11.7 billion in relief for over 29 million consumers and responding to more than 1 million complaints.²⁷ In one important fair lending case, the Bureau charged New Jersey-based Hudson City Savings Bank with discriminating against

25 <https://www.stlouisfed.org/publications/central-banker/fall-2013/the-troubled-asset-relief-program-five-years-later>.

26 <https://www.congress.gov/111/plaws/publ203/PLAW-111-publ203.pdf>.

27 https://www.jec.senate.gov/public/_cache/files/20796f3c-cd05-422f-89f8-ec86f00a7577/consumer-protection-accomplishments-final-4-10-jw-lv-002-.pdf.

applicants for mortgage loans on the basis of race. The settlement, which provides \$25 million in loan subsidies, is one of the largest settlements ever obtained in a redlining case.²⁸ The fair housing movement can be proud of the role it played in helping to create this important new agency.

Advancements in Challenging Sexual Harassment

Too often, women face sexual harassment and assault from their landlords, maintenance staff, real estate agents, mortgage lenders, and other housing provider staff. This is especially true for low-income women. With a fear of retaliation, women must balance safety and shelter for their families with reporting discriminatory harassment and assault. For most, the fear of eviction keeps them from asserting their civil rights and challenging abusive housing providers. Since the addition of sex as a protected class under the Fair Housing Act, much has occurred to better utilize protections under the law to defend women against sexual harassment and violence.

Jurisprudence around the Fair Housing Act has developed over time to protect women from sexual harassment and assault. In 1982, the Toledo Fair Housing Center helped Tammy Shellhammer and her husband file a lawsuit against her landlord, Norman Lewallen, for evicting them in retaliation against her for refusing his sexual advances. At the time, there was no established case law supporting a prohibition against sexual harassment in a Fair Housing Act claim. Despite the uphill challenge, the Toledo Fair Housing Center sought out as many survivors of Lewallen's abuse as they could in order to document their stories. Among the women they encountered, many shared stories of Lewallen's verbal and physical harassment, his propositioning them for sexual favors or to pose for nude photographs, his physical contact with their underage daughters, coercion, molestation, and eviction threats, as well as other forms of harassment and assault.²⁹ In the first case of its kind, the Toledo Fair Housing Center filed suit in 1982 alongside 72 victims of Norman Lewallen's sexual harassment and assault, asserting claims of sexual harassment under the Fair Housing Act. In December 1983, a federal judge ruled in favor of the Shellhammers, establishing that they and others with similar claims were the victims of sexual harassment and were eligible for damages under the Fair Housing Act.

The pernicious sexual harassment and assault that were challenged in the Shellhammer case represent the most common forms of harassment and assault that women face in housing, but they are also fostered by local ordinances against nuisances and crime. Across the United States, cities have adopted chronic nuisance ordinances, or "crime-free" laws which punish tenants and landlords when the police or other emergency services are called at a given frequency. These ordinances can take on several forms, such as fines or criminal charges on tenants and/or landlords after a certain number of

²⁸ https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?noredirect=on&utm_term=.437d2f393e24.

²⁹ See, e.g., *Shellhammer v. Llewellyn*, Fair Housing Fair Lending Report., para 15742 (W.D. Ohio 1983), aff'd 770 F. 2nd 167 (6th Cir. 1985) (unpublished).

times the police are called. These types of blanket ordinances have a disparate impact on women as they are more likely to be survivors of domestic violence. Under standard nuisance abatement ordinances, a landlord could evict a woman if she calls the police on an abusive partner.³⁰ Given the nature of nuisance ordinances and domestic violence, some women are forced to make snap decisions between risking theirs and their children's shelter and their physical safety. Not only do nuisance ordinances endanger the safety of survivors of domestic violence, but they incentivize or force landlords to immediately evict a tenant in situations that require emergency services. The disparate impact on women and the endangerment that nuisance ordinances puts them in are undeniable, and the pressures that these ordinances put on landlords to evict women who use police services in life-or-death situations is an abuse of government power.

In April 2018, HUD and DOJ announced a joint initiative to combat sexual harassment in housing. As part of the effort, HUD and DOJ plan to lead an inter-agency task force, produce a toolkit, and begin a public awareness campaign. By putting a greater emphasis on sexual harassment cases, HUD and DOJ can help to stem the tide of sexual harassment in government-assisted and private housing. The joint initiative is an outgrowth of DOJ's 2017 pilot initiative in Washington, D.C., and the Western District of Virginia court jurisdictions, which aims to connect victims of sexual harassment in housing with local organizations where survivors may turn first, including law enforcement agencies, legal service providers, Public Housing Authorities (PHAs), sexual assault support service providers, and shelters.³¹ With the stated goals of increasing awareness and reporting of sexual harassment in housing, the initiative establishes the following strategy: continued data sharing and evaluations; joint development of training, assessment of PHA complaint systems; coordination of public outreach and media strategies; and a review of existing federal policies that impact sexual harassment in housing. This joint initiative is cause for excitement, as sexual harassment in housing is drastically underreported. NFHA welcomes this initiative and urges HUD and DOJ to use all of its available resources to stop sexual harassment and assault in housing, including the use of HUD's Discriminatory Effects and Quid Pro Quo and Hostile Living Environment rules.

National Commission on Fair Housing and Equal Opportunity

In 2008, The Leadership Conference on Civil and Human Rights, the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, and NFHA convened the National Commission on Fair Housing and Equal Opportunity. The Commission, co-chaired by former HUD Secretaries Henry Cisneros and Jack Kemp, held five hearings to assess the state of fair housing during the 40th anniversary of the Fair Housing Act. It collected, for the first time, significant information about the nature and extent of housing discrimination and segregation and what was required to eliminate both. The Commission issued a report,³² and some of the Commission's

³⁰ Desmond, Matthew. (2016). *Evicted: Poverty and Profit in the American City*. New York: Crown Publishers.

³¹ <https://www.justice.gov/usao-dc/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing>.

³² <http://www.civilrights.org/fairhousing/commission/>.

recommendations included:

- *Create an Independent Fair Housing Enforcement Agency* to address the long-standing and systemic problems with fair housing enforcement at HUD.
- *Revive the President’s Fair Housing Council* to ensure strong federal leadership that coordinates fair housing policy and practice across agencies.
- *Ensure Compliance with the “Affirmatively Furthering Fair Housing”* obligation so that communities will be empowered to develop and implement their own strategies for moving fair housing forward in a way that advances diversity and inclusion in neighborhoods, communities, and throughout metropolitan areas in a coordinated and planned approach.
- *Strengthen the Fair Housing Initiatives Program (FHIP)* by significantly increasing funding to at least \$52 million [and that was ten years ago] and by establishing eligibility and performance standards in joint consultation between federal program personnel and private fair housing groups to ensure that organizations receiving FHIP funds use them effectively.

Had these recommendations been implemented, many of the pernicious practices that persist today would have been ameliorated. Nevertheless, the Commission was a highly successful endeavor and its work continues to strongly resonate at the 50th anniversary of the Fair Housing Act.

Key Accomplishments at HUD under the Fair Housing Act

While the enforcement mechanism at HUD largely underperforms (see the *2017 Fair Housing Trends Report*), HUD has taken many steps to improve enforcement of the Fair Housing Act and to provide rules and guidances which both clarify and strengthen various components of the act and implementing regulations.

Promulgation of Important Rules

HUD has clarified for the public how certain forms of discrimination can be considered under the Fair Housing Act. Beginning in 2012, HUD issued a series of rules that focused on ensuring equal access to HUD-assisted housing, regardless of sexual orientation, gender identity, nonconformance with gender stereotypes, or marital status. In doing so, HUD extended fair housing protections to people who identify as LGBTQ and who live in HUD-assisted and FHA-insured housing,³³ as well as in HUD’s Native American and Native Hawaiian programs.³⁴ It also required that individuals have equal access to HUD-assisted shelter programs in accordance with their self-identified gender identity.³⁵

³³ 24 CFR Parts 5, 200, 203, 236, 400, 570 574, 882, 891, and 982, “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity,” February 2012.

³⁴ 24 CFR 5, 1000, 1003, 1005, 1006, and 1007, “Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs – Regardless of Sexual Orientation or Gender Identity,” November 2016.

³⁵ 24 CFR Part 5, “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs,” September 2016.

While these rules only apply to HUD-assisted housing, they do a great deal to build up protections for the LGBTQ community against rampant housing discrimination.

The Fair Housing Act prohibits harassment behavior, but for decades there was little unified clarity about what kind of behavior is prohibited or how harassment claims should be assessed. In 2016, HUD issued a Harassment Rule, which formalizes standards for use in investigations and adjudications involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability. The rule specifies how HUD will evaluate complaints of quid pro quo harassment and hostile environment harassment under the Fair Housing Act. It also provides for uniform treatment of Fair Housing Act claims raising allegations of quid pro quo and hostile environment harassment in judicial and administrative forums. In addition, this rule clarifies the operation of traditional principles of direct and vicarious liability in the Fair Housing Act context.³⁶ In doing so, HUD created a crucial tool for victims of racial, sexual, and other forms of harassment in housing to exercise their rights and put housing providers on notice that all forms of discriminatory harassment will not be tolerated.

Disparate Impact Rule

In 2013, HUD issued a final rule implementing a discriminatory effects standard for claims brought under the Fair Housing Act.³⁷ The rule formalizes a three-part burden-shifting test for determining whether a practice has an unjustified discriminatory effect. Under the test, a complainant must first establish a prima facie case by proving that a challenged practice has such an effect. The defendant then has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant. The complainant may still establish liability by proving that the legitimate interests supporting the challenged practice could be served by another practice that has a less discriminatory effect. The rule states that a practice has a discriminatory effect where “it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns” because of race, national origin, disability, or other protected class.

After careful reconsideration of insurance industry comments following the court’s decision in *Property Casualty Insurers Association of America v. HUD*, HUD determined that categorical exemptions for insurance practices are unworkable and inconsistent with the broad fair housing objectives and obligations embodied in the act. HUD stated that application of the discriminatory effects standard to insurance practices can and should be addressed on a case-by-case basis.³⁸ Insurance trade groups continue to pursue litigation against HUD for its application of disparate impact liability to insurance products and services, despite the fact that HUD’s position is consistent with the law (see also section on Damaging Challenges to HUD’s Disparate Impact Rule, page 43).

³⁶ 24 CFR Part 100, “Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act,” September 2016.

³⁷ 24 CFR § 100.500 [78 FR 11459 (Feb. 15, 2013)].

³⁸ <https://www.gpo.gov/fdsys/pkg/FR-2016-10-05/pdf/2016-23858.pdf>.

Guidance

In addition to these important regulations, HUD also has issued several guidances addressing fair housing issues, and we provide recent examples herein. One is designed to ensure that people involved with the criminal justice system, which overwhelmingly targets and punishes people of color and people with disabilities, have greater access to housing opportunity. In 2015, HUD's office of Public and Indian Housing issued a notice that prohibits Public Housing Authorities and owners of federally-assisted housing from applying blanket exclusions of applicants with an arrest record in their housing decisions.³⁹ In 2016, HUD's Office of General Counsel issued guidance on how the Fair Housing Act applies to the use of criminal history by housing providers and, specifically, how the discriminatory effects and disparate treatment methods of proof apply to fair housing cases in situations when a housing provider justifies an adverse housing decision based on someone's criminal record.⁴⁰ In issuing these important policy guidances, HUD has helped provide housing stability for people with criminal records, a critical step toward the successful reintegration of people with criminal records into society.

HUD has also issued LEP Guidance that outlines how the Fair Housing Act applies to potential claims of housing discrimination brought by persons who are not proficient in English.⁴¹ Although limited English proficiency is not a protected class, most persons with limited facility in English would be protected under the category of national origin. The guidance explains that housing providers should not utilize limited English proficiency in a manner that intentionally limits housing choice or that causes an unjustified discriminatory effect. In recent years, many local communities have adopted "nuisance" ordinances that require landlords to abate "nuisance behavior," which often includes "excessive" calls to local emergency services. In 2016, HUD issued guidance that outlines how the Fair Housing Act applies to potential claims of housing discrimination brought by persons who are victims of domestic violence.⁴² Women are by far the largest class of persons affected by domestic violence and other particular crimes and are covered by the Fair Housing Act's prohibition against discrimination based on sex (gender).

In 2016, HUD and DOJ issued an important guidance memorandum⁴³ that specifies that the Fair Housing Act does not pre-empt local zoning laws but applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

39 U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, "Notice PIH 2015-19," November 2, 2015, available at <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.

40 U.S. Department of Housing and Urban Development, "Office of General Counsel on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," April 4, 2016, available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

41 <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.

42 <https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>.

43 <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>.

Fair Housing Act Design Manual and Guidance

In 1996, HUD first published the “Fair Housing Act Design Manual: A Manual to Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act.”⁴⁴ Failure to design and construct multi-family dwellings covered under the act with certain features of accessible design is one type of disability discrimination prohibited by the Fair Housing Act, and the manual outlines accessibility requirements that must be incorporated into the design and construction of covered multi-family housing. The manual also provides technical assistance on compliant accessibility approaches that allow housing providers to choose among alternatives and provides persons with disabilities with information on accessible design approaches.

In 2013, HUD and DOJ issued a Joint Statement on the “Accessibility (Design and Construction) Requirements for Covered Multi-Family Dwellings under the Fair Housing Act.”⁴⁵ The guidance is intended to help design professionals, developers, and builders better understand their obligations and to help persons with disabilities better understand their rights regarding the design and construction requirements for covered multi-family dwellings built after March 13, 1991, under the Fair Housing Act.

Reasonable Accommodations under the Fair Housing Act

In 2004, HUD and DOJ published the “Joint Statement of the Department of Housing and Urban Development and Department of Justice: Reasonable Accommodations under the Fair Housing Act.”⁴⁶ The Fair Housing Act prohibits the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling. This statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the act relating to reasonable accommodations.

In 2013, HUD issued a notice on “Service Animals and Assistance Animals for People with Disabilities in Housing”⁴⁷ that explains the circumstances under which the Fair Housing Act and other civil rights laws may require housing providers to allow applicants and tenants to use “service” and “assistance” animals. HUD states that housing providers must accommodate applicants and tenants who require an “assistance animal,” which includes any animal that “works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.”

44 <https://www.huduser.gov/portal//Publications/PDF/FAIRHOUSING/fairfull.pdf>.

45 <https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF>.

46 https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

47 https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF.

Reasonable Modifications under the Fair Housing Act

The Fair Housing Act prohibits refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises. In 2008, HUD and DOJ published a joint statement entitled “Reasonable Modifications under the Fair Housing Act,”⁴⁸ which provides technical guidance regarding the rights and obligations of persons with disabilities and housing providers under the act relating to reasonable modifications. Examples of typical reasonable modifications include widening doorways to make rooms more accessible for persons in wheelchairs; installing grab bars in bathrooms; lowering kitchen cabinets to a height suitable for persons in wheelchairs; adding a ramp to make a primary entrance accessible for persons in wheelchairs; or altering a walkway to provide access to a public or common use area.

Affirmatively Furthering Fair Housing: A Remedy for Segregation, a Great Historical Evil

The long-awaited signature achievement of HUD’s enforcement of the Fair Housing Act was the issuance in 2015 of its rule on Affirmatively Furthering Fair Housing (AFFH). Failure by HUD to clearly delineate the requirement to further fair housing by recipients of federal funds contributed significantly to the perpetuation of segregation and lack of access to opportunity in neighborhoods of color. In the next section, we address HUD’s damaging virtual suspension of the AFFH Rule in January 2018.

Former U.S. Senator and 42nd Vice President of the United States Walter Mondale, who, along with former Senator Edward Brooke, was one of the original co-sponsors of the Fair Housing Act, commemorated the 50th anniversary of the act with an op-ed in the New York Times.⁴⁹ His comments are a timely reminder of the problems that Congress intended the act to remedy – problems that plagued communities across the country and stemmed from entrenched racial segregation perpetuated over many decades by both the private market and government at all levels. Mr. Mondale wrote, in part:

“Fifty years ago, on April 11, Congress enacted the Fair Housing Act, the last of the three great civil rights laws of the 1960s. Along with the Civil Rights Act of 1964 and the Voting Rights Act, it was an attempt by Congress to translate the movement led by the Rev. Dr. Martin Luther King Jr. and others into enduring statute. But it also has the more dubious distinction of being the most contested, most ignored and, at times, most misunderstood of those laws...

The law was Congress’s effort to remedy a great historical evil: the large-scale exclusion and isolation of Blacks from White communities. In the Jim Crow South, White and Black citizens were kept apart to confirm and reinforce the idea of White

⁴⁸ https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.

⁴⁹ <https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-right-region®ion=opinion-c-col-right-region&WT.nav=opinion-c-col-right-region>.

superiority. Residential segregation accomplished the same result elsewhere, but on a much larger scale. The Fair Housing Act was intended to prevent and reverse all this...

But the law has also often suffered from neglect. The public servants tasked with implementing it have often forgotten – or refused to pursue – its ultimate goal of building an integrated society. The evil of residential segregation has waned at some times and in some places, but in others, like my home state, Minnesota, segregation has only grown.

The act has survived long enough to witness a curious debate over its intent. Some scholars have suggested that its functions can be divided into “anti-discrimination” and “integration,” with the two goals working at cross purposes. At times, critics suggest the law’s integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation.

To the law’s drafters, these ideas were not in conflict. **The law was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift.**” [Emphasis added]

As was so eloquently stated, in passing the Fair Housing Act, Congress not only intended to eliminate discrimination in individual housing transactions, but to also “defeat systemic segregation,” whose effects were harmful to the individuals forced to live in segregated neighborhoods cut off from opportunity and starved of resources, and also to the nation. While Congress wanted to ensure that HUD and its grantees would refrain from discrimination in their housing and community development programs, it recognized that simply barring government agencies from future discrimination would not, by itself, be enough to overcome the negative effects of historic, entrenched segregation. To accomplish that goal, and to create truly open housing markets in which people could live in the communities of their choice without regard to race, color, religion, national origin, sex, disability, or family status, Congress required HUD and its grantees to take affirmative steps to dismantle the deliberate policies, practices, and programs that had created segregation to begin with. However, until 2015, HUD failed to begin to truly fulfill that obligation. Even then, it was only a beginning.

In 2015, HUD Finally Took the First Step toward Remediating Segregation

Senator Mondale was correct when he noted that remediating segregation under the Fair Housing Act had been largely ignored until 2015, when HUD issued a long awaited and long overdue AFFH regulation.⁵⁰ In promulgating the AFFH regulation, HUD was finally taking up the mandate Congress gave it in 1968 to use its resources and authority to

50 Details about the 2015 regulation and its early implementation can be found in our 2016 and 2017 Trends reports at www.nationalfairhousing.org. The regulation itself, along with a number of supplementary and explanatory materials, is available on the HUDExchange website at <https://www.hudexchange.info/programs/affh/>.

begin to heal the societal rift caused by segregation. It was an essential step toward building a more equitable country, one in which a child's zip code would not determine his or her destiny. As we have been repeatedly reminded this year, the need to dismantle segregation is as pressing now as it was in 1968.

In addition to marking the 50th anniversary of the Fair Housing Act, 2018 is also the 50th anniversary of the release of the report of the President's National Advisory Commission on Civil Disorders, known as the Kerner Commission, which then-President Lyndon B. Johnson established in the aftermath of the racial unrest that erupted in more than 100 cities across the nation the previous year. The Commission's mandate was to explore the unrest that occurred in those cities, why it occurred, and what could be done to prevent it from occurring again. After extensive research and analysis, the Kerner Commission concluded famously in 1968 that our nation was, "moving toward two societies – one white and one black – separate and unequal."⁵¹ It identified the lack of economic opportunity for Black citizens as a key cause of the unrest and linked the disparities in access to jobs, education, and participation in civic affairs to residential segregation that had been imposed and maintained by White society. The Kerner Commission made several recommendations for redressing these inequities, including the adoption of legislation outlawing racial discrimination in housing.

The 50th anniversary of the Kerner Commission report has occasioned substantial research into how much has changed for Black Americans and other people of color in the last half century. Unfortunately, the answer is "not enough." As detailed in a recent report, entitled, "50 Years After the Kerner Commission,"⁵² issued by the Economic Policy Institute in March 2018, White Americans continue to hold substantial advantages over Black Americans on a host of indicators. Blacks are about half as likely as Whites to have a college degree (54.2 percent today as compared with 56 percent in 1968). The unemployment rate for Blacks was 6.7 percent in 1968, twice that of Whites (3.2 percent). That gap has remained virtually unchanged: in 2017 the unemployment rate for Blacks was 7.5 percent, while that for Whites was 3.8 percent. There continues to be tremendous racial disparity in wealth, as well. In 1968, the typical Black family had very little wealth, but what wealth it had (\$2,647) was about one-sixth, or 15 percent, of that held by the typical White family. By 2017, that gap had grown, with Black families holding only one-tenth (\$17,409) of the wealth held by White families (\$171,000). Similarly, the racial gap in homeownership has grown. In 1968, 65.9 percent of White families owned their own homes, a rate nearly 25 percent higher than that of Blacks (41.1 percent). Today, the rate of Black homeownership remains virtually unchanged (41.2 percent) while that of White families has increased by 5.2 percent to 71.1 percent – a gap of 30 percentage points. These are just some of the indicators of the racial disparities that continue to plague our nation.

51 National Advisory Commission on Civil Disorders. (1968). Report of the National Advisory Commission on Civil Disorders. New York: Bantam Books.

52 <https://www.epi.org/files/pdf/142084.pdf>.

While these disparities have remained unchanged or even worsened over the past 50 years, we have gained considerable knowledge about the negative impacts of segregation and concentrated poverty, which are illustrated by the disheartening statistics cited above. In the field of public health, officials are grappling with the very same issues, which they term as the social determinants of health. These have substantial implications for racial disparities in the incidence of numerous diseases, social and intellectual development, and even the lifespan of individuals. Public health officials are coming to see efforts to dismantle segregation and neighborhoods of concentrated poverty and to provide greater equity in access to opportunity as imperative for eliminating the most pressing health disparities facing our society.

As our understanding of the negative consequences for society of persistent segregation and concentrated poverty has increased, we have also learned a lot about the positive impact of increasing access to opportunity. Raj Chetty and his colleagues have demonstrated the benefits that children experience when they have the chance to move at a young age out of poor neighborhoods into lower poverty communities.⁵³ Compared to their counterparts who remained in areas of concentrated poverty, these children had higher levels of educational attainment, earned higher incomes (and therefore paid higher taxes), were less likely to have children without being married, and lived in lower poverty neighborhoods as adults. Other research demonstrates the benefits of diversity in schools, in the workplace, and on the ability of regions to achieve robust and sustained economic growth.

The challenges created by segregation and the benefits made possible by its elimination were what Congress intended to address through the affirmatively furthering fair housing provisions in the Fair Housing Act. In the nearly 50 years between the passage of the Act and HUD's adoption of the new AFFH rule in 2015, the AFFH obligation has largely been ignored by both HUD and its grantees. Although HUD itself has been sued several times over its failure to fulfill its AFFH obligation, it was not until the Obama administration that HUD took any real action to ensure that its grantees were doing so.

In January 2018, HUD issued a notice delaying the submission date for the fair housing plans required under the new AFFH rule, effectively suspending the rule until at least 2024. NFHA and its allies are advocating for HUD to revoke that notice, and we have confidence that the rule will be reinstated. We take heart from the fact that, despite HUD's action, many jurisdictions are moving ahead with the new AFFH process. This is an indication that they recognize the importance of ensuring that race, national, origin and other protected characteristics are not impediments to opportunity for their residents, and that this new planning process serves their long-term interest in creating diverse, inclusive communities that support robust and vibrant economies. Read more about the suspension of this critical rule in Section II, "Recent Attacks on Fair Housing."

⁵³ <http://www.equality-of-opportunity.org/>.

SECTION II. RECENT ATTACKS ON FAIR HOUSING

In other sections of this report, we provide information about a large variety of housing, lending, insurance, and other types of discrimination and challenges to fair housing enforcement. In this section, we focus on recent actions that threaten the viability of the Fair Housing Act and inhibit the ability of our nation to address discrimination and promote inclusive communities, to the detriment of millions of individuals and families and to neighborhoods throughout the nation. These are but some of the recent attacks on fair housing.

Affirmatively Furthering Fair Housing: HUD Turns Back the Clock, Effectively Abandoning the Fight against Segregation

Implementation of the new AFFH rule began in mid-2016. A handful of jurisdictions conducted required Assessments of Fair Housing (AFHs) in that year, but 2017 represented the beginning of the real test of the rule, with HUD's training and technical assistance resources on tap and jurisdictions following the schedule as anticipated in the rule.

On January 5, 2018, a mere year and a half into the implementation process, HUD issued a notice⁵⁴ effectively suspending the 2015 regulation and instructing its grantees to return to the old, flawed system of conducting "Analyses of Impediments to Fair Housing Choice" (AIs). HUD styled its action as a delay in the submission dates of jurisdictions' AFHs until after October 31, 2020. But in fact, for all intents and purposes, it was a suspension of the AFFH rule. This is true for many reasons.

First, a large number of AFHs were scheduled to be submitted in 2019. This is because the majority of the next round of Consolidated Plans, to which the schedule for AFH submission is tied, will be submitted in 2020. By delaying the submission of AFHs from these jurisdictions until after October 31, 2020, HUD is effectively delaying their submission for another five-year cycle – until 2024. Thus, for the majority of jurisdictions in the country, it will be a minimum of six years before their fair housing plans must be conducted using the process laid out in the 2015 regulation. This is more than a temporary pause in the process; it is an effective suspension of the rule.

Second, the AFH is the lynchpin of the 2015 regulation. Eliminating its use has many significant implications. For example, HUD will no longer review the fair housing plan and give jurisdictions feedback to ensure their plans are complete and set out a good roadmap for fulfilling their AFFH obligations. Jurisdictions will not be required to incorporate the key goals and priorities of the fair housing plan into the Consolidated Plan, so that the allocation of their housing and community development resources will be informed by important fair housing considerations. The accountability measures intended to ensure

⁵⁴ <https://www.federalregister.gov/documents/2018/01/05/2018-00106/affirmatively-furthering-fair-housing-extension-of-deadline-for-submission-of-assessment-of-fair>.

actual progress toward overcoming the negative effects of segregation – annual reports on performance, updates in the jurisdiction’s annual action plans, and HUD’s review of progress at the end of the ConPlan cycle – will no longer be in effect. Having eliminated these central elements of the 2015 regulation, HUD cannot credibly assert that the rule remains in effect.

Third, by instructing grantees to return to the pre-2015 requirements to conduct an AI, HUD has returned to a process whose faults and deficiencies are well-documented. In 2010, the Government Accountability Office (GAO) analyzed the AI process and highlighted its flaws as a method to ensure that HUD grantees are meeting their AFFH obligations. These weaknesses left local officials uncertain as to whether they were taking proper steps to fulfill their fair housing obligations. In fact, GAO noted that public officials had requested greater clarity and guidance from HUD.

GAO’s review⁵⁵ found that many AIs were incomplete, out of date, or missing altogether. They did not consistently follow the format recommended in the Fair Housing Planning Guide. The lack of timetables for implementation of recommendations and signatures of key officials led GAO to question their usefulness as planning documents. GAO recommended that HUD adopt a regulation requiring its grantees to update their fair housing plans periodically, follow a specific format, and submit them to HUD for review. The 2015 regulation included all of these provisions and a number of additional beneficial features.

Further, HUD adopted the 2015 AFFH regulation after extensive piloting and considerable public input. It was preceded by a listening tour around the country by HUD officials with a wide variety of stakeholders, including local elected officials, local government agency staff, fair housing groups, industry groups, and others. Seventy-four communities, recipients of grants under the Sustainable Communities Initiative, conducted Fair Housing and Equity Assessments. Those assessments established the blueprint for the subsequent AFH. The AFFH rule itself went through the notice and comment process dictated by the Administrative Procedure Act (APA), during which HUD received comments from more than 1,000 interested parties.⁵⁶ The Assessment Tools that HUD has adopted to date went through the process laid out in the Paperwork Reduction Act (PRA), with an initial 60-day and a subsequent 30-day comment period. In fact, the Assessment Tool for local jurisdictions, which was initially approved by the Office of Management and Budget for just one year, went through this process twice. These steps ensured that interested parties had ample opportunity to weigh in on the establishment of the new AFFH process and its component parts.

Changes to rules adopted under the APA cannot be made without public notice and comment. The same is true for sub-regulatory documents adopted under the PRA. Yet, rather than going through the proper process, giving the public advance notice of and

55 <https://www.gao.gov/products/GAO-10-905>.

56 <https://www.regulations.gov/document?D=HUD-2013-0066-0889>.

opportunity to provide input on this weighty decision, HUD acted abruptly and without any input from stakeholders. This flawed process has produced a flawed result, and once again leaves local officials without the certainty and guidance they need to fulfill their statutory fair housing obligations.

The Rule HUD Abandoned Created a Much Better System for Defeating Segregation

NFHA has heard from its member organizations throughout the country who have participated in the AFH process in their communities. Based on that feedback and our own observations, it is clear that the process established in the 2015 rule is far superior as a system for getting HUD grantees to assess and begin to dismantle segregation than the old, pre-2015, AI process to which HUD has now returned.

For example, the community engagement process established by the AFFH rule is substantially more robust than that associated with the pre-2015 AI process. The rule directs jurisdictions to consult with organizations that represent members of protected classes and groups involved in fair housing enforcement, among others, something that was previously missing. Further, it encourages jurisdictions to consult with many other organizations and agencies with valuable information to contribute, including regional planning agencies and government agencies from adjacent jurisdictions. The result is a consultation process that does a better job of both including key stakeholders and casting a wider net to obtain relevant information than was typical of the AI process. In addition, the 2015 rule was more precise about providing formal opportunities for public participation and responding to the input received. That allows greater involvement of local community residents, ensures that jurisdictions understand local priorities, and produces strategies that reflect those priorities.

Other aspects of the AFFH rule that are a significant improvement over the AI process include the structure and format of the Assessment Tool, the accompanying guidance, and the data and mapping tool that not only places valuable information into jurisdictions' hands, but also enables them to view its spatial implications. Together, these tools allow jurisdictions to assemble information and knowledge critical for fair housing planning, focus on the issues that are most relevant, and identify priorities that address their most pressing challenges. This is a substantial change from the AI, which too often contained large amounts of data but lacked any clear focus, analysis, or link to critical fair housing issues.

The requirement to identify the fair housing issues and contributing factors that should be given the highest priority, set goals for addressing those, and accompany those goals with appropriate metrics and milestones is another significant improvement in the 2015 regulation. Under the AI process, many jurisdictions failed to identify priorities, establish goals, set out timelines for implementation, or establish any benchmarks by which to measure progress. The result was a planning process that had negligible impact on subsequent actions taken by the jurisdiction and little change in the lives of their residents. Instead, those plans gathered dust on a shelf.

The way that the AFFH regulation encourages and accommodates regional analysis and regional collaboration is also a significant advancement over the earlier process. The Assessment Tool calls on jurisdictions to consider how the patterns of segregation and the resulting problems that they face fit within the larger context of the region in which they are situated. The data and mapping tool provides the necessary data to accomplish this analysis, and the regulation makes provisions for jurisdictions in the same region to collaborate on an AFH, while still holding each accountable for identifying needed actions within their own borders. Because of this supportive infrastructure, several jurisdictions have taken steps to develop regional AFH collaborations, including those in the Kansas City, Denver, Baltimore, and Washington, DC areas, among others. As HUD noted when it issued the regulation in 2015, these problems do not stop at jurisdictional borders, and it makes sense to take a regional approach to tackling them. While the AI process allowed for a regional approach, it did not support them in the same way and, therefore, they were relatively rare.

In addition, even though they were not yet required to do so, an encouraging number of PHAs opted to collaborate on AFHs with their entitlement jurisdictions. This was a notable step forward. While PHAs have long been required to undertake fair housing planning, that process has been ill-defined and a great many PHAs have failed to produce such plans. It would appear that the process established in the 2015 regulation provides PHAs with the support and structure necessary to allow them to take this essential step in fulfilling their fair housing obligations, something that the pre-2015 process did not do. PHAs oversee critical affordable housing resources, which in many communities are highly concentrated in segregated areas, limiting residents' choices and perpetuating government-sponsored segregated living patterns. Given this reality, a structure that facilitates fair housing planning by PHAs is a major improvement. Conversely, the return to the pre-2015 AI process will likely mean that many PHAs will not undertake this planning, and that is a major reversal.

The explicit link between the AFH, the Consolidated Plan (ConPlan), and the PHA Plan is another significant improvement embodied in the 2015 regulation. One of the biggest complaints about AIs – from local officials and community stakeholders alike – was that too often they were merely bureaucratic exercises that had no impact on the allocation of housing and community development resources, and did not lead to improved conditions in local communities. The AFFH regulation changed this dynamic by requiring that the goals and priorities identified in the AFH be reflected in the ConPlan and PHA plan. In this way, the fair housing planning process could result in investments that would bring needed opportunities to disinvested neighborhoods and expand housing choices for local residents. With the return to the AI process, this vital link has been severed.

One other critical improvement in the 2015 regulation was the inclusion of mechanisms by which HUD and the public could hold jurisdictions accountable to carry through on the goals identified in their AFHs. The rule's definition of AFFH makes it clear that a jurisdiction cannot certify that it is affirmatively furthering fair housing by simply creating a plan. Rather, it must take meaningful steps to implement that plan in order

to comply with its statutory obligation. The accountability mechanisms in the rule include submission of the AFH to HUD for review and acceptance, incorporating the AFH's priorities into the ConPlan or PHA Plan, providing annual reports on progress and updates on strategies, and creating timelines and benchmarks against which both HUD, the public, and the jurisdiction itself can measure progress. None of these are features of the AI process. With the suspension of the AFFH rule, all of this is lost and the prospect that jurisdictions will make discernable progress toward meeting fair housing goals or that HUD will take effective steps to hold them accountable for fulfilling their statutory fair housing obligations is diminished.

HUD Has No Good Explanation for Suspending the AFFH Rule

HUD's stated rationale for suspending the AFFH regulation was that 35 percent of the first 49 AFHs were not accepted upon initial submission. HUD offered this as evidence that the rule was fatally flawed and had to be withdrawn until it could be fixed. This explanation does not stand up to scrutiny.

Any time a new regulation is put into effect, it is reasonable to assume that there will be a learning curve for the regulator (in this case, HUD), the regulated entities (jurisdictions), and the public, and that it will take some time and experience for all parties to become familiar with the mechanics of the new regulation. This is true for virtually all regulations, regardless of their subject matter and the issuing agency. The fact that 65 percent of the first round of AFHs were accepted upon initial submission seems like a rather high acceptance rate and suggests that the process was reasonably straightforward and that the technical support that HUD provided was helpful to the majority of grantees.

In any case, HUD itself anticipated that not all AFHs would hit the mark the first time out, and it drafted the regulation specifically to accommodate this likely eventuality. In §5.162, the regulation states that if HUD notifies a grantee ("program participant") that it does not accept an AFH, in the notification "HUD will inform the program participant in writing of the reasons why HUD has not accepted the AFH and the actions that the program participant may take to resolve the non-acceptance."

The regulation also set out a timeline for grantees to revise their initial AFHs in accordance with HUD's written feedback (no less than 45 days), as well as time for a second review by HUD (30 days), after which, if HUD takes no further action, the AFH will be deemed accepted.

These regulatory provisions clearly indicated HUD's expectation that grantees might need to revise their initial submissions, that it had a responsibility to provide specific feedback about shortcomings it might identify in any grantee's AFH and how those could be corrected, and that it viewed such back and forth as a normal part of the regulatory process. In fact, this view is consistent with the public comments made by numerous HUD officials at the time the regulation was adopted, in which they stated that it was HUD's goal to work with grantees to ensure that they would be able to navigate the AFH

process successfully, have their AFHs accepted, and move on to implementation of their plans. The fact that some communication with grantees going through a new regulatory process for the first time proved necessary merely underscores HUD's foresight in establishing a process that would accommodate such interaction. It was not a credible reason to suspend the regulation.

HUD also expressed concern that it had failed to provide grantees with the technical assistance they needed to navigate the AFH process successfully. This may well be true, but it was not for lack of resources or authority. Congress appropriated funds specifically to enable HUD to provide its grantees with technical assistance on compliance with the 2015 regulation. Apparently, a number of requests for such assistance languished at HUD and did not receive a timely response. Resolution of this problem was entirely within HUD's control and did not require suspension of the rule. Similarly, HUD tasked its contractors with developing additional guidance to help grantees gain a better understanding of some of the contributing factors to fair housing issues that are identified in the regulation. The contractors completed their work, but the guidance has never been released. This situation, too, should be corrected, and the ability to correct it lies well within HUD's authority; there was no need to suspend the regulation in the meantime.

We make several recommendations for full implementation of the requirement to affirmatively further fair housing in Section VI.

The Consumer Financial Protection Bureau under Siege by the New Acting Director

The CFPB has been under attack by the banking industry and its allies in Congress since the day it opened its doors in 2010. During the Obama administration and under the leadership of its first director, Richard Cordray, the agency weathered the attacks reasonably well. But the new administration has brought about a sea change, and the change does not bode well for strong fair lending enforcement in the next several years.

When Cordray stepped down as Director, President Trump appointed former Congressman Mick Mulvaney (R-SC) to serve as the CFPB's acting director. Mulvaney is also the director of OMB. While a congressman, Mulvaney was very critical of the Bureau, calling it "a sad, sick joke."⁵⁷ Some of his early actions as CFPB director have severely limited the role of the Bureau's Office of Fair Lending and Equal Opportunity, undermining the agency's fair lending enforcement capacity. In February 2018, he announced that he was moving the Office of Fair Lending out of the division that handles supervision and enforcement into the Director's office as part of the Office of Equal Opportunity and Fairness (OEOF),⁵⁸ effectively stripping it of any enforcement powers. OEOF is focused on advocacy, coordination, and education and has no role in supervision or enforcement.

⁵⁷ <https://www.theatlantic.com/business/archive/2017/11/cfpb-mulvaney-trump/546131/>.

⁵⁸ https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?noredirect=on&utm_term=.d83a04b76201.

Under Mulvaney, the Bureau has also pulled back on some enforcement matters that had been in the works, indicated a willingness to reconsider regulations the industry does not favor, and taken a laxer approach to compliance. For example, it announced that lenders that file inaccurate data under the Home Mortgage Disclosure Act (HMDA), a key fair lending tool, will no longer be subject to monetary penalties. The Bureau has also changed its mission statement to read, “The Consumer Financial Protection Bureau is a 21st century agency *that helps consumer finance markets work by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations; by making rules more effective; by consistently enforcing federal consumer financial law; and by empowering consumers to take more control over their economic lives.*” (Emphasis added.)

In sum, the attitude of the Bureau under the current administration no longer reflects the concept, voiced so often by Senator Elizabeth Warren, who championed the CFPB’s creation, that it will be the “cop on the beat” to make sure that consumers are treated fairly. This is an unwelcome change for an agency whose vigilance is critical to borrowers and communities of color, women, older Americans, and other consumers. Fair housing and consumer advocates have much work ahead to prevent the agency from being neutralized altogether and to ensure that it does not allow abusive, predatory, and discriminatory practices to creep back into the marketplace.

On April 24, 2018, Mulvaney made it abundantly clear that the CFPB would no longer protect consumers but serve instead the interests of industry. According to a New York Times report of the American Bankers Association conference, Mulvaney told 1,300 banking and lending industry executives and lobbyists that “they should increase their campaign donations to influence lawmakers, revealing that he would meet only with lobbyists who contributed to his campaign when he served in the House.” Mulvaney was quoted as saying, “We had a hierarchy in my office in Congress . . . If you’re a lobbyist who never gave us money, I didn’t talk to you. If you’re a lobbyist who gave us money, I might talk to you.”⁵⁹

Mulvaney is clearly an improper choice to lead the agency that protects the financial interests of the American people. He should be removed immediately, and the agency should resume its full enforcement powers and activities.

HUD Finds That Houston Discriminates in Its Policies for Approving Tax Credits for Affordable Housing, Enters into Inadequate Agreement with Houston, and Gets Sued by Advocates

In January 2017, HUD issued a determination that the City of Houston had failed to comply with the Fair Housing Act and had discriminated on the basis of race, color, or national origin in connection with a proposal for the development of Fountain View, a multi-unit affordable housing development that the Houston Housing Authority wished

⁵⁹ <https://mobile.nytimes.com/2018/04/24/us/mulvaney-consumer-financial-protection-bureau.html>.

to locate in a predominantly White, high-opportunity neighborhood near the city center. The housing authority asked the city to approve an application for low-income housing tax credits for Fountain View. HUD found the city's denial of the proposal was based in part on racially motivated opposition and that Houston's policies and procedures for approving tax credit projects effectuate local opposition motivated by discriminatory intent and perpetuate segregation.

In coming to its decision, HUD found that a staggering 25 out of 26 of the Houston Housing Authority's developments are in majority non-White census tracts and that of the 68 tax credit projects that were issued Resolutions between 2011 and 2014, only eight were in districts with majority White populations. In a 2011 letter from HUD rejecting Houston's Analysis of Impediments to Fair Housing Choice for that year, the Department noted that the City is the most racially segregated city in the State of Texas and the 13th most segregated city in the country.⁶⁰

HUD informed the city that it would require corrective actions, including developing a strategy to encourage development of affordable housing in census tracts with poverty rates of less than 20 percent; developing a strategy to encourage property owners in such census tracts to accept housing vouchers; and revising policies and procedures that create barriers to affordable housing in these areas. HUD stated it would provide supplemental funding to help cover the cost of the Fountain View Project or other similar projects in predominantly White, high-opportunity census tracts.

In March 2018, in another indication of the current administration's reduced efforts to effectively enforce the Fair Housing Act, HUD and the City of Houston entered into a weak joint agreement to expand housing choice and mobility for lower-income residents, including those experiencing homelessness and victims of Hurricane Harvey.⁶¹ The agreement requires the City of Houston to adopt multi-family development siting priorities and a policy to objectively evaluate federally supported affordable housing developments in all areas of Houston; to invest additional funds in homelessness assistance programs; and to encourage more landlord participation in Houston's housing voucher program. The agreement fell far short of what advocates had hoped for and of what HUD had initially indicated would require correction.⁶²

That same month, Texas Low Income Housing Information Service filed a lawsuit against HUD, challenging HUD's failure to require the City of Houston to comply with Title VI of the Civil Rights Act and the Fair Housing Act.⁶³ The complaint alleges HUD's continued funding of Houston – while failing to require the city to address patterns of residential segregation – violates the Administrative Procedure Act (APA) because HUD has a statutory obligation to ensure that the cities it funds comply with Title VI, and that

60 HUD Letter Finding Noncompliance with Title VI (January 11, 2017), available at: https://cdn.theatlantic.com/assets/media/files/exhibit_1_filed.pdf.

61 https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_020.

62 <https://www.houstonchronicle.com/news/houston-texas/houston/article/HUD-Houston-come-to-agreement-on-city-s-12742434.php>.

63 Texas Low Income Housing Service v. Carson, No. 1:18-cv-00644 (D.D.C. 2018).

HUD's actions violate its requirement under the Fair Housing Act to affirmatively further fair housing.

Damaging Challenges to HUD's Disparate Impact Rule

In 2013, HUD issued an important rule on the use of disparate impact to address policies and practices that may appear neutral on their face but which have a negative disparate impact on persons in protected classes covered by the Fair Housing Act. Disparate impact has long been vital to addressing systemic discrimination in the housing and housing services markets, including the homeowners insurance market. The Supreme Court's decision in *Inclusive Communities Project v. Texas Department of Housing and Community Affairs* ratified the disparate impact doctrine as the law of the land,⁶⁴ and the HUD disparate impact rule provided a uniform, burden-shifting three-part standard for determining disparate impact liability.⁶⁵

In October 2017, the Treasury Department issued a report that recommended HUD reconsider its use of the disparate impact rule as applied to the insurance industry and to consider whether the rule is consistent with the McCarran-Ferguson Act and state law.⁶⁶ Yet, in the thirty years since the Fair Housing Act was amended and HUD issued interpretive regulations, the many courts that have considered that specific issue have all held that the Fair Housing Act prohibits acts of discrimination by homeowners insurers⁶⁷ and that this prohibition is not in conflict with the McCarran-Ferguson Act or state law. HUD has taken an appropriately nuanced position on this that is consistent with the McCarran-Ferguson Act itself: "the case-by-case approach appropriately balances [insurance industry] concerns against HUD's obligation to give maximum force to the Act by taking into account the diversity of potential discriminatory effects claims, as well as the variety of insurer business practices and differing insurance laws of the states, as they currently exist or may exist in the future."⁶⁸ Despite the industry's repeated protestations otherwise, HUD's position is consistent with the law.

In November 2017, a small group of congressional representatives wrote to HUD and incorrectly asserted that the Disparate Impact Rule is inconsistent with recent Supreme Court precedent, when in actuality the disparate impact rule was implicitly adopted in the *Inclusive Communities* decision. Recently, the 2nd Circuit held in *Mhany Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* "[t]he Supreme Court] implicitly adopted HUD's approach."⁶⁹ Then in June 2017, the Northern District of Illinois issued a decision that analyzed the relationship between the Rule and the Supreme Court decision and concluded that, "[i]n short, the Supreme Court in *Inclusive Communities* expressly

64 135 S. Ct. 2507 (2015).

65 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500).

66 U.S. Dept. of Treasury Report, "A Financial System That Creates Economic Opportunities: Asset Management and Insurance," available at: <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset-Management-Insurance.pdf>.

67 See, e.g., *National Fair Hous. Alliance v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002).

68 Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule (Feb. 8, 2013) [78 Fed. Reg. 11459, 11475 (Feb. 15, 2013)].

69 *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2nd Cir. 2016).

approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that requires correction."⁷⁰

The disparate impact standard is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of wide-spread discrimination with appropriate recourse. HUD would be violating its own enabling legislation should it give credence to these arguments. HUD considered decades of federal court jurisprudence applying the Fair Housing Act in its consideration of how to appropriately fashion a rule that provides a uniform standard, such that following these suggestions could put HUD in violation of the APA.

Delay of the Small Area Fair Market Rents Rule Is a Violation of the APA

In 2016, HUD published a Small Area Fair Market Rents Rule that expands the use of the small area rent methodology that uses prevailing market rents in individual zip codes, rather than in broad metropolitan areas, to determine voucher values for 24 metropolitan areas. The Rule grew out of a demonstration project dating back to 2010 in five pilot metropolitan areas. Effective January 1, 2018, the rule was implemented to address problems with HUD's method of calculating fair market rents, which local housing authorities use to set their payment standards for housing vouchers. Voucher subsidies calculated on a metropolitan-wide basis may limit voucher holders' ability to afford rents in high-rent, high-opportunity neighborhoods, thus restricting voucher holders to low-opportunity areas of concentrated poverty. HUD noted in the executive summary of the final rule that calculating payment standards based on small area rent in the additional metropolitan areas would provide subsidies that were adequate to make high opportunity, low poverty areas "accessible and, consequently, help reduce the number of voucher families that reside in areas of high poverty concentration."⁷¹

Then, in August 2017, after receiving preliminary findings in an interim report from the demonstration project, HUD issued a memorandum delaying the implementation of the small area rent rule for 23 of the 24 metropolitan areas that it covered until 2020. The memorandum said that "several findings" in the interim report were troublesome, in particular the decrease in the number of available units in low and moderate rent zip codes and the potential of increasing voucher holders' rent burden.⁷²

The Open Communities Alliance in Hartford, Connecticut, and two individual plaintiffs sued HUD, challenging the delay in the implementation of the rule. The plaintiffs alleged, among other things, that HUD had violated the APA by suspending a promulgated rule without providing proper notice and the opportunity to comment, and by suspending the rule "based on information that it had previously considered when promulgating the rule." The plaintiffs asked the court to enter a preliminary injunction requiring HUD to implement the rule on January 1, 2018.

⁷⁰ Prop. Cas. Insurers Ass'n of Am. v. Carson, 2017 WL 2653069 (N.D. Ill. June 20, 2017) at *8.

⁷¹ Final Rule, Small Area Fair Market Rents in Housing Choice Voucher Program Values for Selection Criteria and Metropolitan Areas Subject to Small Area Fair Market Rents, November 2016, available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-11-16/pdf/2016-27112.pdf>.

⁷² HUD Letter Announcing Suspension of Small Area Fair Market Rent Rule, August 2017, available at: http://nlihc.org/sites/default/files/Small-FMR-Letter-A_081117.pdf.

In December 2017, the court granted the plaintiffs' motion for a preliminary injunction, ruling that HUD was required to make an area-specific showing that the small area rent rule would adversely impact a specific area or public housing authority's rental unit housing supply before it could suspend the rule for any of the 24 metropolitan areas. The court also found that HUD's action in delaying the rule was a substantive regulatory delay that required notice and comment, and concluded that HUD's delay of the final rule was "arbitrary, capricious or otherwise not in accordance with law." It set the suspension aside as "unlawful . . . and as without observance of procedure required by law."⁷³

Using Faith as a License to Discriminate

The Trump Administration has issued a broad attack on civil rights protections under the guise of "Religious Liberty." On May 4, 2017, Donald Trump signed the "Presidential Executive Order Promoting Free Speech and Religious Liberty."⁷⁴ The order primarily did three things: it attempts to repeal the Johnson Amendment, federal legislation that prohibits all Section 501(c)(3) organizations, religious or otherwise, from endorsing or advocating for or against candidates for public office; it requires the Departments of Treasury, Labor, and Health and Human Services to "consider" repealing requirements that forbid employers from refusing to provide birth control based on religious objections; and it instructs the Attorney General to issue guidance "interpreting religious liberty protections in the law."

In October 2017, Attorney General Jeff Sessions issued a policy memo expanding the use of religious liberty exemptions across the federal government.⁷⁵ As the Center for American Progress has written, Sessions' guidance essentially asserts that "many government interests, such as the prevention of discrimination, would not be found compelling enough to take precedence over religious beliefs 'except in the narrowest of circumstances.'"⁷⁶ Such favoring of religious beliefs has the power to essentially make every arm of the federal government, including contractors and grantees, a tool for discrimination. This is especially true for women and members of the LGBTQ+ community. Under DOJ's new guidance, for example, HUD and DOJ employees investigating a complaint from a woman who alleges she was denied an apartment by a landlord because she is an unmarried mother may choose to no-cause the complaint if the landlord claims a religious objection to extra-marital relations. And a landlord who accepts housing vouchers could deny a gay applicant an apartment if they claim a religious objection to homosexuality, despite HUD's Equal Access rule, which protects members of the LGBTQ+ community from discrimination on the basis of gender non-conformity or stereotypes under the protected characteristic of sex.⁷⁷

73 *Open Communities Alliance v. Carson*, No. 1:17-cv02192, 2017 U.S. Dist. LEXIS 211318 (D.D.C. Dec. 23, 2017).

74 Executive Order no. 13798, Promoting Free Speech and Religious Liberty (May, 2017), available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-free-speech-religious-liberty/>.

75 Memorandum from U.S. Attorney Jeff Sessions to All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty," October 6, 2017, available at <https://www.justice.gov/opa/press-release/file/1001891/download>.

76 Sharita Gruber, Grank J. Bewkes, Elizabeth Platt, Katherine Franke, and Claire Markham, "Religious Liberty for a Select Few: The Justice Department is Promoting Discrimination Across the Federal Government," Center for American Progress, April 3, 2018, available at <https://www.americanprogress.org/issues/lgbt/reports/2018/04/03/448773/religious-liberty-select/>.

77 For more information on HUD's Equal Access Rule and LGBT protections in federal housing, please see <https://www.hudex->

This Administration’s utilization of religious exemptions has sent the message to housing providers that their religious beliefs warrant the harming of marginalized people. This dangerous message is especially concerning as FBI statistics on hate crimes reveal that over 30 percent of all reported hate crimes occur in or near a residence.⁷⁸ By condoning the use of religious exemptions, the Trump Administration threatens the stability and safety of people in need of safe and affordable housing solely on the basis of their identity or personal characteristics. It is imperative that HUD and DOJ remain committed to fully enforcing the Fair Housing Act, regardless of dubious claims of religious liberty exemption.

Attacks on HMDA Data Reporting

Congressional Republicans, with the support of conservative Democrats, have also set their sights on mortgage data reporting as part of a determined effort to roll back several aspects of the Dodd-Frank Act.⁷⁹ Among the provisions of Dodd-Frank affecting mortgage lending was the expansion of the data fields that lenders must report as part of their regular Home Mortgage Disclosure Act (HMDA) reporting. One of the goals of this expanded reporting requirement was for the public to be able to monitor the flow of mortgage products in the market and ensure that protected classes are not targeted for unsustainable credit as they were in the lead-up to the foreclosure crisis. This requirement was critical to ensuring that all qualified borrowers receive quality financial products free of predatory or subprime features.

In the fallout from the foreclosure crisis, it became clear that the proliferation of unsustainable mortgage loans was central to the explosion of foreclosures across the country, which were disproportionately concentrated in communities of color. A final report by the National Commission on the Causes of the Financial and Economic Crisis in the United States, a commission put together to uncover the root causes of the financial crisis, points out the growing trend of negatively amortizing option adjustable rate mortgage (ARM) loans, like those made by Washington Mutual and Countrywide in the years immediately preceding the crisis.⁸⁰ Under HMDA, Dodd-Frank explicitly required lenders to report the types of terms and features that made faulty loans unsustainable.

These included:

Total points and fees	Prepayment penalty term	Introductory interest rate term
Non-amortizing features	Loan term	Application channel
Loan originator ID	Property value	Parcel number
Age	Credit score	Debt-to-Income Ratio

[change.info/resource/1991/equal-access-to-housing-final-rule/](https://www.fairhousing.org/change.info/resource/1991/equal-access-to-housing-final-rule/).

78 FBI Hate Crime Statistics for the years 2013-2015, available at <https://www.fbi.gov/investigate/civil-rights/hate-crimes>.

79 See Pub. Law 111-203 (2010).

80 National Commission on the Causes of the Financial and Economic Crisis in the United States, “The Financial Crisis Inquiry Report,” pps. 106-109, February 25, 2011, available at <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

On March 14, 2018, seemingly forgetting the lessons of the foreclosure crisis, Senate Republicans, with the support of 15 Democrats, passed S. 2155, the so-called “Economic Growth, Regulatory Relief, and Consumer Protection Act.” This sweeping financial deregulation bill unravels several aspects of Dodd-Frank and creates a broad exemption to the expanded HMDA data reporting fields required under Dodd-Frank, referenced above.⁸¹ In S. 2155, and of great concern to fair housing and fair lending advocates, was the inclusion of an exemption for insured depository institutions or credit unions that make fewer than 500 closed- or open-end loans from having to report basic information about a loan application, such as applicant credit score, total points and fees charged, and other commonsense information that lenders already collect. This HMDA reporting provision effectively removes important tools that the public has to stop the kinds of toxic, unsustainable mortgage products that previously flooded Black and Latino communities.

Unsustainable loans directly contributed to the loss of 50 percent of Black and Latino family wealth in the economic downturn, while White family wealth was only reduced by 16 percent. The foreclosure rate was also 50 percent higher for Blacks and Latinos in the wake of the crash,⁸² and many of those foreclosures were the result of unsustainable mortgages with toxic features that would be reported under the new HMDA reporting fields. Congress now limits the ability to identify future reverse redlining and other discriminatory practices that proliferated in the run-up to the foreclosure crisis.

In passing S. 2155, and specifically its HMDA reporting exemption, Congress sent a message that the quality and price of products sold to communities of color do not matter. Congress must reverse this course and maintain Dodd-Frank’s expanded HMDA data reporting requirements. At the time of the writing of this report, the House of Representatives had not voted on the version of S. 2155 which passed the Senate in March.

The Erosion of Bi-Partisan Support

Fair housing has long garnered bi-partisan support in Congress; however, in the past decade, Republican support of fair housing has receded and House Republicans have attempted to limit private, nonprofit fair housing organizations from conducting enforcement efforts in their local markets. The primary funding mechanism for these organizations is HUD’s Fair Housing Initiatives Program (FHIP). Congress has recently set limitations on specific FHIP grant initiatives, hindering HUD’s ability to tailor each year’s FHIP grant allocation in a way that targets observed trends of discrimination throughout the housing market. Members of Congress have also sought to altogether eliminate private enforcement funding in appropriations legislation. In doing so, House Republicans have shown that they wish to eliminate the nation’s most significant investigative force working to eliminate housing discrimination – private, nonprofit fair

⁸¹ Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong., 1st Sess. (2017).

⁸² https://prosperitynow.org/files/resources/a_downpayment_on_the_divide_03-2017.pdf

housing organizations.

Beginning in Fiscal Year 2016 (FY16), House Republicans set a floor on the amount of funding that HUD must make available through Education and Outreach Initiative (EOI) grants under FHIP, seriously limiting private enforcement capabilities. This has occurred as overall FHIP funding has decreased. As the federal budget diminishes, HUD continues to reduce the amount of Private Enforcement Initiative (PEI) funding available each year, even though PEI funds have proven to be most impactful in addressing discrimination in the housing market and in providing redress to victims of housing discrimination. HUD must have the flexibility to make adjustments to grant allocations to ensure that private fair housing organizations can adequately respond to trends in housing discrimination and unexpected changes to their local housing markets. Without the flexibility to adjust the amount of grant funding available for each component of the FHIP program, HUD is forced to allocate funding in ways that are not fully based on an impact- or results-driven methodology.

Congressional Republicans have also made attempts to eliminate private enforcement. In FY16, Representative Steve Stivers (R-OH) introduced to the House of Representatives' Transportation, Housing and Urban Development and Related Agencies (THUD) appropriations bill a pair of amendments that would effectively zero-out all PEI funding in FHIP and reallocate the funds to the Administrative Enforcement Initiative (AEI) component of FHIP, which HUD had previously phased out. Citing unsubstantiated conflicts of interest and decades-old program reports from HUD's Office of Inspector General, Rep. Stivers led the majority of the House to approve this amendment with only Republican support. Fortunately, the Senate's sister legislation contained no such amendments or limitations, and the final spending legislation for FY16 maintained PEI funds. Rep. Stivers introduced a similar set of amendments to the THUD bill for FY18, and the language was again stripped from the final spending legislation.

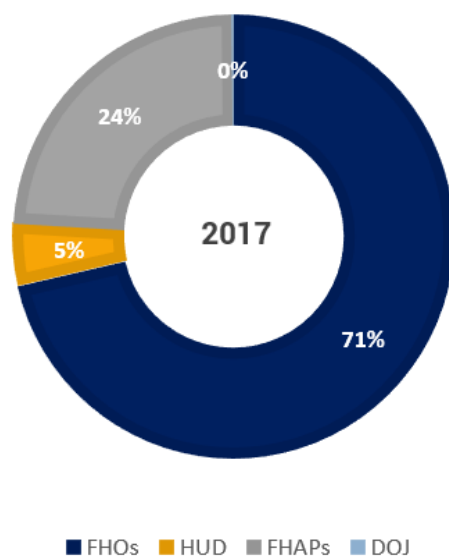
Repeated attacks on FHIP are cause for concern. FHIP itself has a strong bipartisan history, with its origins tracing back to the end of the Reagan Administration, and its piloting and full authorization in the early 1990's gained support from the George H. Bush Administration. Regardless of which party has occupied the White House, Congress has seldom placed limitations on HUD's authority to support private enforcement. The fundamental right to housing choice cuts across party lines, and Congressional Republicans would do well by their constituents to withdraw their support for arbitrary attempts to limit private enforcement of the Fair Housing Act.

SECTION III. OVERVIEW OF HOUSING DISCRIMINATION REPORTED IN 2017

Fifty years after the Fair Housing Act made housing discrimination illegal, acts of discrimination in housing still occur every day, and while often undetected and underreported, housing discrimination is still a huge obstacle for many. Every year, to provide a current snapshot of the number and types of housing discrimination complaints that have been reported, NFHA collects data from both private fair housing organizations and government agencies across the country that receive and address fair housing complaints from the public. The government agencies whose data are included in this report are: (1) state and local Fair Housing Assistance Program (FHAP) agencies, (2) the U.S. Department of Housing and Urban Development (HUD), and (3) the U.S. Department of Justice (DOJ). Together with private, nonprofit fair housing organizations (FHOs), these agencies make up the national infrastructure to address housing discrimination in America.⁸³

Year after year, private fair housing organizations address the majority of housing discrimination complaints that are reported across the country. This year, private, nonprofit fair housing organizations processed 71.3 percent of complaints, as compared to 4.5 percent by HUD, 23.9 percent by FHAP agencies, and .01 percent by DOJ.⁸⁴

HOUSING DISCRIMINATION COMPLAINTS BY REPORTING AGENCY



⁸³ Private fair housing agencies report their data based on the calendar year, while DOJ and HUD data is reported based on the federal fiscal year (October-September).

⁸⁴ This does not include complaints from the Consumer Financial Protection Bureau which are not collected in a manner that provides the level of detail needed for this report.

Housing discrimination comes in many forms and occurs during a range of different housing transactions. For the purposes of this report, data is collected and reported on all of the seven federally protected classes (race, color, national origin, disability, familial status, sex, and religion). The report also includes data broken out by several of the classes protected under state and local laws, including sexual orientation, source of income, and a number of other categories. Data is broken out by transaction type, where possible. Transaction types commonly reported include rental, sales, mortgage lending, housing-related insurance, discriminatory advertising, discrimination by homeowners associations or condominium associations, harassment, and several other types of complaints.

In 2017, there were a total of 28,843 reported complaints of housing discrimination across the country. Of these, 20,595, or 71.4 percent, were addressed by fair housing organizations, as compared to 1,311 complaints processed by HUD, 6,896 processed by FHAP agencies, and 41 cases by DOJ. This data is included in the table below, along with the same data from the past ten years. While the total number of housing discrimination complaints reported through the existing infrastructure has continued to go up compared to recent years, HUD and the FHAP agencies processed fewer complaints this year than in 2016.

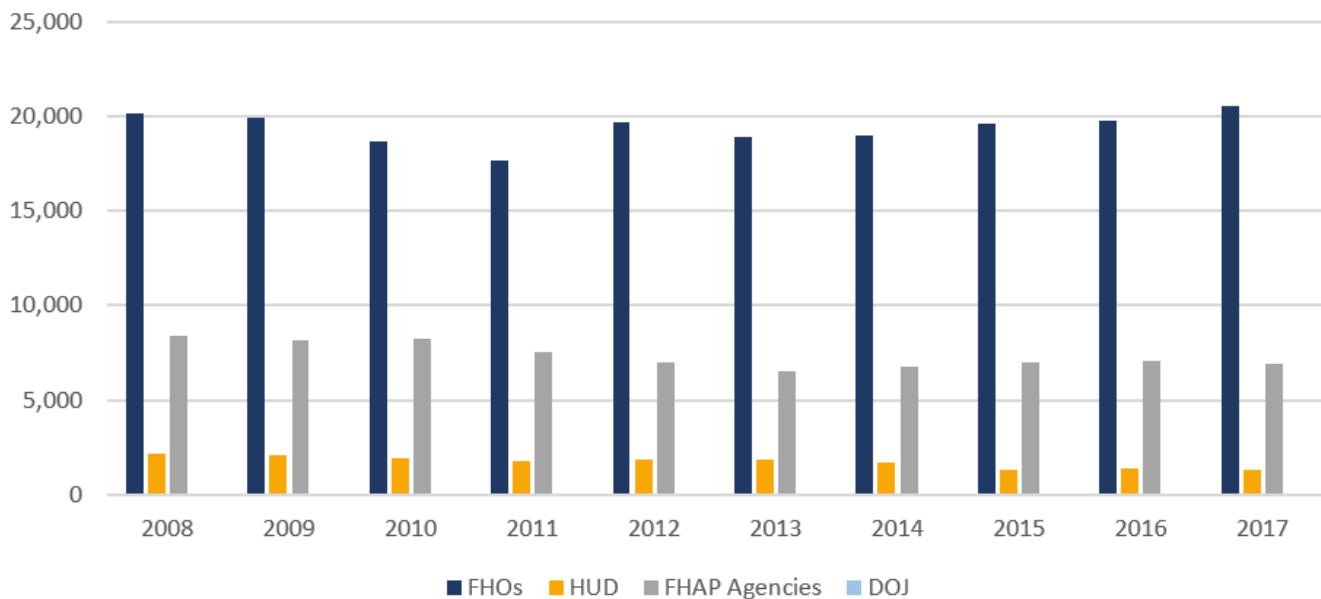
Year	FHOs	HUD	FHAP Agencies	DOJ	TOTAL
2008	20,173	2,123	8,429	33	30,758
2009	19,924	2,091	8,153	45	30,213
2010	18,665	1,943	8,214	30	28,852
2011	17,701	1,799	7,551	41	27,092
2012	19,680	1,817	6,986	36	28,519
2013	18,932	1,881	6,496	43	27,352
2014	19,026	1,710	6,758	34	27,528
2015	19,645	1,274	6,972	46	27,937
2016	19,740	1,371	7,030	40	28,181
2017	20,595	1,311	6,896	41	28,843

It is also important to note that the number documented here in the annual trends report is just a small fraction of the incidences of housing discrimination that occur over the course of a year. Housing discrimination often goes undetected and unreported, and it is common for victims of discrimination not to report it because it is difficult to identify, prove, and document. Victims of housing discrimination also often feel that nothing can or will be done about the discrimination that they experience. They also often feel that they might be subject to retaliation by their housing provider, landlord, or even their neighbors.

In 2017, the data collected for this report includes submissions from 98 nonprofit organizations, including both fair housing organizations and legal aid agencies. It also includes data from the 83 FHAP agencies⁸⁵ that participate in the FHAP program at HUD, through which they receive annual funding to support fair housing administrative and enforcement activities. These include complaint investigation, conciliation, administrative and/or judicial enforcement; training; implementation of data and information systems; and education and outreach.

As the table above and the graph below illustrate, private fair housing organizations have consistently addressed the vast majority of fair housing complaints during the last ten years.

FAIR HOUSING COMPLAINTS BY REPORTING AGENCY
2008 - 2017



This year's complaint data shows that fair housing organizations processed a total of 20,595 complaints, up from 19,740 in 2016 and 19,645 in 2015. Conversely, FHAP agencies saw a decrease in the number of complaints they addressed, with 6,896 complaints addressed in FY2017, down from 7,030 in FY2016. HUD saw a slight decrease as well, addressing 1,311 complaints in FY2017, down from 1,371 in FY2016.

85 <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>.

National Data by Basis of Discrimination

The following section takes a deeper dive into this national data by looking at the protected classes under which each of these complaints fell in 2017. As has been the case in past years, the majority of complaints from 2017 involved housing discrimination against people with disabilities. There were 16,337 cases that involved discrimination against a person with disabilities, or 56.7 percent of all cases. It should be noted that discrimination on the basis of disability is the easiest to detect as it usually involves a denial of a request for a reasonable accommodation or modification or because it involves a multi-family property that is not accessible in ways that violate the requirements of the Fair Housing Act.

The second most reported type of housing discrimination was discrimination on the basis of race, with 5,346 or 18.5 percent of all cases involving racial discrimination. This was followed by familial status as the third most frequent basis for discrimination, with 2,675 cases (or 9.3 percent of all cases of housing discrimination). The fourth most frequent basis of discrimination was national origin, with 1,951 reported cases (or 6.8 percent of all complaints), and the fifth most frequent basis was sex, with 6.7 percent, or 1,917 complaints. Color was a basis of discrimination for 422 complaints (1.5 percent), and religion was the basis of 383 complaints, or 1.3 percent of all complaints nationwide.

Basis	FHO %	HUD %	FHAP %	DOJ %
Race	15.6%	23.5%	26.5%	12.2%
Disability	55.5%	61.9%	58.9%	51.2%
Familial Status	8.7%	8.6%	11.0%	14.6%
Sex	5.4%	7.9%	10.1%	7.3%
National Origin	5.4%	10.1%	10.1%	4.9%
Color	1.1%	1.4%	2.5%	0.0%
Religion	0.7%	3.3%	2.7%	9.8%
Other	7.5%	4.7%	11.3%	4.9%

In 2017, 2,386 complaints (8.3 percent of all complaints) involved a basis of discrimination in the “other” category. For private fair housing organizations, the other category includes bases of discrimination that are covered at the state and local level, including:

- Source of Income (680 complaints)
- Age (175 complaints)
- Sexual Orientation (153 complaints)
- Retaliation (93 complaints)

- Marital Status (78 complaints)
- Gender Identity/Expression (50 complaints)
- Arbitrary (in California Rentals Only) (40 complaints)
- Military/Service Member Status (23 complaints)
- Criminal Background (23 complaints)
- Victim of Domestic Violence (8 complaints)

As far as the HUD and FHAP data is concerned, the other category only includes retaliatory claims, and for DOJ this year, it only includes military status.

National Housing Discrimination Complaint Data by Transaction Type

Housing discrimination can and does occur during a number of different types of housing transactions and housing-related situations. While occasionally housing discrimination is blatant and obvious, it is increasingly subtle, and it can be masked by discriminatory pricing, terms, false information, and other factors that influence housing choice. An example of how this plays out is when someone receives a quote for a security deposit; it would be virtually impossible to know that you are being told a security deposit is double that of another prospective tenant simply because you are a member of a protected class. This is why testing is essential as a tool to uncover housing discrimination. Fair housing testing can be customized to uncover discrimination in transactions ranging from rental apartments to homeowners insurance. For the purposes of this report, NFHA collected data from private fair housing organizations based on the most common types of housing transactions: (1) rental (2) real estate sales (3) mortgage lending (4) homeowners insurance and (5) harassment based on protected class.

Rental Market – Private Groups Reported 17,989 Complaints

Housing discrimination occurs most often in the rental market, and the complaints reported in 2017 were overwhelmingly rental-related complaints. The prevalence of discrimination in the rental market over other types of transactions is because it is the most common and frequent type of housing transaction and because it is easier to detect discrimination due to the simplicity of the transaction itself. Testing for rental discrimination is far more straightforward than testing for a real estate sales or mortgage lending case, for example. In 2017, there were 17,981 complaints reported by private fair housing organizations. This is consistent with the number in the past few years but represents 87.4 percent of all transactions types, down from 91.4 percent last year and in 2015.

Real Estate Sales – Private Groups Reported 317 Complaints

There were 314 complaints of housing discrimination that occurred during real estate sales transactions. This number represents a significant decrease from 2016 (during

which 406 sales complaints were reported), but it is consistent with data from 2015 (317 complaints). Sales complaints comprised 1.5 percent of all housing discrimination cases.

Mortgage Lending – Private Groups Reported 229 Complaints

Private fair housing organizations reported 229 complaints of lending discrimination in 2017, continuing the downward trend in the number of lending complaints from the past few years. These represented only 1.1 percent of all complaints. In 2016, there were 333 lending complaints and in 2015, there were 649 complaints. This decline in lending-related complaints over the past few years is likely due to the fact that additional barriers have been added to the mortgage lending process following the foreclosure crisis.

Homeowners Insurance Transactions – Private Groups Reported 23 Complaints

In 2017, 23 complaints of homeowners insurance-related discrimination were reported by private fair housing organizations, representing less than 1 percent of all cases. This represents a slight increase from the number reported in 2016 (19 complaints).

Harassment – Private Groups Reported 747 Complaints

Harassment based on protected class can occur in the form of coercion, intimidation, threats or interference. When this harassment occurs in the provision of housing or in a housing setting, it is illegal under the Fair Housing Act. Unfortunately, abusive and hateful behavior towards tenants, residents, and prospective occupants is a major issue across the country, and it has been increasing at a rapid rate in the past few years. This year, 747 complaints of harassment were reported, up significantly from 640 in 2016 and 591 in 2015. Perhaps more so than other types of fair housing violations, although easily recognizable, harassment often goes unreported because it tends to victimize persons with housing insecurity. Thus, poor individuals and tenants of public housing, for example, may not report harassment due to fear of eviction or retribution. This past year, 200 of the 747 harassment complaints reported were on the basis of sex and 118 were on the basis of race.

Other Housing-Related Transactions – 1,290 complaints

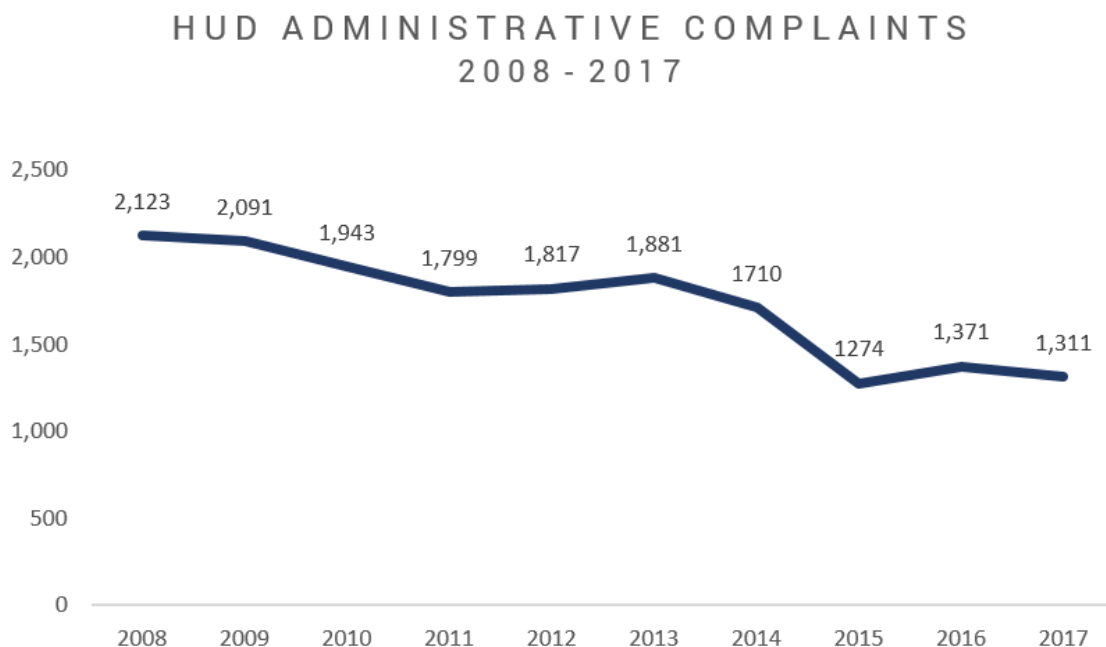
Other housing-related transactions during which discrimination was reported in 2017 included discriminatory advertising by housing providers, discrimination by homeowners or condominium associations, and zoning and land use related discrimination. There were 1,290 complaints that fell into this “other transaction” category.

Complaint Data Reported by HUD and FHAP agencies

The U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity (FHEO) has the primary authority to enforce the Fair Housing Act and to carry out its mandate to eliminate housing discrimination through enforcement actions. It also enforces civil rights laws that affect housing transactions, including Title VI of the Civil Rights Act of 1964, Section 109 of the Housing and Community Development 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, the Architectural Barriers Act of 1968, and housing provisions under the Violence Against Women Act. Additionally, FHEO publishes and distributes education and outreach information, and administers both the FHAP and FHIP programs. FHEO is also responsible for establishing fair housing and civil rights regulations and policies for HUD programs, issuing guidance on complying with the requirements of fair housing and related civil rights laws, and assuring compliance with federal nondiscrimination regulations and the requirement to affirmatively further fair housing in HUD's housing and community development programs.

HUD Administrative Complaints

In the last fiscal year, HUD received 1,311 complaints of discrimination, a decrease of 60 complaints when compared to the previous fiscal year. This number continues the overall downward trend in the number of complaints addressed by HUD over the past decade, as is illustrated in the graph below. This downward trend, despite the overall increase in complaints reported across all agencies and organizations that take complaints, is partly because HUD relies on local and state civil rights agencies, funded by the FHAP program, to undertake these efforts.



Secretary-Initiated Complaints

The Fair Housing Act allows HUD to initiate complaints when (1) the agency obtains sufficient evidence to believe that a Fair Housing Act violation has occurred or is about to occur or (2) when it has received an individual complaint but believes there may be additional victims

Bases	Number of Cases
Disability (alone)	5
Familial Status (alone)	3
Race, National Origin	2
Disability, Race, Familial Status	1

of discrimination or wants to obtain relief in the public interest. In 2017, there were 11 secretary-initiated complaints, down from 16 in 2016 and 33 in the fiscal year before that. In six of these cases, disability was the protected basis of discrimination, making it the most frequent basis around which secretary-initiated complaints were opened or completed. This was followed by familial status (four cases) and race (three cases).

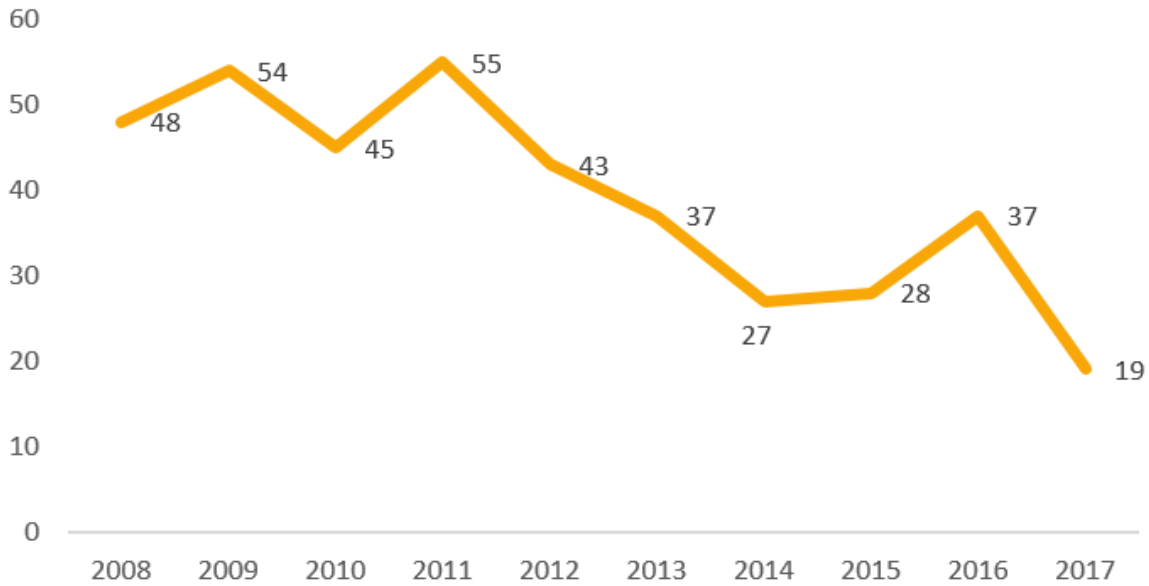
Charged Cases

HUD cases are resolved frequently through conciliation or are closed because of an administrative reason. Administrative reasons could include untimely filing, jurisdiction issues, withdrawal by the complainant without resolution, or inability to locate the respondent. HUD may also issue a charge based on the information uncovered during its own investigation of the case. In 2017, HUD charged 19 cases, down approximately half from the number of cases charged last year (37 charges in 2016).

FHAP agencies also play a prominent role in the charging and closure of cases. HUD refers complaints that originate in geographies where a local government agency is part of the FHAP program to that participating agency. FHAP agencies may issue a “cause” determination if probable discrimination is found. In 2017, there were 383 cause determinations at FHAP agencies, down significantly from 434 during the previous year and 421 in 2014.

The table on the next page shows the total number of case completions during the past year was 8,044 completions, 1,560 from HUD and 6,484 from FHAP agencies. While overall this shows a decrease of 374 completions from the previous year, HUD closed 75 more cases this year than in the previous year. However, the increase in completions from HUD is mainly due to an increase in administrative closures (64 more than the previous year) and No Cause cases (20 more than the previous year).

HUD CHARGES 2008 - 2017

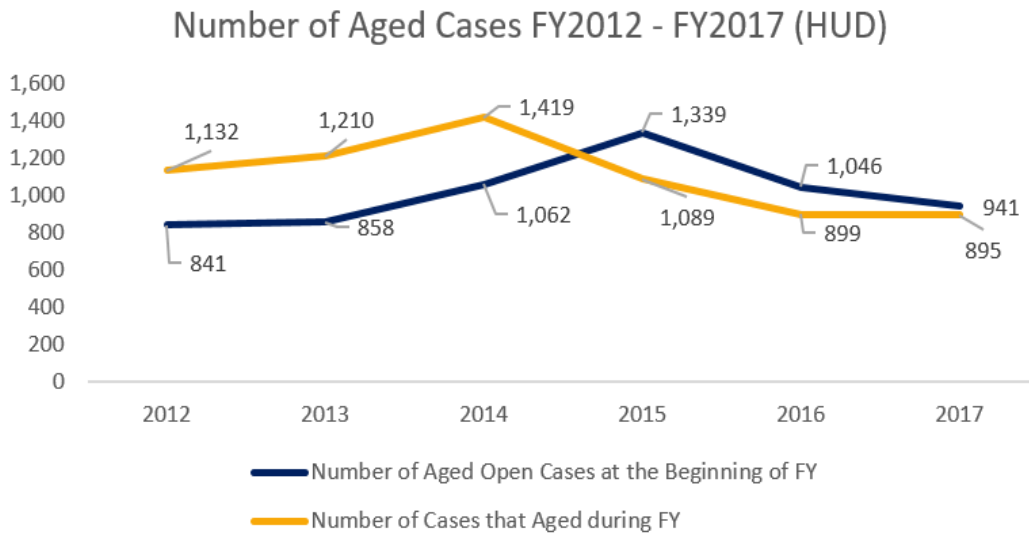


Number of Case Completions in 2017 by Type and Agency

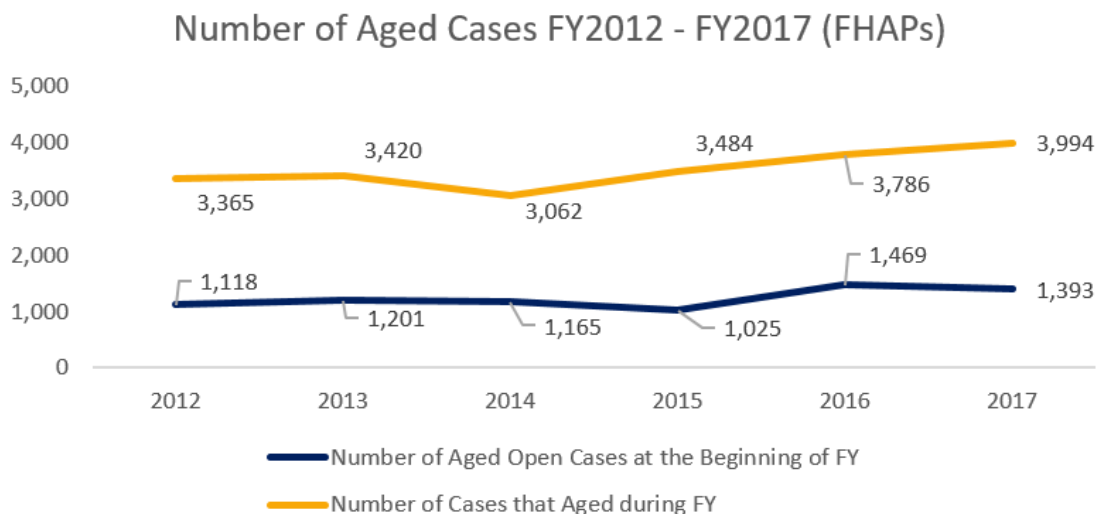
Case Completion Type	HUD	FHAP	Total
Administrative Closure	284	555	839
Charged or FHAP Caused	19	383	402
Conciliation/ Settlement	528	1,721	2,249
DOJ Closure	5	-	5
No Cause	572	3,239	3,811
Withdrawn after Resolution	152	586	738
Total	1,560	6,484	8,044

Aged Cases

HUD regulations under the Fair Housing Act require that HUD and FHAP agencies complete their investigations of fair housing complaints within 100 days of the initial receipt of a complaint, with exceptions only for more complex cases, such as mortgage lending discrimination and insurance discrimination cases. If a case exceeds the 100-day statutory mark, it is considered an “aged” case. Aged cases at both HUD and FHAP agencies often remain stalled for several years.



As in 2016 and prior years, both HUD and FHAP agencies have a large number of aged cases that extend past the 100-day statutory period. At HUD, 895 cases became aged during 2017, which was a slight decrease from prior years. Similarly, there were 941 cases that were open and aged at the beginning of the fiscal year, indicating that the number of open aged cases is beginning to trend downward.



The same trend does not carry over to the number of aged cases at FHAP agencies in 2017. As the graph above illustrates, FHAP agencies had 1,393 open aged cases at the beginning of FY2017. While this is a slight decrease from the number of open aged cases at the start for FY2016, it is still significantly higher than the usual numbers of aged cases seen in 2015 and earlier. FHAP agencies also saw 3,994 cases become aged in FY2017, which is the highest number of aged cases seen in the last five years, continuing an upward trend in the number of cases that become aged at FHAP agencies each year.

Complaint Data Reported by DOJ

DOJ's Housing and Civil Enforcement Section is responsible for enforcing the Fair Housing Act, the Equal Credit Opportunity Act (ECOA), and Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations. ECOA prohibits lending institutions from discriminating against credit applicants on the basis of race, color, national origin, religion, sex, marital status, age or source of income. Under ECOA, the Justice Department has the authority to investigate and file a fair lending lawsuit. The 1968 Federal Fair Housing Act also gave DOJ the authority to investigate 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 DOJ's authority to include cases in which a housing discrimination complaint has been investigated and charged by HUD and one of the parties has elected to go to federal court. DOJ is also able to initiate civil lawsuits in response to fair housing violations by any state or local zoning or land-use laws referred by HUD. Finally, the Civil Rights Division of DOJ also has the authority to establish fair housing testing programs.

In 2017, DOJ filed a total of 41 cases, which is relatively consistent with the numbers from the past few years. Of these 41 cases, 24 were pattern or practice cases, four of which involved familial status as the protected class, 10 of which involved disability as the protected class, and one that involved sex as the protected class. Of the remaining 17 cases, 14 were HUD election cases and three were HUD Enforcement Actions. During 2017, DOJ obtained settlements for 43 cases, resulting in a total of just over \$80 million in relief.

Every year, NFHA collects data from private fair housing organizations, local and state government agencies, HUD, and DOJ to establish a picture of fair housing complaints in America.

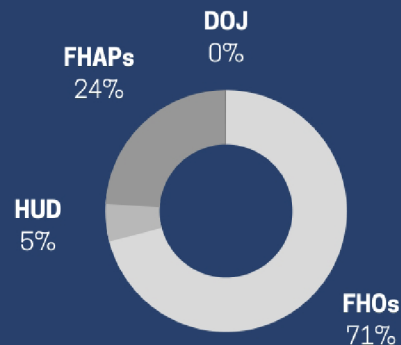


In 2017, there were

28,843

reported complaints of housing discrimination across the USA.

PERCENT BY REPORTING AGENCY



Private Fair Housing Organizations (FHOs) processed the overwhelming majority of housing discrimination complaints, followed by Fair Housing Assistance Program (FHAPs) agencies, HUD and DOJ.



57%

ON THE BASIS OF
DISABILITY

19%

ON THE BASIS OF
RACE

9%

ON THE BASIS OF
FAMILIAL STATUS

7%

ON THE BASIS OF
NATIONAL ORIGIN

7%

ON THE BASIS OF
SEX

1.4%

ON THE BASIS OF
COLOR

1.3%

ON THE BASIS OF
RELIGION

8%

**OTHER STATE/
LOCAL PROTECTION**

SECTION IV. FAIR HOUSING CASE HIGHLIGHTS

Each year, fair housing and other nonprofit organizations, HUD, and DOJ investigate and file cases of housing discrimination in the federal court and HUD/FHAP administrative complaint systems. In 2017, several notable cases highlight the persistence and variability of housing discrimination and underscore the need for stronger support of fair housing in this nation. First, however, we focus on an important case related to Fair Housing Act Standing.

Supreme Court Upholds the Right of Local Communities to Fight for Fair Housing with 2017 *Bank of America, et al. v. City of Miami* Decision

In May 2017, the U.S. Supreme Court upheld the right of cities to sue banks whose practices harm the municipalities and their residents.⁸⁶ It ruled that economic injuries that the City of Miami alleged resulted from discriminatory acts by Bank of America and Wells Fargo fall within the zone of interests protected by the Fair Housing Act. However, the Court found that the fact that the injuries were foreseeable by the banks was insufficient, in itself, to establish proximate cause under the act.

Miami filed lending discrimination lawsuits under the Fair Housing Act against Bank of America and Wells Fargo, alleging that the banks discriminated on the basis of race and national origin by intentionally issuing toxic mortgages with higher fees and costs to Black and Latino borrowers than they offered to similarly situated White borrowers. According to the city, the banks' discriminatory practices adversely impacted the racial composition of the City; impaired the City's goals to assure racial integration and desegregation; frustrated the city's interest in promoting fair housing; and disproportionately caused foreclosures and vacancies in communities of color. The city said that the foreclosures and vacancies harmed the city because decreased property values reduced tax revenues. In addition, the city said that it was forced to spend more on municipal services that it provided and still must provide to remedy blight and unsafe and dangerous conditions which exist at properties that were foreclosed because of the Banks' illegal lending practices.

A federal district court dismissed the lawsuits, ruling Miami's claims did not fall within the Fair Housing Act's zone of interests and that the city had not shown that the defendants' conduct proximately caused the harm to it that it alleged. An Eleventh Circuit panel reversed, finding the district court had imposed too stringent a zone of interests test and wrongly applied the proximate cause analysis.

In a five-three opinion written by Justice Stephen Breyer, the majority of the Court ratified a core principle of the Fair Housing Act, holding the injuries that Miami alleged fall within the zone of interests that the Fair Housing Act arguably protects, as the statute permits

⁸⁶ *Bank of America v. City of Miami*, Florida, No. 15-1111, 2017 U.S. LEXIS 2801 (U.S. May 1, 2017).

any aggrieved person to bring a housing discrimination lawsuit and the Court itself has repeatedly said that the definition of an aggrieved person reflects a congressional intent to confer standing broadly. Although the Court affirmed the Eleventh Circuit’s ruling with regard to the zone of interest requirement, it reversed the appeals courts holding that the City had adequately pled causation. The Court found that “foreseeability alone is not sufficient to establish proximate cause under the [Fair Housing Act]” and ruled that “proximate cause under the [Fair Housing Act] requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’”

The decision reaffirms bedrock Supreme Court fair housing jurisprudence – in *Trafficante*, *Gladstone*, and *Havens Realty* – interpreting a broad scope of the law for those seeking to redress harm from discriminatory conduct, whether in the form of a tenant being denied the opportunity to live in an integrated community or a city that loses tax revenue from racial steering practices.

2017 Case Highlights

The representative cases highlighted in this section include the following allegations: Black borrowers charged higher rates and fees for origination services; restricted loan services for Latino mortgage applicants; refusal to rent units to applicants with criminal histories or housing choice vouchers; denial of housing to families with children by not allowing more than two people per bedroom; a County’s failure to affirmatively further fair housing in its operation of housing and community development programs; a transgender tenant denied housing on the basis of sexual stereotyping; a shared-economy housing platform that failed to prevent discrimination against guests; denial of sign language services for deaf persons by nursing homes; real estate groups that targeted a predatory rent-to-own scheme at communities of color; a state-administered affordable housing program that permitted local officials to block tax credit-funded housing in majority White communities; a fire marshal who denied the accommodation requests of people recovering from substance abuse; a city’s selective enforcement of its nuisance ordinance in Black neighborhoods; allegations of widespread sexual harassment by a prominent property owner; and an apartment complex’s denial of an accommodation that resulted in a tenant falling down the stairs.

United States v. JPMorgan Chase Bank

In January 2017, DOJ and Chase Bank agreed to a consent decree resolving claims that from 2006 through 2009, Chase violated the Fair Housing Act by charging Black borrowers higher rates and fees on home loans originated by mortgage brokers than it charged similarly situated White borrowers with the same credit and risk profiles. Under the terms of the consent order, Chase will create a settlement fund of approximately \$53 million and retain a fund administrator to locate borrowers who are eligible for compensation. Chase will also pay a \$55,000 civil penalty.⁸⁷

⁸⁷ <https://www.justice.gov/crt/case/united-states-v-jpmorgan-chase-bank-na-sdny>.

State of Washington v. Weidner Property Management LLC, et al.

In January 2017, the attorney general of Washington State announced that five companies agreed to settlements of claims that they discriminated on the basis of race or color by refusing to rent units to applicants with criminal histories without considering the individual facts of each applicant's history, such as the type and severity of the offense and when the offense occurred. The attorney general found that the companies' policies discriminated on the basis of race because they had a disparate impact on Black applicants for housing. Each company has agreed to adopt a nondiscrimination policy that does not automatically exclude applicants on the basis of criminal history and that, when criminal history is considered in an application, each company will consider the individual facts of each applicant's history. Each company will also pay the state \$5,000 or \$6,000.⁸⁸

Fair Housing Center of West Michigan, et al. v. AMP Residential

In January 2017, five local fair housing centers entered into a conciliation agreement with AMP Residential, an Indianapolis-based company that owns and operates apartment complexes throughout the United States. The complainants include the Fair Housing Center of West Michigan, Fair Housing Center of Central Indiana, Fair Housing Center of Southeast & Mid-Michigan, Fair Housing Center of Southwest Michigan, and Central Ohio Fair Housing Association. The agreement resolves a complaint alleging that AMP discriminated against families with children in 20 properties in three states by allowing no more than two people per bedroom in an apartment, regardless of the apartment's size. AMP agreed to revise its occupancy policy to ensure that families with children are not prohibited in AMP properties; rental company personnel will participate in fair housing training; and it will pay a total of \$207,000 to the complainants.⁸⁹

Metropolitan Milwaukee Fair Housing Council v. Waukesha County

In February 2017, the Metropolitan Milwaukee Fair Housing Council entered into a conciliation agreement with Waukesha County, Wisconsin, to resolve an administrative complaint with HUD that alleged that Waukesha County discriminated on the basis of race, color, and national origin and failed to affirmatively further fair housing in its operation of housing and community development programs with HUD funds. Pursuant to the terms of the conciliation agreement, Waukesha County agreed to participate in a regional assessment of fair housing. Waukesha County will also require municipalities in the county that receive CDBG or HOME funds to submit fair housing impact statements that name the steps they will take to address impediments to fair housing and to report on annual progress in eliminating impediments. The county will also identify parcels of land suitable for the development of affordable housing and will seek to keep financial incentives for the creation of affordable rental housing in place. It will pay the Fair Housing Council a total of \$140,000.⁹⁰

88 <http://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories>.

89 <https://www.fhcci.org/wp-content/uploads/2011/12/1-27-17-AMP-Press-Release.pdf>.

90 <http://www.fairhousingwisconsin.com/PDF/WaukCountyAgreement2.2017.pdf>.

Smith v. Wasatch Property Management, Inc., et al.

In March 2017, a prospective tenant represented by the ACLU and other civil rights offices filed a lawsuit in U.S. District Court for the Western District of Washington alleging an apartment management company violated the Fair Housing Act when it refused to consider the tenant's application because its blanket screening policy disproportionately harms African-Americans, particularly African-American women. According to the plaintiff, though rental housing providers may have a valid interest in avoiding applicants who are unlikely to perform well as tenants, categorically denying all applicants with an eviction record does not necessarily achieve this interest and a housing provider should account for the nature and timing of an applicant's record.⁹¹

National Fair Housing Alliance v. Bank of America

In May 2017, NFHA announced that Bank of America agreed to settle claims the bank discriminated against Latino borrowers in its lending practices. Based on testing conducted by NFHA of the bank's loan origination services, HUD issued a charge in December 2016 that there was reasonable cause to believe discrimination occurred. Under the terms of the agreement, Bank of America will give \$100,000 to Charleston-area organizations for down payment and closing cost assistance for Latino homebuyers in the region. Bank of America will also give NFHA \$336,380 to support NFHA's mission of ensuring equal housing opportunity. In addition, Bank of America will continue its community partnerships with organizations focused on promoting homebuyer education, counseling, and financial literacy to all prospective homebuyers in the Charleston area.⁹²

Smith v. Avanti

In April 2017, a Colorado federal district court ruled that a property owner discriminated in violation of the Fair Housing Act and Colorado Anti-Discrimination Act on the basis of sex and familial status when she refused to rent a townhouse to a transgender woman, her wife, and their two children. The prospective tenants argued that the property owner had violated the law by discriminating against them based on sex stereotypes; the judge agreed with the contention that discrimination against women for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or have children is discrimination on the basis of sex under the Fair Housing Act. The judge held that the property owners had discriminated on the basis of sex in violation of both the Fair Housing Act and the Colorado law based on sexual stereotyping, and that she had discriminated on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.⁹³

California Department of Fair Employment and Housing v. AirBnB

In April 2017, AirBnB entered into a settlement agreement with the California Department of Fair Employment and Housing to resolve a Department-initiated complaint alleging that AirBnB engaged in acts of housing discrimination and failed to prevent discrimination

⁹¹ <https://www.aclu-wa.org/docs/complaint-smith-v-wasatch-property-management>.

⁹² <http://nationalfairhousing.org/2017/05/19/bank-of-america-and-the-national-fair-housing-alliance-reach-settlement-agreement-in-mortgage-loan-case>.

⁹³ https://www.lambdalegal.org/in-court/cases/co_smith-v-avanti.

against Black guests in violation of California civil rights laws. AirBnB is an online community marketplace that connects people looking to rent their homes with people who are looking for accommodations. Under its terms, AirBnB hosts and guests in California are required to accept a recently implemented nondiscrimination policy as a condition for participating in AirBnB. The Department will conduct fair housing testing of AirBnB hosts in the state, and AirBnB California employees will receive fair housing and discrimination training. AirBnB has designated a unit to investigate all discrimination complaints, and this unit will submit periodic reports to the Department. AirBnB has also agreed to develop a progressive system of counseling, warning, and discipline for hosts and guests when unlawful discrimination occurs.⁹⁴

Fair Housing Justice Center v. Crown Nursing Home Associates, Inc., et al.

In May 2017, the Fair Housing Justice Center announced that several nursing homes and assisted living facilities agreed to settle claims that they discriminated on the basis of disability by refusing to provide American Sign Language (ASL) services to deaf persons. In separate agreements, Crown Nursing Home Associates, Inc.; Cliffside Nursing Home, Inc.; Forest View Nursing Home, Inc.; Ultimate Care Assisted Living Management, LLC; EBC White Plains, LLC; Hungry Harbor Care, LLC; Sayville Senior Care, LLC; and Armonk Senior Care, LLC, have agreed to settlements with similar provisions. They have agreed not to refuse to provide reasonable accommodations as needed to deaf persons, including ASL interpreters. They will also adopt policies and procedures that will ensure that deaf people have access to ASL interpreters and other auxiliary services. Staff will participate in fair housing training and training about the legal rights of deaf persons. In addition, the settling defendants will pay a total of \$242,500 in damages and attorneys' fees.⁹⁵

Fair Housing Center of Central Indiana v. Rainbow Realty Group, Inc., et al.

In May 2017, the Fair Housing Center of Central Indiana and four individual plaintiffs sued Rainbow Realty Group, Inc.; Empire Holding Corporation; and James Hotka, alleging they violated the Fair Housing Act, the Equal Credit Opportunity Act, and other laws by engaging in a predatory "rent-to-own" scheme in Marion County, Indiana, that targets Black neighborhoods and minority homebuyers. According to the complaint, the defendants purchased almost one thousand dilapidated houses in Marion County and engaged persons who wish to buy homes in paying inflated prices and exorbitant interest rates for houses in which they earn no equity. The plaintiffs allege that the defendants intentionally target their predatory rent-to-own scheme at Marion County's communities of color.

Oxford Housing, Inc. v. H. "Butch" Browning

In July 2017, a federal district court entered partial summary judgment for Oxford House Inc. in a reasonable accommodation claim against the state fire marshal of Louisiana. Oxford House sued the Louisiana fire marshal after he refused Oxford

⁹⁴ <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/Press-release-4-27-17.pdf>.

⁹⁵ <http://www.fairhousingjustice.org/newsletters/opening-acts-may-5-2017>.

House's request for a reasonable accommodation for an Oxford House residence in Lake Charles, Louisiana. The fire marshal deemed the home for tenants recovering from substance abuse a lodging or rooming house, such that Oxford House was therefore required to comply with the costly code requirements prescribed for rooming houses, including an automatic sprinkler system, a fire alarm system, and single station smoke alarms. The court ruled that Oxford House had demonstrated that there was no genuine issue of material fact as to whether the residents were disabled; they requested an accommodation which the defendant refused; the requested accommodation was reasonable; and it was necessary to afford them the equal opportunity to use and enjoy the dwelling.⁹⁶

HOPE Fair Housing Center v. City of Peoria

In August 2017, HOPE Fair Housing Center filed a lawsuit against the City of Peoria, Illinois, challenging the city's "chronic nuisance" ordinance. According to the complaint, this ordinance, which requires the eviction of tenants at certain properties that the city considers to be nuisances, is intentionally enforced in predominantly Black neighborhoods and against buildings with predominantly Black tenants. HOPE charges that this allegedly selective enforcement violates the Fair Housing Act and the Illinois Civil Rights Act. HOPE has asked the court to enjoin further enforcement of the ordinance. It also requests compensatory and punitive damages and attorneys' fees.⁹⁷

Central New York Fair Housing v. Waterbury, et al.

In August 2017, Central New York Fair Housing and six individual plaintiffs filed a lawsuit against Douglas Waterbury and Waterbury's corporate entities, alleging that Waterbury subjects women tenants and prospective tenants to egregious sexual harassment, including unwanted sexual contact. According to the plaintiffs, Waterbury's conduct includes preying upon women who are desperate for housing by routinely conferring housing benefits, or conditioning rental terms, on a woman's willingness to perform sexual favors. In addition to owning approximately 50 properties in the Oswego, New York, area, Waterbury is the owner of Santa's Workshop in North Pole, New York, the Sterling Renaissance Festival, and the Sylvan Beach Amusement Park.⁹⁸

Baltimore Regional Housing Campaign v. State of Maryland

In September 2017, the State of Maryland entered into a conciliation agreement resolving a discrimination complaint filed by the Baltimore Regional Housing Campaign alleging that Maryland discriminated on the basis of race, national origin, and familial status in the operation of its Low-Income Housing Tax Credit Program by administering policies that permitted local officials to block tax credit-funded housing in majority White, high-opportunity communities. Under the agreement, the Maryland Department of Housing and Community Development will ensure that at least 1,500 units of family housing are developed in communities of opportunity; not reinstate or impose new threshold

⁹⁶ <http://www.gnofairhousing.org/2017/10/17/fair-housing-center-settles-case-against-louisiana-state-fire-marshal-after-judge-rules-he-violated-fair-housing-laws-protecting-people-with-disabilities>.

⁹⁷ <http://hopefair.org/index.php?page=news&full=24>.

⁹⁸ <http://www.relmanlaw.com/civil-rights-litigation/cases/Waterbury.php>.

or scoring criteria that require the approval of a local governing body; and expand its affirmative fair housing marketing plans. It will pay complainants \$225,000 to support efforts to increase housing choice.⁹⁹

Sams v. GA West Gate LLC, et al.

In November 2017, CHG West Gate LLC, et al., the owners and managers of apartments in Garden City, Georgia, entered into a settlement agreement to pay thirteen tenants and the estates of two former tenants a total of \$357,500 to settle claims of race discrimination. The present and former tenants alleged that the management company imposed rules on the Westgate tenants that they did not impose on tenants in complexes they owned or managed where the tenants were not Black, and that the management's policies had a disparate impact on Black tenants when they attempted to evict the tenants based on criminal background under a policy that barred tenancy if a person had a felony or misdemeanor conviction within the previous 99 years. In January 2017, the court ruled that the plaintiffs had stated sufficient facts in support of their claims. In addition to the payment of damages to the plaintiffs, the defendants agreed to pay attorneys' fees and costs.

Hart v. Premier Apartments, LLC, et al.

In November 2017, the owners and operators of a Los Angeles, California, apartment complex agreed to pay \$1,000,000 to settle claims that they discriminated against the Harts on the basis of disability. The Harts are Section 8 recipients who lived on the third floor of an apartment building. Mr. Hart uses a wheelchair for mobility because he has serious physical disabilities, including paralysis. As such, the Harts asked for a transfer to a first-floor apartment, but the defendants did not respond to their request. In 2016, the building elevator broke and was not repaired for three months. Mr. Hart attempted to use the stairs so he could go to his medical appointments, but he fell down the stairs, hit his head, and has been bedridden since he fell. After the fall, the building management allegedly continued to ignore the Harts' request for a first-floor apartment and issued them an eviction notice.

Equal Rights Center v. Lenkin Company Management, Inc., et al.

The Lenkin Company Management Inc. and related entities agreed to resolve a lawsuit filed by the Equal Rights Center alleging that it engaged in unlawful source of income and race discrimination by refusing to rent available units in four rental properties in Washington, D.C., to prospective tenants who wished to use housing choice vouchers. Under the terms of the consent order, Lenkin will affirmatively market to housing choice voucher holders and train two employees to act as housing choice voucher liaisons. It will hold any unit for which a voucher holder is the first applicant to allow sufficient time for the D.C. Housing Authority to process the voucher holder's application. Lenkin employees will participate in fair housing training, and Lenkin will pay the Equal Rights Center a total of \$125,000 for damages and attorneys' fees.¹⁰⁰

⁹⁹ <http://www.reلمانlaw.com/civil-rights-litigation/cases/HUDvMaryland.php>.

¹⁰⁰ <https://equalrightscenter.org/erc-resolves-race-soi-discrimination-complaint>.

SECTION V. THE NEXT 50 YEARS: FAIR HOUSING CHALLENGES

There is no question that, as we undertake the next 50 years of the Fair Housing Act, we must continue our efforts to address discrimination against individuals and families, improve methods of challenging systemic and institutional barriers, foster investment in all neighborhoods, and affirmatively further fair housing in all federal and federally-funded programs. In this section, we identify some of the most critical challenges to fair housing, such as the failure to affirmatively further fair housing, barriers in access to credit, and gentrification. At the same time, we make note of some of the more recent and pending issues that the fair housing community will need to address, such as the fair housing ramifications of big data, providing housing for an aging population, advertisement of housing opportunities on digital platforms, and the need to include additional protections under the Fair Housing Act based on marital status, source of income, sexual orientation, gender identity, and gender expression.

Affirmatively Furthering Fair Housing

As we look ahead, one of the most important challenges facing our movement is to equip ourselves to be leaders in the effort to address the tremendous inequities that undermine the fabric of our nation and its future prosperity. The AFFH regulation adopted by HUD in 2015 can be a useful tool in this effort. One of our immediate tasks is to help HUD see the importance of revoking its January 5, 2018 notice that suspended implementation of the rule, and then forge ahead to complete the remaining components of the AFFH infrastructure. These components include the assessment tools for states and insular areas,¹⁰¹ the modifications to the data and mapping tool needed to improve usability by those entities as well as PHAs, and publication of the additional guidance developed by HUD contractors that will help its grantees better identify and address the fair housing problems they face.

Once the rule is reinstated and the implementation process restarted, there will also be work to be done to perfect the rule over time. The assessment tools are time-limited documents, approved by OMB for three-year intervals. When they come up for renewal, it will be important for fair housing advocates to offer their suggestions for any necessary changes, including, among others, improvements to sharpen the focus of those tools and ensure they address emerging issues.

However, the AFFH rule is not a “check the box” regulation. It leaves a lot of discretion to jurisdictions to determine which fair housing issues are most pressing, what strategies are likely to be most effective, and what timeline would be reasonable for making measurable progress. Given that flexibility, this is a rule that will likely only be as good

¹⁰¹ An insular area of the United States is a U.S. territory that is neither a part of one of the 50 states nor of a federal district.

as fair housing and other local advocates make it. If the community is engaged, bringing the voices of affected constituencies into the conversation, developing their own agenda and strategies, lifting up important local data and knowledge to be considered, and pressing their jurisdiction(s) to incorporate those into the fair housing plan, the AFFH rule can provide a forum and serve as leverage for engaging with local officials and advancing a community's agenda.

Another important task that fair housing advocates face is to sharpen their community engagement skills and strengthen their ties with other, non-fair housing entities and individuals that are working to address the problems faced by people of color, immigrants, families with children, people with disabilities, and people of low- and moderate-income. In many ways, we are all pulling toward the same end, which is to create strong, healthy, vibrant communities for all in which people can flourish, regardless of their race, national origin, or other protected characteristics. We may not all use the same vocabulary, embrace the same strategies, or advocate the same tactics to achieve that end, but as long as those differences divide us, we will be less successful than we could be as a united front. That means we must find ways to understand each other better and use our different strengths to maximum effect in achieving our common goals.

Finally, we must learn to work across silos to forge alliances with those working on the full range of issues brought into play by the AFFH rule, including transportation, education, environmental justice, employment, public health, city planning, and more. There is work under way in all of these fields to address racial and other inequities, and we will make progress more quickly and effectively if we can find strategic ways to align our efforts and leverage our respective resources. In many ways, this is the very work that embodies the vision set out in the Fair Housing Act. The effort to dismantle segregation and redress the harms it has caused must be broader than just housing and the programs managed by HUD. Rather, it must incorporate the full range of matters encompassed by the term "urban development," which takes in the programs managed by a wide range of other federal agencies. Those federal programs stand as proxies for the issues facing communities of color and other protected classes. For those of us in the fair housing world whose central focus is on using the fair housing laws to help victims of discrimination, and whose work is so heavily shaped by those laws and their accompanying regulations, working across these silos requires some "outside the box" thinking that may not come naturally. But just as with AFFH efforts at the local level, we are all working toward a common goal and we will get there faster if we work together.

Improving Access to Credit for Persons and Neighborhoods of Color

Access to mortgage credit is fundamental to homeownership. In order to increase homeownership for people of color, we must eliminate redlining and discrimination in mortgage lending markets. In this section, we report that lending discrimination continues as a primary barrier to credit access by people of color, compounded by a history of discrimination that contributes to artificial deficiencies in credit scores or credit invisibility of borrowers of color.

Redlining and Lending Discrimination Persist

A recent investigation by Reveal from the Center for Investigative Reporting showed that, in 61 metro areas, mortgage loan denial rates are still much higher for Black and Latino applicants than for White applicants, even after controlling for the income of applicants, loan amount, and neighborhood. The report was based on an analysis of millions of HMDA records.¹⁰² We have provided examples of mortgage lending discrimination cases throughout this report, but in this section we highlight that lending discrimination, as documented by the Reveal investigation, is not a thing of the past. In the last several years, many cases of lending discrimination have been brought that demonstrate that redlining and discrimination in the mortgage lending market are robust and resistant to change. Here are recent lending discrimination case examples that include allegations of redlining; denial of mortgage loans to Black and Latino applicants while approving loans to similarly situated White applicants; predatory lending targeted at communities of color; and inappropriately charging people of color higher interest rates, points, and fees for mortgage loan products.

In December 2011, DOJ settled a case with Countrywide Financial Corporation that included relief for more than 200,000 victims of lending discrimination. DOJ alleged that Countrywide steered Latino and Black borrowers who qualified for prime-rate mortgages into subprime loans, while also placing similarly situated non-Latino White borrowers into prime-rate loans in 2004-2008. Countrywide also charged extra points and fees to people of color.¹⁰³

In 2012, DOJ and the City of Baltimore announced settlement of lending discrimination cases against Wells Fargo Bank, which included an allegation that approximately 30,000 Black and Latino borrowers paid higher fees and costs for their mortgages than White borrowers because of their race and/or national origin.¹⁰⁴

In 2015, the CFPB and DOJ announced settlement of a joint action against Hudson City Savings Bank for discriminatory redlining practices that denied residents in majority-Black-and-Latino neighborhoods fair access to mortgage loans in New York, New Jersey, Connecticut, and Pennsylvania. The bank located branches and loan officers, selected mortgage brokers, and marketed products to avoid and thereby discourage prospective borrowers in predominantly Black and Latino communities.

In May 2015, HUD entered into a settlement with Associated Bank in a redlining case out of Chicago and Milwaukee, resolving allegations the bank denied mortgage loans to Black and Latino applicants and in underserved communities of color between 2008 and 2010.¹⁰⁵

¹⁰² <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.

¹⁰³ <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>.

¹⁰⁴ Relman, Dane & Colfax PLLC website, "Baltimore Settles Landmark Fair Lending Case Against Wells Fargo," <http://www.relmanlaw.com/civil-rights-litigation/cases/Baltimore-v-wells-settlement.php>.

¹⁰⁵ HUD News, "HUD & Associated Bank Reach Historic \$200 Million Settlement of 'Redlining' Claim," May 26, 2015, <http://por->

In 2016, the CFPB and DOJ announced settlement of a joint action against BancorpSouth for discriminatory mortgage lending practices that harmed African Americans and other persons of color.¹⁰⁶ These practices included illegal redlining in Memphis; denying certain African American applicants mortgage loans more often than similarly situated non-Hispanic White applicants; charging African American customers for certain mortgage loans more than non-Hispanic White borrowers with similar loan qualifications; and implementing an explicitly discriminatory loan denial policy.

In June 2016, a federal jury entered a verdict for the plaintiffs in a lending discrimination case against Emigrant Savings Bank and Emigrant Mortgage Company in a lawsuit alleging that Emigrant had engaged in predatory lending by aggressively marketing and originating high-cost mortgage refinance products to Black and Latino homeowners in majority non-White census tracts in New York City between 2004 and 2009. The plaintiffs alleged that Emigrant engaged in “equity stripping” by marketing high-cost products to borrowers of color who had substantial equity in their homes.¹⁰⁷

In January 2017, DOJ and Chase Bank agreed to a consent decree resolving claims that from 2006 through 2009 Chase violated the Fair Housing Act by charging Black borrowers higher rates and fees on home loans originated by mortgage brokers than it charged similarly situated White borrowers with the same credit and risk profiles.¹⁰⁸

In February 2018, the City of Sacramento filed a lawsuit against Wells Fargo, alleging that Wells Fargo steered Latino and Black borrowers in Sacramento into mortgage loans with discriminatory terms that have higher costs than loans for which they were eligible and which were routinely issued to similarly situated White borrowers.¹⁰⁹

Credit Score Insufficiencies and Invisibility

Redlining and discriminatory treatment are not the only barriers to credit access for persons of color. The Urban Institute estimates that since the foreclosure crisis, there are over 6 million mortgage loans missing from the U.S. market as the result of a too-restrictive credit market.¹¹⁰ CoreLogic estimates that the market is producing a deficit of 250,000 loans to borrowers of color each year. As disturbing as these figures are, they reflect only a small picture as they are based on would-be projections for consumers who have credit scores. When we include the pool of borrowers who are credit invisible or who have insufficient credit to generate a score, the picture becomes much worse.

tal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-064b.

106 <https://www.justice.gov/crt/case-document/consent-order-united-states-and-consumer-financial-protection-bureau-v>.

107 <https://www.nytimes.com/2016/06/28/nyregion/emigrant-savings-bank-discriminated-against-minorities-brooklyn-jury-says.html>.

108 <https://www.justice.gov/crt/case/united-states-v-jpmorgan-chase-bank-na-sdny>.

109 <http://money.cnn.com/2018/02/27/investing/wells-fargo-sacramento-lawsuit-discriminatory-lending/index.html>.

110 Goodman, Laurie, Jun Zhu and Bing Bai, “Overly Tight Credit Killed 1.1 Million Mortgages in 2015,” Urban Institute. November 21, 2016. Available at: <https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015>.

Overly restrictive credit requirements and outdated credit scoring mechanisms built on stale data are locking millions of consumers out of the opportunity to obtain sustainable homeownership. A disproportionate percentage of these consumers are people of color.

America has a dual credit market that harms under-served borrowers and results in disparate outcomes, particularly for borrowers of color, people with disabilities, and other groups protected under the Fair Housing Act. The dual credit market has persisted in part because the mechanisms for determining borrower risk are built upon incomplete data records that, by design, create and perpetuate discriminatory disparities. Our lending markets began with a fundamental assumption that there was a direct correlation between race and risk. That principle has been baked into the apparatuses that determine creditworthiness. While these credit-scoring and automated underwriting systems may not include the variables of race, national origin, or ethnicity, they do contain variables that, either in isolation or in combination, serve as a proxy for race, national origin, or ethnicity.¹¹¹

As a result of historical and current systemic disparities in our financial system, people of color and persons with disabilities are disproportionately credit invisible, score-insufficient, or have artificially low credit scores. According to the CFPB, 26 million American consumers – 11% of the adult population – are credit invisible. This does not mean that these consumers do not have credit. It means that they do not have credit information that has been reported to the major credit repositories. An additional 8.3 percent (19 million consumers) do not have enough information on their credit profiles to generate a credit score.¹¹² An analysis by the CFPB reveals that almost 30 percent of Black and Latino adults are credit invisible or have an unscorable credit profile, compared to about 17 percent of White adults.¹¹³

On average, Black and Latino applicants have lower credit scores than their White counterparts. The Urban Institute found that in 2013, only 41 percent of Latinos and 33 percent of Blacks had a FICO score of 750 or higher while more than 64 percent of White borrowers had such a score. Many factors have contributed to deflated credit scores for borrowers of color. These consumers have limited access to quality financial service providers. Black and Latino families are subjected to targeting by non-traditional and subprime lenders for unsustainable and abusive lending products, which leads to higher delinquency and foreclosure rates for these groups. Underserved consumers may also be more likely to receive a loan from a consumer finance company which would likely lower the consumer's credit score. Borrowers of color disproportionately access alternative financial service providers who do not report positive behavior to credit repositories. These consumers are also disproportionately impacted by lending discrimination, which can damage a borrower's credit score. Consumers of

111 For example, the variable "type of credit" may have a discriminatory effect as people of color have less access to prime credit and traditional lending institutions.

112 The credit record may contain too few accounts, insufficient information about payment history, or the credit information may be too old.

113 Brevoort, Kenneth P., Philipp Grimm, and Michelle Kambara. 2015. Data Point: Credit Invisibles, CFPB Office of Research, May 2015.

color, negatively impacted by America's racial wealth gap, also lack the benefits other consumers have gained as a result of wealth legacies.

As we move forward in the next decades, we must dismantle systems that leave people with insufficient or invisible credit, maximize the recognition and incorporation of alternative credit usage to determine the viability of applicants, and eradicate redlining and discrimination in the provision of mortgage lending credit.

Expanding Protected Classes under the Fair Housing Act

Throughout the nation, cities and states have recognized the urgent need to combat biases in the housing market that remain unprotected by the Fair Housing Act. These include states and localities that have passed legislation to protect people against housing discrimination on the basis of sexual orientation, gender identity, marital status, source of income, veteran or active service member status, domestic violence survivor status, or having a criminal record. Congress must add the aforementioned protected classes to the Fair Housing Act and begin to counter the unique forms of discrimination faced by members of the LGBTQ+ community, unmarried individuals, people who use federal housing or income assistance, survivors of domestic violence, and people with criminal records in the housing market.

There have been several bills in the last three meetings of Congress to expand the Fair Housing Act's protected classes. The Housing Opportunities Made Equal Act (HOME Act), introduced in the 113th Congress, adds sexual orientation, gender identity, marital status, and source of income as protected categories under the act and the Equal Credit Opportunity Act.¹¹⁴ Currently, in the 115th Congress, the proposed Equality Act provides much needed updates to protections based on sex in the Civil Rights Act of 1964, and also adds sexual orientation and gender identity to the Fair Housing Act and the Equal Credit Opportunity Act.¹¹⁵ The Fair Housing for Domestic Violence and Sexual Assault Survivors Act of 2017 amends the Fair Housing Act to prohibit discrimination against survivors of domestic violence or sexual assault.¹¹⁶ The Fair and Equal Housing Act of 2017 adds only sexual orientation and gender identity protections to the Fair Housing Act.¹¹⁷ The Landlord Accountability Act of 2017 amends the Fair Housing Act to make it unlawful to discriminate against housing voucher holders.¹¹⁸

114 H.R. 2479/S. 1242, "Housing Opportunities Made Equal Act of 2013," 113th Congress (2013-2014), available at <https://www.congress.gov/bill/113th-congress/house-bill/2479/text>.

115 H.R. 2282/ S. 1006, "Equality Act," 115th Congress (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/2282>.

116 H.R. 1963/ S. 858, "Fair Housing for Domestic Violence and Sexual Assault Survivors Act of 2017," 115th Congress (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1963?q=%7B%22search%22%3A%5B%22%5C%22fair+housing+act%5C%22%22%5D%7D&r=3>.

117 H.R. 1447/ S. 1328, "Fair and Equal Housing Act of 2017," 115th Congress (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1447/related-bills>.

118 H.R. 202, Landlord Accountability Act of 2017, 115th Congress (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/202?q=%7B%22search%22%3A%5B%22%5C%22fair+housing+act%5C%22%22%5D%7D&r=10>.

This constellation of bills to amend the Fair Housing Act is a promising reminder of the growing support to better address unabated discrimination against communities who, at best, must rely on a patchwork of state and local protections when they are discriminated against. Congress must consolidate these bills and unify to begin to chip away at discrimination that goes unaddressed throughout most of the United States.

Gentrification and Fair Housing

[Note: We do not intend this section to represent a comprehensive examination of gentrification, only to mark it as a pressing issue that must be addressed in the coming years, as gentrification in urban areas throughout the country is growing exponentially. We plan, in the next year, to release a more comprehensive paper on gentrification and fair housing.]

Gentrification is the process of redevelopment that is spurred by the influx of more affluent, mostly White individuals into previously deprived, under-resourced, low-income communities of color. Redevelopment through gentrification typically entails change in neighborhood character and culture and an increase in the cost of living that prices out original residents. Gentrification is fundamentally an economic process, yet the neighborhood transition that typically ensues is deeply racial, cultural, and sometimes ethnic, affecting Blacks, Latinos, and Asian Americans. With variations, gentrification operates as a powerful development pattern in housing markets in cities across the country.

The fair housing implications of gentrification associated with residential integration are complicated. Despite temporary increases in racial and ethnic integration as White residents move into previously non-White neighborhoods at the onset of gentrification, the resulting dislocation that occurs to the pre-existing residents as the process unfolds and market values increase further marginalizes communities of color through residential displacement. In the context of the persistent affordable housing crisis plaguing many cities across the country,¹¹⁹ displaced low-income residents are relegated to low-opportunity areas, generally fortifying entrenched racial and ethnic residential segregation. In this way, gentrification pressures ultimately reinforce patterns of segregation.

Public investments have had a direct impact in fueling gentrification. As such, public policy is ultimately driving the displacement of communities of color. Therefore, it is appropriate that local jurisdictions evaluate how their investments and public policy decisions, and resulting market changes, impact residential segregation, and how they can take action to ensure their policies ultimately promote housing choice.¹²⁰

¹¹⁹ See <http://nlihc.org/oor>.

¹²⁰ See e.g., Anne Bellows and Michael Allen, "The Fair Housing Imperative to Address the Displacement Crisis," *Civil Rights Insider* at 5-7, Winter 2018, available at: <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Civil-Rights/Civil-Rights-Winter-2018.aspx>.

Although HUD, as described in Section II, has currently suspended local governments' obligation to submit Assessment of Fair Housing plans until October 2020 or thereafter, jurisdictions may still look to HUD guidance for information on how to comply with the mandate that HUD funds are used to affirmatively furthering fair housing. In August 2016, HUD released the *Fair Housing Assessment Tool for Local Governments*,¹²¹ which provides guidance to jurisdictions that receive HUD community development funds on factors associated with residential segregation they should consider when conducting their fair housing planning processes, and it specifically advises jurisdictions to consider "displacement due to economic pressures." As such, in order for local jurisdictions to credibly certify to HUD that they are affirmatively furthering fair housing, they should consider the fair housing implications of gentrification.

The *Fair Housing Assessment Tool for Local Governments* planning guide states the following about the displacement of residents due to economic pressures:

"The term 'displacement' refers here to a resident's undesired departure from a place where an individual has been living. 'Economic pressures' may include, but are not limited to, rising rents, rising property taxes related to home prices, rehabilitation of existing structures, demolition of subsidized housing, loss of affordability restrictions, and public and private investments in neighborhoods. Such pressures can lead to loss of existing affordable housing in areas experiencing rapid economic growth and a resulting loss of access to opportunity assets for lower income families that previously lived there. Where displacement disproportionately affects persons with certain protected characteristics, the displacement of residents due to economic pressures may exacerbate patterns of residential segregation."¹²²

In administering fair housing planning, local jurisdictions must do more than analyze the processes of gentrification that impact residential segregation; they must also take action to mitigate how these processes perpetuate segregation. Communities across the country are putting forward policies to mitigate the displacement of low-income residents in gentrifying neighborhoods, and these strategies may be identified and prioritized through fair housing planning processes. California's Oakland, San Jose, and San Mateo Counties identified displacement as a barrier to housing choice in their recent fair housing planning documents.¹²³ These and other communities are identifying solutions to displacement through expanding tenant protections by implementing rent control policies and policies that restrict evictions only to instances where there is an identified just cause.

While the utility of the Fair Housing Act may be limited in addressing development processes that are not overtly motivated by prejudice, unjustified development policies and practices that have a discriminatory outcome violate the Fair Housing Act and, in

¹²¹ <https://www.hudexchange.info/resource/5133/afh-assessment-tool-for-local-governments/>.

¹²² <https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool-for-Local-Governments.pdf>, see Appendix C – Contributing Factors Descriptions, page 3.

¹²³ Say It Loud: Renters' Rights are Civil Rights, <https://shelterforce.org/2017/12/07/say-it-loud-renters-rights-are-civil-rights/>.

the course of gentrification-related displacement, may be subject to disparate impact liability. In Washington D.C., residents facing displacement from multi-family housing are pursuing litigation against developers, alleging they were being excluded as a result of redevelopment plans that significantly eliminate family-sized units (three-, four-, and five-bedroom units), which have a disproportional discriminatory impact on families.

Gentrification is one of the most powerful forces dramatically impacting neighborhood demographics in cities across the country. In the face of displacement that perpetuates entrenched patterns of segregation, fair housing practitioners can play a more prominent role in addressing the social justice implications of gentrification.

Big Data and Fair Housing

50 years ago, when the Fair Housing Act was passed, there was no way of knowing how the housing market would develop, especially with respect to technological advances and the extent to which the market has begun to leverage powerful online platforms. It was unimaginable that advertisements could target specific affinity groups on social media platforms or that pricing rates could be calibrated regionally on the basis of inputs that fluctuate daily. Similarly, it is difficult to predict what changes in the housing market may result over the next half century; however, as one looks at the horizon, it is clear that big data will reshape how housing, lending, and insurance products are advertised, priced, and managed in a number of ways.

There is growing attention among advocates regarding the role that big data and related algorithms play in marketing and pricing services in the housing, employment, and credit access markets.¹²⁴ Unfortunately, the tools used to harness this data to make predictive decisions, from review of users' web browsing practices or from other third-party data sources such as credit repositories, may result in discriminatory outcomes. These outcomes can derive from the data sources entered into the predictive tools that reinforce historic patterns of segregation, the generalization used in processing the data that can be laden with discriminatory assumptions, and additional inputs from users that may be imbued with both overt and implicit bias.

In June 2016, academic researchers, computer scientists, and journalists filed a lawsuit in the U.S. District Court for the District of Columbia against DOJ, to challenge the constitutional reach of the Computer Fraud and Abuse Act, which makes it a crime to exceed the authorized access of private websites.¹²⁵ The suit alleges that the statute prohibits researchers and others from engaging websites to analyze discrimination on the internet. In March 2018, the court denied in part and granted in part the government's motion to dismiss, allowing the case to proceed for the researchers to address the merits of one of the First Amendment claims.

¹²⁴ See e.g., Brookland Manor Litigation Fact Sheet. Washington Lawyers Committee for Civil Rights and Urban Affairs, 26 Aug. 2016, www.washlaw.org/news-a-media/506-brookland-manor-litigation-fact-sheet#_ftn12.

¹²⁵ Sandvig v. Lynch, No. 16-1368 (D.D.C. 2016), available at: https://www.aclu.org/sites/default/files/field_document/cfaa_complaint_0.pdf.

Big data cannot be allowed to undermine the application of fair housing principles in housing and related transactions. Both industry and advocates must be mindful of the intentional and implicit bias big data may contain. This will clearly be an issue to address in the next 50 years under the Fair Housing Act.

Responsible Advertising in the Digital Advertising Space

The Fair Housing Act prohibits discrimination in the advertisement of housing and housing-related opportunities. Under the act, it is illegal to specify a preference or limitation or to change the terms and conditions of housing based on someone's protected characteristics. It is similarly illegal to target or distribute ads on the basis of protected class. These can include expressing a restriction against renting to families with children or advertising a housing opportunity using phrases like "English speaker only," for example. The act prohibits these forms of discrimination, including in online advertising platforms which have proliferated in the digital age as the primary means for the public to access housing ads.

Online advertising platforms have been the subject of much concern among fair housing advocates. In the rental space, enforcement actions against Craigslist¹²⁶ and Roommates.com¹²⁷ for allowing the posting of discriminatory advertisements have put online platforms on the radar as the public increasingly turns to the internet to begin the search for their new home.

Facebook – Discriminatory Targeting of Housing Advertisements

In October 2016, the investigative news nonprofit ProPublica published an article reporting that Facebook's online platform enabled advertisers to exclude Facebook users assigned Black, Hispanic, and other "ethnic affinities" from seeing advertisements in the housing category published through its advertising portal.¹²⁸ NFHA and other civil rights partners engaged Facebook to indicate that its advertising features appeared to violate the Fair Housing Act and state laws. In February 2017, Facebook issued a statement committing to end the use of "ethnic affinity marketing" for ads that it identified as offering housing, employment, or credit. Facebook also said it would require housing, employment, and credit advertisers to "self-certify" that their ads complied with anti-discrimination laws.¹²⁹

In November 2017, more than a year after its original report, ProPublica published a second story revealing that Facebook continued to create content enabling housing advertisers to exclude users by prohibited categories, such as race and national origin.¹³⁰

126 See Julie Bosman, "Craigslist is Accused of Bias in Housing Ads," The New York Times, Feb. 23, 2006, available at <https://www.nytimes.com/2006/02/23/business/media/craigslist-is-accused-of-bias-in-housing-ads.html>.

127 For information on *Fair Housing Council of San Fernando Valley et al v. Roommates.com, LLC*, see <https://caselaw.findlaw.com/us-9th-circuit/1592538.html>.

128 Julia Angwin and Terry Parris Jr., Facebook Lets Advertisers Exclude Users by Race, ProPublica.org (Oct. 28, 2016), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>.

129 Improving Enforcement and Promoting Diversity: Updates to Ads Policies and Tools, newsroom.fb.com, (Feb. 8, 2017), <https://newsroom.fb.com/news/2017/02/improving-enforcement-and-promoting-diversity-updates-to-adspolicies-and-tools/>.

130 Julia Angwin, Ariana Tobin and Madeleine Varner, Facebook (Still) Letting Housing Advertisers Exclude Users by Race, propublica.org (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discriminationhousing-race-sex-national-origin>.

ProPublica reported that it had bought dozens of rental housing ads on Facebook and asked that they not be shown to certain categories of users, such as African Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina, and Spanish speakers. Facebook had approved all of these ads.

In light of Facebook's broken promises, NFHA and three of its partners – Fair Housing Justice Center, Housing Opportunities Project for Excellence, Inc., and the Fair Housing Council of Greater San Antonio – conducted an investigation of Facebook. Based on the results of the investigation, the organizations filed a lawsuit against Facebook, Inc. in federal court in New York City in March 2018, alleging that Facebook's advertising platform enables landlords and real estate brokers to exclude families with children, women, and other protected classes of people from receiving housing ads. As the complaint explains, while Facebook had previously removed some of the discriminatory options identified by ProPublica, it continues to violate fair housing laws that prohibit discrimination in other ways. With almost 2 billion users, Facebook customizes the audience for its millions of advertisers based on its vast trove of personalized user data.

NFHA and its partners created a non-existent realty firm and then prepared dozens of housing advertisements that they submitted to Facebook for review. Facebook's advertising platform indicated specific audience groups that could be excluded from receiving the ads, including families with children, moms with children of certain ages, women or men, and other categories based on sex or family status. The lawsuit alleges that Facebook created pre-populated lists that make it possible for its housing advertisers to exclude home seekers from viewing or receiving rental or sales ads because of protected characteristics, including family status and sex. The investigations also revealed that Facebook allows housing advertisers to exclude users of certain interest categories from receiving ads. For example, if Facebook users demonstrate an interest in disability-based pages and topics, such as disabled veterans or accessible parking permits, an advertiser can exclude them from viewing a housing ad. Similarly, if Facebook users demonstrate an interest in pages and topics that relate to national origin, such as English as a second language, advertisers are able to exclude these users as well. Both disability and national origin are protected classes under the Fair Housing Act.

Making housing options unavailable to members of these protected classes would violate the Fair Housing Act. NFHA and its partners allege that Facebook's practices violate federal and local fair housing laws that bar discrimination in housing advertising, and they ask the court to: declare that the practice of excluding Facebook users from receiving housing ads on the basis of sex, family status, and any other legally protected categories violates the Fair Housing Act and the New York City Human Rights Law; issue an injunction barring Facebook from continuing to engage in discriminatory housing advertising; and require Facebook to change its advertising platform and its practices to comply with fair housing laws, including by eliminating checkboxes, selection categories, and other content that enable advertisers to restrict access to housing advertisements.

Online Advertising Reform and Amending the Communications Decency Act

Seventy-two percent of those searching for an apartment utilize the internet as the starting point of their search, and 90 percent of home buyers search online at some point in the home buying process.¹³¹ This makes it increasingly important to ensure that adequate safeguards exist to ensure online ad platforms are subject to fair housing and fair lending laws.

It is essential that Congress update existing law that has shielded online entities from the requirements of the Fair Housing Act, especially as it relates to advertising content. Congress must amend the Communications Decency Act (CDA)¹³² by expressly stating that the CDA itself, and specifically § 230, does not give immunity from the Fair Housing Act to any platform that allows for the publishing of discriminatory third-party content. In doing so, Congress will effectively ensure that the protections of the Fair Housing Act and other civil rights laws apply to current and future popular forums for housing advertisements, online or otherwise.

HUD, DOJ, the Federal Trade Commission, and the CFPB must also build a strong regulatory framework to better protect consumers against steering and other discriminatory online advertising behaviors by online advertising platforms, mobile app companies, and all other online entities. These agencies should form a joint task force with the advisement of fair housing and civil rights advocates, as well as advertising, privacy, Artificial Intelligence, and machine learning experts, to investigate areas in which online entities may allow discriminatory advertisements and other illegal behavior. This task force must conduct this analysis and offer policy and legislative recommendations to address discriminatory advertisements in housing and other civil rights abuses.

Online advertising platforms, mobile app companies, and all other online entities must also begin to better explain, in plain language, to consumers what their data is used for and how their systems allow for the targeting of ads. They must also expend the necessary resources to closely monitor the language in advertisements and audience targeting or exclusion by third parties that use their services.

Only by initiating these efforts can we as a nation begin to meet the pressing fair housing challenges of the digital age. These efforts include the monitoring of amorphous and multi-service online entities, many of which provide housing or housing-related advertisements. This will require dedication and commitment to transparency, equity, and civil rights from lawmakers and public servants, and strong multi-issue collaboration among fair housing, civil rights, and other advocates.

Accessibility, Affordability, and the Aging Population

It has been well documented that the nation is currently experiencing a housing affordability crisis. As rents tighten across most metropolitan areas and the nation's housing stock continues to age, there are serious concerns about meeting the housing needs of people with disabilities now and in the future. Although the Fair Housing

¹³¹ http://costarmultifamily.com/google-whitepaper/Apartment_GoogleWhitePaper.pdf.

¹³² Communications Decency Act of 1966, 47 U.S.C. §§ 230, 560, 561 (2006).

Act requires that housing with four or more units designed and constructed for first occupancy after March 13, 1991, be accessible, people with disabilities still face tremendous architectural barriers to safe and affordable housing. As this report states in Section III, disability-based complaints comprise the largest share of reported housing discrimination complaints each year. A sizeable portion of these complaints allege design and construction violations in rental housing and condo communities. As these trends continue, the demand for accessible and affordable housing in the United States will only grow as the population ages and more persons are likely to have a disability.

People with disabilities are forced to manage their way through a housing market where much of the housing stock is not accessible or affordable to them.¹³³ Newer developments are more likely to provide accessible features; however, since people with disabilities are more likely to be of lower and moderate income, the lack of development of units that serve low- and moderate-income renters limits housing options for this population.¹³⁴ In 2014, the poverty rate for people with a disability aged 18 to 64 was 28.5 percent,¹³⁵ more than twice the national rate,¹³⁶ and people with disabilities earn 37 percent less on average than people without disabilities.¹³⁷ As a result of this inequality, people with disabilities are often forced to choose between substandard housing or to live without necessary accessibility features.

According to the 2013 American Community Survey 5-Year Estimates, the majority of active housing stock was built before the design and construction requirements of the Fair Housing Act came into effect. Of the total occupied housing stock, nearly 73 percent was built before 1990.¹³⁸ Absent any structural modifications to older housing, which would trigger the act's design and construction requirements and compliance with those requirements, the majority of this housing remains inaccessible to people with disabilities. In fact, in 2015 HUD reported that just under one third of the nation's housing is potentially modifiable to meet the accessibility needs of people with disabilities, and less than one percent of housing was wheelchair accessible as of 2011.¹³⁹ According to a 2017 report from Harvard's Joint Center for Housing Studies (Joint Center), as of 2011, only three percent of rental units provide the three basic universal features that assist people with disabilities to fully and safely enjoy a home: extra-wide hallways and

133 <http://www.tacinc.org/media/52012/Priced%20Out%20in%202014.pdf>.

134 Joint Center for Housing Studies of Harvard University, *America's Rental Housing 2017*, p. 16, available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_americas_rental_housing_2017.pdf.

135 DeNavas-Walt, Carmen and Bernadette D. Proctor, *Income, Poverty, and Health Insurance Coverage in the United States: 2014*, p. 16, U.S. Census Bureau, U.S. Government Printing Office, Washington, DC, 2015. Available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

136 The United States Census estimates that in 2016, the national poverty rate was 12.7 per cent. See Semega, Jessica L., Kayla R. Fontenot, and Melissa A. Kollar, U.S. Census Bureau, Current Population Reports, P60-259, *Income and Poverty in the United States: 2016*, available at <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

137 Michelle Yin, Dahlia Shaewitz, and Mahlet Megra, American Institutes for Research, *An Uneven Playing Field: The Lack of Equal Pay for People with Disabilities*, p. 3, December 2014, available at https://www.air.org/sites/default/files/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities_Dec%2014.pdf.

138 Data Based on U.S. Census Bureau; 2013 American Housing Survey C-01-AH; using American FactFinder <<http://factfinder.census.gov>>; (20 April 2018).

139 Luke Bo'sher, Sewin Chan, Ingrid Gould Ellen, Brian Karfunkel and His-Ling Liao, *Accessibility of America's Housing Stock: Analysis of the 2011 American Housing Survey (AHS)*, p. 2, New York University Furman Center, prepared for the U.S. Department of Housing and Urban Development Office of Policy Development and Research, May 2015, available at <https://www.huduser.gov/portal/sites/default/files/pdf/accessibility-america-housingStock.pdf>.

doors; bedrooms and bathrooms on the entry level; and an entrance with no steps.¹⁴⁰ These statistics are staggering, but the demand for accessible housing will only grow as the population continues to age. People ages 39 and under make up over half of the current U.S. population. If we are to anticipate the needs of some of the largest and most diverse generations this country has seen, it will mean addressing the need for more affordable and accessible housing in areas of opportunity in the years to come.

As the nation's population ages, a larger proportion of it becomes more likely to have a disability and require accessible housing. The 2016 American Community Survey shows that people ages 35-64 make up 12.9 percent of the total population with a disability; people ages 65-75 make up 25.4 percent of people with disabilities; and people 75 and older make up half of all people with disabilities.¹⁴¹ Recent population estimates show that the size of the population ages 54 years and younger (which includes Gen Zers, Millennials, and Gen Xers) is 2.7 times that of people 75 and older.¹⁴² The Joint Center notes that there is already cause for concern among people aged 75 and older. Fifty-two percent report living in single-family homes and in apartment buildings with 2-4 units, both of which are less likely to have basic universal features that would assist this group to age safely in place.¹⁴³ Unless the stock of affordable and accessible units catches up to reflect the changing national age distribution, younger generations will likely face even greater design and construction barriers as they grow older.

The Fair Housing Act provides strong protections for people with disabilities and has clear accessible design and construction requirements. However, unless the federal government ramps up its enforcement of these requirements, these trends in housing accessibility will grow and the design and construction requirements of the Fair Housing Act will continue to be ignored by housing developers. Policymakers must not only monitor the number of accessible units, but they must better incentivize the development of affordable accessible housing. Only then can the growing housing needs of people with disabilities be met.

Addressing the Increase in Hate Crimes

Leading up to and following the 2016 presidential election, there was a well-documented increase in hate activity across the country,¹⁴⁴ and bias-motivated hate activity continued in 2017. Many of these hate actions occurred inside or on the property of the victim's place of residence, which means that they were likely violations of the Fair Housing Act.

140 Joint Center for Housing Studies of Harvard University, *America's Rental Housing 2017*, p. 16, available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_americas_rental_housing_2017.pdf.

141 U.S. Census Bureau, "Disability Characteristics: 2012-2016 American Community Survey 5-Year Estimates," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_S1810&prodType=table.

142 Data based on 2016 American Community Survey 5-Year Estimates, available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

143 Luke Bo'sher, Sewin Chan, Ingrid Gould Ellen, Brian Karfunkel and His-Ling Liao, *Accessibility of America's Housing Stock: Analysis of the 2011 American Housing Survey (AHS)*, p. 16, New York University Furman Center, prepared for the U.S. Department of Housing and Urban Development Office of Policy Development and Research, May 2015, available at <https://www.huduser.gov/portal/sites/default/files/pdf/accessibility-america-housingStock.pdf>.

144 SAALT reports a 64% increase in hate activity towards South Asian, Muslim, Sikh, Hindu, Middle Eastern and Arab individuals (<http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.) Following the election, SPLC documented over 1,000 hate actions in just the one month after the presidential election, and overall, FBI hate crimes increased from 2015 to 2016 (<https://ucr.fbi.gov/hate-crime/2016/>).

Year after year, FBI data on hate crimes reflects that the most common place where a hate crime occurs is in or near a place of residence. In 2016, 27.3 percent of hate crimes occurred in or near homes.¹⁴⁵ In addition to these hate crimes, other hate activities that may not have constituted a criminal offense are covered under the Fair Housing Act. We refer to such behavior as “housing-related hate activity.” This term encompasses all activity that may coerce, intimidate, threaten, injure or interfere with persons attempting to exercise and enjoy their fair housing rights because of their race, color, ethnicity, religion, gender, disability, or because they have children.

In 2017, there was no shortage of examples of housing-related hate continuing at elevated levels. Several fair housing organizations reported complaints from Latino/a clients who were being harassed or displaced by frightening language related to immigration status. Others reported an increase in Ku Klux Klan flyer distribution as well as swastikas and the N-word spray-painted on homes or in neighborhoods where Black and Jewish residents live or go to school. There were several reports of routine harassment of transgender individuals by both neighbors and property management, and instances where families were targeted because they are or were perceived to be Muslim.

The Fair Housing Act also covers the many incidents of hate that have occurred in on-campus dormitories and student housing. For example, in November 2017, University of Hartford student Chennel ‘Jazzy’ Rowe, a young Black woman, reported that her roommate was harassing her, intimidating her, and even endangering her physical health because of Jazzy’s race.¹⁴⁶

Because the federal Fair Housing Act makes it unlawful to injure, intimidate, or interfere with any person in the exercise or enjoyment of his or her fair housing rights (42 U.S.C. § 3631), victims of hate actions may obtain additional relief from extremely stressful and harmful situations by exercising their fair housing rights. Civil remedies in housing-related hate activity cases may include injunctive relief, compensation for economic loss, and monetary compensation for injury, including emotional distress. While the Fair Housing Act is a civil law, a separate provision of the U.S. Code imposes criminal penalties for housing-related hate activity. 42 U.S.C. § 3631 provides criminal penalties, including fines and prison time, for those who commit housing-related hate actions against members of protected classes.

Fair housing organizations can be great resources to react to individual acts of housing-related hate by supporting victims and helping them pursue their rights. Fair housing organizations do so by advocating for the victim, generating media attention and public support, coordinating with law enforcement, and by assisting them to pursue enforcement of their rights under the law. They can also be leaders to combat hate activity in a broader manner. For example, in Indiana, one of only five states that does not have a hate crime law in place, the Fair Housing Center of Central Indiana has provided leadership by spearheading the launch of the Central Indiana Alliance Against Hate. In 2017, the Alliance launched promotional materials and a hate-tracking database, and it held the Inaugural Indiana Response to Hate Conference.

¹⁴⁵ <https://ucr.fbi.gov/hate-crime/2016/topic-pages/locationtype>.

¹⁴⁶ <https://www.nytimes.com/2017/11/01/us/brianna-brochu-hartford.html>.

Fair housing and other organizations must have a response system in place when acts of hate and harassment occur that provides support and resources to victims. They must also be positioned to assist those persons with filing complaints under the Fair Housing Act, in addition to other criminal measures that may be taken.

Incorporating Fair Housing into Disaster Recovery

Large-scale disasters have a profound impact on the communities in their paths, wreaking havoc on the natural and built environments, displacing large numbers of residents, weakening the social and cultural fabric, and disrupting local and regional economies. Disasters create many challenges, not least of which is how best to use limited resources to rebuild and recover. Those resource allocation decisions, in turn, can have their own profound impact on the post-disaster life of the community, including determining who is able to return and rebuild their lives and to what extent the rebuilding process creates greater resilience in the face of future disasters. Disasters force us to confront questions about whether to rebuild in ways that perpetuate segregation, a condition that plagues many communities, or whether to take a different approach. Can we use the federal dollars that flow to communities hit by disasters – often sums much greater than the typical annual allocation of housing and community development dollars – to help overcome the harms caused by segregation, bringing new investments in housing, infrastructure, and economic development to disinvested communities, and creating new affordable housing in opportunity-rich neighborhoods?¹⁴⁷

The Fair Housing Act mandates the latter approach, but it is not necessarily the one that state and local officials, or HUD and other federal agencies, are inclined to adopt. Fair housing advocates have a vital role to play in the recovery and rebuilding of disaster-affected areas. They and their allies must promote a vision of fairness and equity and hold officials accountable for living up to the obligation that comes along with those federal disaster recovery dollars: creating diverse and inclusive communities.

2017 Disasters

The United States experienced an unusual number of severe weather-related events in 2017, causing numerous deaths, widespread damage to land and property, disruption to people's lives, and stress on local economies. The process of recovering and rebuilding from these disasters will likely take years, and if past experience is any guide, it will be necessary to take affirmative steps to ensure that people of color, people with disabilities, and people whose first language is not English are not left behind in that process. Clear guidance and strict oversight will be needed to accomplish that.

Three Category 4 hurricanes (defined as storms with sustained wind speeds of 130-156 miles per hour) made landfall in the United States in 2017. The first was Hurricane

¹⁴⁷ For further discussion on how the disaster recovery process may perpetuate patterns of residential segregation and inequality, see "Rigging the Real Estate Market: Segregation, Inequality and Disaster Risk," by Stacy Seicshnaydre (Tulane Law School) Robert A. Collins (Dillard University) Cashauna Hill (Greater New Orleans Fair Housing Action Center) Maxwell Ciardullo (Greater New Orleans Fair Housing Action Center), *The Data Center*, April 5, 2018; and also Morgan Williams and Nisha Arekapudi, "Disasters' Long-Term Impact on Fair Housing: Rebuilding as an Engine to Perpetuate or Challenge Entrenched Segregation," (*ABA Housing and Community Development publication*, 2013).

Harvey, which made an initial landfall in Texas on August 25 and lasted for 117 hours. In the process, it dumped 51.88 inches of rain on the Houston area, the largest rainfall from a single storm on record and as much rain as the area typically gets in an entire year.

Less than two weeks later, on September 6, Hurricane Irma struck the U.S. Virgin Islands, and on September 10, Irma made landfall in Florida, devastating parts of the Florida Keys and causing widespread damage throughout southern Florida. Irma was the second-strongest hurricane on record in the Atlantic Basin, and the 37 hours over which it sustained wind speeds of 185 miles per hour were the longest of any cyclone anywhere.

Ten days after Irma hit Florida, on September 20, Hurricane Maria struck a devastating blow to both the U.S. Virgin Islands and Puerto Rico. The 35 inches of rain it dumped on Puerto Rico caused some rivers to rise as much as 20 feet in a few hours. The storm destroyed homes, commercial structures, roads, and bridges and caused an island-wide power outage. Five months later, nearly a third of the island's residents still lacked power, with an island-wide blackout occurring six months later in April 2018.¹⁴⁸ The level of destruction, extended lack of electricity, and slow pace of rebuilding have led an estimated 135,000 or more Puerto Ricans to relocate to the mainland, primarily in Florida, New York, Massachusetts, Connecticut, New York, Pennsylvania, and New Jersey.¹⁴⁹

According to the National Oceanographic and Atmospheric Agency (NOAA), Hurricanes Harvey, Irma, and Maria are three of the five costliest hurricanes in U.S. history.¹⁵⁰ NOAA estimates the total (insured and uninsured) losses from these storms at \$265 billion (\$125 billion for Harvey, \$90 billion for Maria, and \$50 billion for Irma). Those numbers only begin to give a sense of the level and extent of destruction the storms caused in the communities they struck.

Hurricanes were not the only disasters to strike in 2017. Wildfires were also severe, particularly in California, where, according to CalFIRE (the state's firefighting agency), more than 9,000 fires raged over 1.2 million acres, an area the size of Delaware.¹⁵¹ The fires destroyed nearly 10,000 structures and caused 48 deaths. The largest and most destructive of these was the Tubbs fire, in Sonoma County. In some parts of the state, heavy rainfalls in areas previously destroyed by fire led to dangerous and destructive mudslides, causing further damage and loss of life.

148 <https://www.nytimes.com/2018/04/18/us/puerto-rico-power-outage.html>.

149 <https://centrop.r.hunter.cuny.edu/events-news/news/new-report-estimates-more-135000-puerto-ricans-have-relocated-us-six-months-after>.

150 <https://coast.noaa.gov/states/fast-facts/hurricane-costs.html>.

151 http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf.

Fair Housing Lessons from Past Disasters

With disasters of this scale, recovery is a long-term effort. Congress has appropriated some \$26 billion dollars for disaster recovery activities for these 2017 events. The states that will be receiving those funds are largely still in the planning stage for those efforts, making this the time to ensure that their plans will result in a fair and equitable recovery process. For this purpose, there is much to be learned from past disaster recovery efforts, as the recovery process for virtually every disaster since 2005 has given rise to fair housing complaints, forcing states to reallocate hundreds of millions of dollars to remedy discriminatory elements of their original plans.¹⁵² In each of these cases, had there been effective guidance during the planning process and oversight during the implementation process, there would have been no need to file complaints. Residents would have received an equitable share of the recovery funding sooner, and the rebuilding would have advanced more quickly – an outcome that would have been to everyone’s benefit.

Hurricane Katrina struck the Gulf Coast in 2005, causing widespread destruction and displacement from Louisiana to Alabama. In its wake, numerous fair housing problems arose in the affected states. Louisiana’s adoption of a discriminatory formula for determining the amount of Community Development Block Grant-funded assistance for which homeowners would be eligible led NFHA and the Greater New Orleans Fair Housing Action Center (GNOFHAC) to file a lawsuit under the Fair Housing Act against HUD and the State. As a result of the settlement of that suit, nearly \$500,000 in additional funds were made available to help an additional 13,000 low-income homeowners, predominantly homeowners of color, rebuild their homes.

St. Bernard Parish, immediately adjacent to New Orleans, enacted a series of policies and practices that had a racially discriminatory effect. The most notorious of these was the so-called “blood relative” ordinance, which required property owners in the Parish to get express permission from the Parish to rent single-family homes to anyone other than a blood relative. Since the Parish population was over 90 percent White, that ordinance had the effect of prohibiting rentals to people of color. These and other discriminatory actions prompted legal action by GNOFHAC, a HUD investigation and a DOJ lawsuit. The court found the Parish to be in violation of the Fair Housing Act, requiring it to pay over \$5 million in damages and attorneys’ fees and to cease its discriminatory actions.

Mississippi allocated rebuilding assistance primarily to people whose homes had sustained damage from water, which had inundated the predominantly White communities along the coast, rather than from wind, which affected the communities of color further inland. Then, the governor diverted funds intended for housing recovery to expansion of the port in Gulfport, prompting the Gulf Coast Fair Housing Center, the Mississippi Center for Justice, and the Mississippi Branch of the NAACP to bring a

¹⁵² An excellent overview of the intersection between fair housing and disaster recovery issues can be found in a September 15, 2015 White Paper issued by Texas Appleseed, “Lessons from Texas: 10 Years of Disaster Recovery Examined,” by Madison Sloan and Deborah Fowler, available at https://www.texasappleseed.org/sites/default/files/TexasAppleseedHurricane_WhitePaper_02c_Final.pdf.

lawsuit against HUD for approving that use of the funds. The settlements in that case required the state to direct \$132 million to help low-income homeowners rebuild.

The disaster recovery plans adopted by the State of Texas after Hurricanes Ike and Dolly, which struck that state in 2008, also gave rise to a Fair Housing Act complaint. That complaint was brought by two nonprofit organizations, Texas Appleseed and the Texas Low Income Housing Information Service (also known as Texas Housers), and resulted in the state entering into a Voluntary Compliance Agreement¹⁵³ that required it to take a series of steps to ensure that it would comply with fair housing requirements and treat historically underserved communities fairly in spending the more than \$3 billion in federal disaster recovery funds it received. The agreement called for the state, among other things, to update its Analysis of Impediments to Fair Housing Choice to reflect the impact of the storms, provide mandatory training to grantees on affirmatively furthering fair housing and civil rights compliance, establish data collection and reporting systems for monitoring compliance with AFFH and civil rights requirements, and establish a series of programs designed to ensure that its disaster recovery plans furthered fair housing. These addressed affordable rental housing, one-for-one replacement of public housing, a disaster recovery demonstration project in the Colonias areas,¹⁵⁴ a title clearance and legal assistance program, a Moving to Opportunity program for Housing Choice Voucher holders, provisions for access to housing for people with disabilities, and a number of other measures.

Superstorm Sandy struck the Northeast U.S. in 2012. The following year, the New Jersey Fair Share Housing Center and others filed a complaint against the State of New Jersey, alleging violations of the Fair Housing Act and Title VI. HUD's investigation found that Blacks and Latinos were disproportionately denied recovery and rebuilding assistance and that the state had not conducted sufficient outreach to communities of color, low-income people, and people with limited English proficiency (LEP). The settlement in that complaint, reached in 2014, required New Jersey to provide \$240 million in direct housing assistance to low-income households, re-evaluate applications for assistance it had previously denied, adopt a comprehensive language access plan, and conduct additional outreach to LEP residents.

As Texas, Florida, Puerto Rico, the U.S. Virgin Islands, and California develop their disaster recovery plans for the storms and wildfires that caused so much damage in their jurisdictions, they would be smart to learn from these past efforts and take deliberate steps to incorporate fair housing and other equitable development approaches in order to avoid the mistakes of the past.

¹⁵³ <https://www.texasappleseed.org/sites/default/files/ApprovedConciliationAgreement.pdf>.

¹⁵⁴ Colonias are predominantly low-income unincorporated areas located in the U.S.- Mexico border region.

Interagency Guidance: Five Steps Recommended to Advance Civil Rights in Disaster Situations

These and other problems in the use of federal disaster recovery funds prompted a number of federal agencies, at the urging of NFHA and a number of our civil rights partners, to collaborate on guidance to help jurisdictions comply with Title VI of the Civil Rights Act of 1964 in future disaster recovery efforts.¹⁵⁵ Title VI prohibits discrimination based on race, color, or national origin (including limited English proficiency) by recipients of federal financial assistance, including states and localities that receive federal disaster recovery funds. Published jointly in 2016 by the Departments of Justice, Homeland Security, Housing and Urban Development, Health and Human Services, and Transportation, the guidance focuses on five key steps that recipients of federal financial assistance should take to ensure their disaster recovery efforts comply with Title VI. It directs readers to several helpful resources and describes “promising practices” for the jurisdictions that will be receiving federal assistance to recover from the 2017 disasters, and for fair housing advocates and others who want to ensure that all members of the affected communities can share in the recovery, without regard to race, color, or national origin.

Step #1: Reaffirm a commitment to protecting civil rights. The first step recommended by the interagency Title VI guidance is for recipients to reaffirm their commitment to non-discrimination protections by communicating this commitment internally within their agencies as well as to external stakeholders. This can be done through training, policies, outreach, information-sharing, and posting of non-discrimination statements in public facilities and on public websites, among other means.

Step #2: Engage with the affected groups. The second step is for recipients to engage with diverse racial, ethnic, and LEP populations, either directly or through community and faith-based organizations, civil legal aid groups, and ethnic media outlets. This should begin before disaster strikes, and this engagement can help inform the best ways to ensure that these groups have access to the information and resources they need in the lead-up and aftermath of a disaster.

Step #3: Provide meaningful access for LEP individuals. The third step is to provide meaningful access to LEP individuals, assessing the language needs of LEP individuals in the service area, creating a language access plan, and making language services – including in-person and telephonic interpretation, translation services, monolingual communications in languages spoken by LEP persons, and sight-translation – available in all public-facing programs or activities. Relevant documents should be written in plain and simple English, at appropriate literacy levels, that can be translated into languages spoken by LEP individuals in the recipient’s service area.

¹⁵⁵ <https://www.justice.gov/crt/fcs/EmergenciesGuidance>.

Step #4: Include immigrant communities. Fourth, recipients should include immigrant communities in preparedness, response, mitigation, and recovery efforts. They should share information, in the most prevalent languages spoken in the affected areas, about eligibility requirements for disaster-related programs and services, including information about any immigration restrictions that may affect eligibility. Further, they should provide training and reminders to staff, including first responders and those providing benefits, about the prohibition on discrimination and instruct them not to inquire about immigration status unless necessary for determining an individual's eligibility for a particular public benefit. And they should state publicly that they will not engage in immigration-related enforcement activities in connection with their disaster efforts.

Step #5: Collect, analyze, and share publicly relevant data about the community. Finally, the guidance recommends that recipients collect and analyze data about the race, color, national origin, languages spoken by LEP populations, and other demographic information about their communities in order to address potential barriers that may have an unlawful discriminatory impact on disaster-related activities, including recovery efforts. It also recommends sharing that data with community organizations, nonprofits, advocacy groups, and local leaders to determine what populations were affected by the disaster, and as part of a larger effort to collect other anecdotal and qualitative data necessary for formulating recovery and mitigation plans.

Don't forget fair housing. In addition to Title VI, recipients of federal disaster recovery funds must also ensure that their programs and activities affirmatively further fair housing, which means they must not discriminate against any of the seven protected classes under the federal Fair Housing Act (which includes the three classes protected under Title VI, race, color, and national origin, as well as religion, sex, family status, and disability). They also must not perpetuate existing patterns of segregation. Fair housing advocates are tracking the proposed plans of the states affected by the 2017 disasters to ensure that they comply with both Title VI and the Fair Housing Act.

It should be noted that one of the challenges faced by both fair housing advocates and the states and localities that are drafting disaster recovery plans is the difficulty in obtaining the data needed to identify potential fair housing or civil rights issues. Despite the fact that it has non-discrimination requirements under the Fair Housing Act, Title VI, and the Stafford Act, FEMA does not collect any information about the protected class characteristics of people applying for emergency assistance or the residents of the properties for which it makes damage assessments. Some judgments can be made about the characteristics of people affected by disasters by matching up data from FEMA, HUD, and the Census, but this is a technically challenging and time-consuming task. HUD apparently does some of this cross-tabulation and shares the results with the states to assist in planning, but it does not make that data available to the public. Once states begin to disburse disaster recovery funds to residents, it is challenging for

the public to get access to the data needed to determine whether those benefits are being awarded in a non-discriminatory fashion.

Troubling Signs of Potential Fair Housing Problems in 2017 Disaster Recovery

First up is the State of Texas, which submitted a proposed disaster recovery plan for Hurricane Harvey for HUD approval on March 8, 2018.¹⁵⁶ This plan covered the initial \$57.6 million that HUD allocated for Texas' recovery effort, and it is expected to be the basis for further plans that will determine the spending of the next \$5 billion of Hurricane Harvey recovery dollars¹⁵⁷ that Texas will receive. That \$5 billion is part of the \$35.4 billion in CDBG-Disaster Recovery funds that Congress has appropriated for the 2017 disasters. With much more disaster recovery funding coming down the pike, the approach taken in Texas may influence the steps taken in other states.

A national coalition of civil rights and other organizations, as well as NFHA members in Texas, evaluated the draft plan, and both groups came to the same conclusion: the plan falls far short of ensuring that recovery efforts in Texas will be carried out in a manner that is fair and non-discriminatory.

NFHA worked with the Lawyers' Committee for Civil Rights Under Law and a coalition of 25 national civil rights groups and 51 state and local groups to review and submit comments on Texas' first draft plan. That review found that Texas failed to take many of the steps recommended in the interagency guidance to protect the civil rights of Texans. In some cases, these failures also constitute a failure to adhere to requirements under other laws, such as the CDBG statute or the Fair Housing Act.

One such failure was the absence of any indication in the proposed plan that Texas had or would conduct outreach to or otherwise encourage participation in the planning process by low- and moderate-income people or people of color. This violates the CDBG requirements and sets Texas up for potential Title VI violations as well.

Also problematic was the state's approach to data. While it had received some data from FEMA and other sources about estimated property damage and individual applications for FEMA disaster assistance, the state did not share this information with the public to help inform public comments on the plan. Nor had the state collected, reviewed, or shared any relevant data on the race, color, or national origin of people in the geographic areas affected. These steps are called for not only under Title VI, but also under HUD's program requirements. In addition, the data that the state proposed to release in the future to inform the public about progress in recovery efforts are not sufficient to allow a meaningful assessment of the extent to which either the state or its sub-recipients are fulfilling their civil rights obligations.

¹⁵⁶ <http://texasrebuilds.org/Documents/TX%20Harvey%20Action%20Plan%2057%20mil%20-%20Final%203-6-18.pdf>.

¹⁵⁷ <https://www.gpo.gov/fdsys/pkg/FR-2018-02-09/pdf/2018-02693.pdf>.

Another aspect of the state's proposed plan that fell short with respect to fair housing and civil rights was its provisions for access by LEP individuals. The state initially published the proposed plan only in English. Subsequently, it published a version in Spanish, but not in any other languages, despite the fact that after Hurricane Dolly, which affected many of the same geographic areas, Texas published a Vietnamese-language version of the disaster recovery plan it was proposing at the time. Its failure to do so now creates significant barriers for non-English-speaking residents to understand what was being proposed and offer meaningful input.

In addition to other failures to adhere to Title VI guidance, the Texas disaster recovery plan raised fair housing concerns. In particular, it failed to incorporate any of the provisions of the (still operational) programs that Texas put in place as part of its settlement of Fair Housing Act violations after Hurricanes Ike and Dolly. It also failed to address the fact that the City of Houston had not yet resolved the Title VI violations that HUD had found a year earlier, which were based on problems with segregation in the siting of public and assisted housing in that city. While that violation remained unresolved, Houston could not legitimately certify that it was in compliance with its civil rights obligations, rendering it ineligible to receive CDBG funding.

The coalition's letter made a number of recommendations for steps Texas should take to address these shortcomings, ensure that its disaster recovery plan complied with civil rights requirements, and, more importantly, ensure that all Texas residents would be treated fairly in the recovery process.

NFHA's five member organizations in Texas (Austin Tenants Council, Fair Housing Council of Greater San Antonio, Greater Houston Fair Housing Center, Inclusive Communities Project, and North Texas Fair Housing Center) and several of their allies also commented on Texas' proposed Hurricane Harvey recovery plan. Their comments echoed many of the same themes and addressed a few others. They stressed the need to give the public timely access to relevant data along with ample time and opportunity to provide input on the proposed plan, including holding public hearings in the communities hardest hit by the hurricane. They also recommended bolstering the plan's provisions for affirmatively furthering fair housing, requiring Houston to resolve its outstanding Title VI violations, and taking some specific steps to address the needs of people with limited English proficiency, people with disabilities, renters – especially low- and moderate-income renters – who are disproportionately people of color, and people who were homeless before the hurricane.

Other recommendations spoke to the need to make sure that assistance is provided to homeowners in a non-discriminatory manner, is structured to support the state's resilience goals, and that resources for infrastructure are allocated equitably. This last recommendation recognizes the disparities in storm water management infrastructure in different neighborhoods, particularly in Houston, where many communities of color have only open ditch drainage that is not up to the task of handling the flow of water

from a major storm, let alone a hurricane. This storm water management issue is currently the subject of a Title VI discrimination complaint filed with HUD by Texas Housers, which has documented this problem extensively.

HUD has not yet determined whether to accept the plan proposed by Texas or whether to require the state to make changes to address these issues. From a fair housing and civil rights perspective, the number of significant shortcomings in Texas' proposed plan does not bode well for a recovery process that will be equitable and non-discriminatory for all Texans. The state should learn from its past mistakes, act now to revise its plan to better serve the needs of its residents, and avoid unnecessary delays in the flow of funding that may occur if it does not make needed revisions to address civil rights concerns. If the state fails to act, then HUD must require such changes. Only then will HUD be living up to its own requirements to manage its programs in a manner that is consistent with its fair housing obligations.

Florida, Puerto Rico, and the U.S. Virgin Islands are all in line to receive soon substantial sums of disaster recovery funds from the federal government, and they are working on their own disaster recovery plans now. It remains to be seen whether they will avoid the shortcomings of the process as it has played out in Texas.

SECTION VI. RECOMMENDATIONS

Housing discrimination and segregation are serious problems in this nation, and they merit serious attention. While the housing discrimination and segregation we see across the country today are widespread and deeply entrenched, there are many ways we can strengthen the arsenal of tools we have in place to fight discrimination and dismantle segregation. As we look forward to the next 50 years under the Fair Housing Act, we must address discriminatory practices and policies, promote residential integration, and ensure that every neighborhood is a place of opportunity. There are hundreds of recommendations that would advance those goals, but in this section, we focus on those we believe are the most important and practical first steps, as follows:

- Reinstatement and Effectively Implement the Affirmatively Furthering Fair Housing Rule.
- Strengthen the Fair Housing Initiatives Program.
- Improve Access to Credit.
- Create an Independent Fair Housing Agency or Reform HUD's Office of Fair Housing and Equal Opportunity.
- Make Fair Housing and Civil Rights a Priority in Disaster Recovery Efforts and Programs.

Reinstatement and Effectively Implement the Affirmatively Furthering Fair Housing Rule and Hold Grantees Accountable

The AFFH regulation is a critical tool for breaking down barriers to opportunity and ensuring that all people, regardless of their race, national origin, religion, family status or disability, have access to the opportunities they need to flourish. HUD should take immediate steps to put the agency and its grantees back on the path of dismantling segregation, expanding housing choice for people in America, and making every neighborhood a place of opportunity.

To accomplish this, NFHA recommends that HUD:

- Immediately revoke the January 5, 2018, Federal Register notice and reinstate the AFFH rule;
- Rectify its internal problems with providing the necessary technical assistance and guidance to its grantees conducting AFHs. To do so, it should evaluate the experiences to date of different types of grantees to identify potential areas of difficulty. With this evaluation in hand, HUD should be proactive in helping grantees navigate those aspects of the process;
- Highlight best practices and lessons learned to date to smooth the path for grantees that have not yet conducted their AFH. This should be an on-going process, reflecting additional lessons learned as more grantees conduct AFHs;
- Convene a working group, including fair housing advocates, representatives of jurisdictions that have conducted AFHs and other stakeholders, to review the implementation process and make recommendations for improvements, if needed; and
- Work with other federal agencies (such as the Departments of Transportation and Health and Human Services and the Environmental Protection Agency) to coordinate planning processes and leverage funding streams to have maximum impact in dismantling segregation and creating diverse, inclusive, thriving communities in which all residents can flourish.

NFHA recommends that Congress:

- Call on HUD to reinstate the 2015 AFFH regulation;
- Fully fund staffing, training, technical assistance and other resources needed at HUD to provide the support grantees need to conduct effective Assessments of Fair Housing; and
- Use its oversight authority to monitor HUD's actions, or lack thereof, to fulfill its obligation to affirmatively further fair housing and ensure that its grantees do the same.

NFHA recommends that cities, counties, states, and public housing authorities:

- Work closely with fair housing groups and other stakeholders to ensure robust community participation in their fair housing planning efforts;
- Continue to use the templates, tools, and procedures laid out in the 2015 regulation to conduct Assessments of Fair Housing in their communities and regions;

- Incorporate the goals and priorities identified in their AFHs into their ConPlans and PHA plans;
- Carry through on their commitments to use their resources to dismantle segregation; and
- Measure and report publicly on their progress toward meeting these goals, updating them as needed.

Strengthen the Fair Housing Initiatives Program

The Fair Housing Initiatives Program was established to provide direct funding to private, nonprofit, full-service fair housing organizations serving people throughout the United States and to establish new fair housing organizations in underserved areas. The program is meant to fund the fair housing education and enforcement activities of qualified full-service fair housing organizations that serve persons in all protected classes and at all income levels. Additionally, the program is intended to fund organizations whose primary purpose and mission are to eliminate housing discrimination and promote residential integration, the dual goals of the Fair Housing Act. Unfortunately, the administration of FHIP has evolved over the years in a way that deviates significantly from the original Congressional and programmatic intent.

Within the past 10 years, the Office of Fair Housing and Equal Opportunity (FHEO) has frequently diverted FHIP funding to organizations that have little or no fair housing expertise, organizations whose primary purpose and mission are not related to fair housing, organizations that deny services to persons in some protected classes, or organizations that only or primarily serve low-income persons, leaving working-class, middle-class and higher-income people who experience discrimination without assistance.

HUD has also redesigned and at times eliminated funding sources under the different components of the FHIP program that has undermined the purpose of supporting private fair housing organizations with longevity, and instead has designed grant components that support one-off organizations or project efforts with no eye toward sustaining fair housing education and enforcement in several housing markets. Finally, FHEO has each year delayed release of the Notice of Funding Availability, announcement of awards to grantees, and final negotiations of grant contracts and awarding funds to grantees. In the past two years at least, funds have not even been awarded until the fiscal year after the funds were appropriated. This has caused serious funding lags at nonprofit fair housing organizations, forcing them to lay off or terminate experienced staff, cease services to victims of housing discrimination, and use precious reserve funds to survive.

Recommendations

- Congress must do all it can to increase funding for the Fair Housing Initiatives Program. In 2008 the bipartisan National Fair Housing Commission recommended funding of the FHIP program at a minimum of \$52 million to address housing discrimination, but funding continues at just under \$40 million per year. Congress must also allow HUD to determine how to allocate funds to each component, but also direct it to fund full-service fair housing organizations that serve people of all protected classes and income levels.
- HUD must increase FHOI funding to begin the creation of full-service fair housing organizations in states and large MSAs where no organization exists; however, new organizations should not be created if it affects the continued funding of existing organizations.
- HUD must revamp the award announcement and administration process so that the awards are made in a consistent, timely manner each year and no funding gaps are allowed to exist. This may require, in the short term, awards of 18-month grants to put the funding cycle back into the proper timing sequence.
- HUD must return its administration of FHIP to the program's original purpose of supporting the development of a network of experienced full-service nonprofit fair housing organizations throughout the country that serve persons at all income levels and in all protected classes. To do so, HUD must prioritize funding of education and enforcement efforts performed by private full-service nonprofit fair housing organizations whose mission is to eliminate housing discrimination against persons in all protected classes and to assist people at all income levels.
- HUD should execute the many prior recommendations NFHA has made to it about the effective and meaningful implementation of FHIP.

Improve Access to Credit

Throughout U.S. history, people of color, people with disabilities, and other underserved groups have had limited access to the financial mainstream, forcing these groups to rely on a dual credit market that provides unsafe, high-cost, volatile financial products, such as predatory subprime loans, payday loans, title loans, “buy-here, pay-here” loans, and other abusive financial products. A widening racial wealth gap, growing debt, and a shrinking middle class are reflective of this separate and unequal financial system. Current policies, practices, and infrastructure issues unnecessarily prevent some consumers from obtaining sustainable and affordable financial services and products. Access to fairly-priced quality credit is also hindered by continued redlining of communities of color, illegal denial of mortgage loans to people of color, and discriminatory pricing, terms, and conditions of loans to people of color. Much more can be done to dismantle the discriminatory credit market in the U.S. and expand access to quality, sustainable credit to all qualified individuals and communities.

Recommendations

- **Use Alternative Credit Scoring Models:** Given the current housing economy and consumer demographic shifts, the Government-Sponsored Enterprises (GSEs) and FHA must accept the use of alternative credit scoring mechanisms that include a wider set of credit data, especially non-traditional credit such as rental payment history, and more accurately assess the risk of credit invisible consumers. The mortgage insurance sector should also examine methods of approving borrowers with non-traditional credit.
- **Expand Creative Lending Programs:** The financial industry must expand the development of creative lending programs that increase access to credit in underserved areas and for underserved consumers. This could involve partnering with Community Development Financial Institutions and other non-profit organizations.
- **Modernize FHA Technology:** Outdated FHA technology hinders efficiency in lending. Committing multi-year Congressional appropriations and/or instituting targeted, revenue-generating fees that are spent at the discretion of FHA, would allow FHA to upgrade its 1960s-era technology, increase lending capacity, better serve consumers, and more appropriately allocate public funds.
- **Public and private fair housing agencies must continue to engage in systemic investigations of mortgage lending practices and bring enforcement actions to dismantle redlining and mortgage lending discrimination.**
- **GSEs Must Evaluate Lending Rates in Communities of Color:** Fannie Mae and Freddie Mac must continue to evaluate their market penetration levels in communities of color to ensure that they are adequately providing credit in these markets.
- **Develop Additional Tools and Resources to Evaluate Risk:** Over-reliance on the credit score as an assessment of risk has been detrimental to equal access to credit. There is a need to develop new tools and resources to better gauge all the components that affect loan performance in addition to, or instead of, a credit score alone.
- **Develop Affordable Housing Inventory:** Without adequate stock of affordable housing options, efforts to decrease barriers to credit will never reach their fullest potential.

Create an Independent Fair Housing Agency or Reform HUD's Office of Fair Housing and Equal Opportunity

HUD has the primary responsibility for administering the Fair Housing Act and it does so through its Office of Fair Housing and Equal Opportunity (FHEO). The division is also responsible for ensuring that HUD itself and its programs, as well as the Government-Sponsored Enterprises, Fannie Mae and Freddie Mac, comply with the Fair Housing Act. FHEO is also responsible for implementing the Fair Housing Act's Affirmatively

Furthering Fair Housing provision. FHEO has long faced many challenges to realizing and expanding the goals of the Fair Housing Act, many of which are systemic in nature and that have impacted our nation's progress. In addition, there are internal conflicts between HUD's program offices and FHEO that have undermined strong enforcement efforts and have resulted in the failure to adequately ensure that federal housing investments increase housing choice, rather than contribute to further racial and economic segregation.

FHEO has also seen a consistent decline in dedicated staff to investigate housing discrimination complaints, contributing to a backlog of complaints and delays in resolution for victims of discrimination. FHEO's extensive list of other responsibilities, include enforcing several other civil rights statutes and executive orders, has made dedicating adequate staff and resources to complaint investigation challenging given its other competing priorities.

Recommendations

- Congress must establish an independent fair housing enforcement agency that would include:
 - Career staff with fair housing experience;
 - An advisory commission appointed by the President with the advice and consent of the Senate made up of industry, advocacy, and enforcement representatives; and
 - Resources necessary to conduct high level investigations of the nation's housing discrimination complaints and public policy implementation concerning all federal agencies' role and duties to affirmatively further fair housing.
- In the absence of Congressional action to establish an independent fair housing enforcement agency, HUD must divide the current Office of Fair Housing and Equal Opportunity into two separate offices staffed by two separate Assistant Secretaries and dedicated attorneys:
 - One office with sole authority over all fair housing enforcement, education, FHIP and FHAP with an Assistant Secretary who reports directly to the HUD Secretary; and
 - One office to monitor and administer HUD's other statutory responsibilities housed under the current FHEO and to monitor HUD's own programs and grantees for compliance with the Fair Housing Act.
- In the absence of an independent agency, the role of the office of FHEO must be pre-eminent at HUD, guiding and informing the actions in all other program areas.

- In the absence of an independent agency, Congress must increase funding for salaries and expenses at HUD’s Office of Fair Housing and Equal Opportunity to support at least 750 full time equivalent staff for the sole purpose of implementing and enforcing the Fair Housing Act, separate and apart from FHEO’s other responsibilities.
- In the absence of an independent agency, Congress should provide HUD with \$5 million to provide extensive training for existing and qualified fair housing enforcement staff to better investigate complaints according to current court interpretations of the law.
- In the absence of an independent agency, HUD must also:
 - Provide ongoing, comprehensive training to its staff;
 - Hold staff accountable to performance standards;
 - Conduct internal audits of intake specialists and complaint investigators to ensure quality control;
 - Re-examine the standards of proof applied to housing discrimination cases;
 - Ensure FHAP agencies are in fact substantially equivalent and acting in compliance with HUD requirements; and
 - Increase funding for systemic housing investigations and ensure robust enforcement of the disparate impact standard, particularly related to policies and practices that perpetuate segregation.

Make Fair Housing and Civil Rights a Priority in Disaster Recovery Efforts and Programs

The multitude of disasters in recent years in the form of hurricanes, floods, wildfires, tornados, and mudslides makes it evident that disaster recovery efforts will influence the future structure of neighborhoods and communities. These rebuilding programs provide an opportunity to promote integration and improve services in all neighborhoods, and fair housing and other civil rights laws should play a primary role in prioritizing disaster recovery options.

Recommendations

- During the disaster response and recovery processes, FEMA, HUD, and other relevant federal agencies should provide clearer guidance to their grantees about both their civil rights obligations and best practices for compliance with those obligations.

- Congress should require FEMA to collect information about the characteristics of people affected by disasters that are relevant to that agency's civil rights obligations under the Stafford Act, Title VI, and the Fair Housing Act, and to provide that information to HUD, relevant states and local jurisdictions, and the public.
- HUD should incorporate clearer requirements for fair housing and civil rights compliance into the disaster recovery action plan development and approval process. These should include requirements to ensure that the public has access to the relevant data, that outreach about the disaster recovery process is conducted in the necessary languages (including translating proposed plans into those languages) and via methods that will reach all affected groups within the disaster areas, and that the public has adequate time – a minimum of 30 days – to review and comment on any proposed disaster recovery plans.
- To eliminate unnecessary delays in the disbursement of those funds, HUD should review proposed disaster recovery plans to ensure that they do not discriminate against members of protected classes, either directly or through proxy measures. Where necessary, it should work with states and local jurisdictions to correct any fair housing and civil rights problems it identifies.
- Similarly, HUD should review disaster recovery plans to ensure they do not perpetuate segregation.
- HUD should ensure that states and localities receiving disaster recovery funds collect and make public data about the race, sex, national origin, family status, and disabilities of beneficiaries of those funds to ensure that the funds are distributed in a manner that is fair and equitable.
- Congress should build more robust non-discrimination requirements into its disaster appropriations bills to ensure that residents of areas affected by disasters are not left behind in the recovery due to race, national origin, disability, or other protected characteristics.
- Congress should exercise its oversight authority over the disaster response and recovery process to ensure that FEMA, HUD, and other federal government agencies, along with their grantees, comply with their civil rights obligations.

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