

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

March 28, 2019

Memorandum

To: Members, Committee on Financial Services

From: FSC Majority Staff

Subject: Tuesday, April 2, 2019, Full Committee Hearing entitled “The Fair Housing Act: Reviewing Efforts to Eliminate Discrimination and Promote Opportunity in Housing”

The Full Committee will hold a legislative hearing entitled, “The Fair Housing Act: Reviewing Efforts to Eliminate Discrimination and Promote Opportunity in Housing” on Tuesday, April 2, 2019 at 10:00 a.m. in room 2128 of the Rayburn House Office Building. This hearing will examine the state of fair housing in America, including evolving issues in the digitization of the housing market, the Department of Housing and Urban Development’s enforcement of the Fair Housing Act under Secretary Carson, and legislative proposals to address these issues.

Witness List

- **Debby Goldberg**, Vice President, Housing Policy and Special Projects, National Fair Housing Alliance
- **Cashauna Hill**, Executive Director, Greater New Orleans Fair Housing Action Center
- **Kierra Johnson**, Deputy Executive Director, National LGBTQ Task Force
- **Skylar Olsen**, Director of Economic Research & Outreach, Zillow Group
- **Salim Furth, Ph.D.**, Senior Research Fellow, Mercatus Center, George Mason University

Background

Over 50 years after the passage of the federal Fair Housing Act, where someone lives continues to be a significant factor in determining his or her life outcome—from educational attainment and health to chances of arrest and financial stability. For example, the National Center for Health Statistics released neighborhood-level data that shows U.S. life expectancy estimates vary from block to block.¹ Their data showed that someone living in the Beverly Hills 90210 zip code of California will live an average of 10 years longer than someone who lives in California’s Hawthorne or Inglewood neighborhoods. Decades of research have also shown how increased access to high-opportunity neighborhoods positively benefits a child’s long-term outcomes and diminishes intergenerational poverty.²

The Fair Housing Act was signed into law on April 11, 1968, seven days after the assassination of Reverend Dr. Martin Luther King Jr. who at the time, through the Chicago Freedom Movement, was

¹ National Center for Health Statistics. U.S. Small-area Life Expectancy Estimates Project (USALEEP), 2018.

² Chetty, Raj, Nathaniel Hendren, and Lawrence F. Katz. “The effects of exposure to better neighborhoods on children: New evidence from the Moving to Opportunity experiment.” *American Economic Review*, 2016.

fighting for fair housing and economic justice.³ The Act was passed with two main purposes: 1) to end and prohibit discrimination in the sale, rental, financing, advertising, and insurance of housing based on several protected classes; and 2) to undo systemic barriers to housing opportunity through a mandate to “affirmatively further fair housing” (AFFH). As passed, the Fair Housing Act established fair housing protections on the basis of race, color, religion, and national origin. Sex was added as a protected characteristic in 1974 and disability and familial status (the presence or anticipated presence of children under 18 in a household) were added in 1988.

The Department of Housing and Urban Development (HUD) is the primary federal agency charged with enforcement of the Fair Housing Act. HUD’s Office of Fair Housing and Equal Opportunity (FHEO) receives and investigates fair housing complaints, and occasionally refers complaints to the Department of Justice (DOJ), typically when HUD determines that there is a more systemic issue involved in the case. The DOJ can also choose to litigate fair housing cases without a referral from HUD. In addition to investigating complaints that are submitted to HUD, the Secretary of HUD has the power to proactively conduct investigations and file subsequent Secretary-Initiated Complaints. According to HUD, these complaints involve potential fair housing violations that are national in scope and affect the broad public, or where HUD is unaware of a specific complainant or injured party.⁴

FHEO also administers the following HUD programs that support initiatives that address fair housing complaints:

- The Fair Housing Initiatives Program (FHIP) provides grants on a competitive basis to private fair housing organizations, including nonprofit organizations, that assist people who believe they have been victims of housing discrimination. FHIP received \$39.6 million in FY2019.
- The Fair Housing Assistance Program (FHAP) provides grants to state and local agencies that administer fair housing laws determined by HUD to be substantially equivalent to the federal Fair Housing Act (i.e. “FHAP agencies”). Funding granted to FHAP agencies is meant to supplement local funding allocated for processing fair housing complaints. FHAP received \$23.9 million in FY2019.

Current Trends

There were 28,843 reported complaints of housing discrimination in 2017.⁵ Private nonprofit fair housing organizations, typically funded by FHIP, are on the frontlines of handling these complaints. In 2017, private nonprofit fair housing organizations handled 71.3 percent of reported complaints, as compared to 4.5 percent by HUD, 23.9 percent by FHAP agencies, and 0.1 percent by the DOJ.⁶ While the number of reported housing discrimination claims may seem high, recent data shows housing discrimination is under-reported. For example, in October 2018, Zillow Research surveyed 10,000 adults in the nation’s 20 largest metro areas and found that 1 in 4 people, or 68 million, believe they have been treated differently in their search for housing because of their status as a member of a protected class under the Fair Housing Act.⁷

³ Washington Post, “The Fair Housing Act was languishing in Congress. Then Martin Luther King Jr. was killed,” 2018.

⁴ HUD Public Affairs, “Hud Files Housing Discrimination Complaint Against Facebook,” 2018.

⁵ National Fair Housing Alliance, “Fair Housing Trends Report,” 2018.

⁶ *Id.*

⁷ Zillow Research, “The Zillow Housing Aspirations Report,” 2018.

Recent analyses have also shown how federal programs may be contributing to, rather than helping to alleviate, patterns of segregation. In 2019, the Center for Budget and Policy Priorities released the first metropolitan-level analysis of HUD's Housing Choice Voucher (HCV) program, one which is intended to promote residential mobility and housing choice.⁸ The study found that 33 percent of families with vouchers living in the 50 largest metropolitan areas were concentrated in high-poverty areas, 40 percent live in low-opportunity areas, and 61 percent of voucher-assisted families of color live in racially segregated neighborhoods.⁹

Technological advances over the last decade have resulted in a major shift of services to online platforms, transforming consumer experiences and presenting new challenges for HUD in investigating and handling fair housing discrimination cases. Online platforms like AirBnB, Facebook, and others are now major avenues for advertising available housing. For example, an estimated 80 percent of Millennials use their mobile devices to find housing and 73 percent of all renters use online resources to find a home.¹⁰ While recent technological advances have expanded access to knowledge and information, these technological innovations also create new opportunities for discrimination in our housing markets that may be harder to spot and harder to attribute to any particular individual when computer algorithms are making decisions that have systemic impacts. Research has demonstrated how algorithms and artificial intelligence can reflect human biases against low income people and people of color, whether it's through the automation of homeless services¹¹ or determining if a prospective homebuyer is worthy of a mortgage.¹² Civil rights groups settled a lawsuit against Facebook on March 19, 2019, the world's largest online advertiser, for allowing the exclusion of people of color and women from viewing housing ads on its platform.¹³ Similarly, nearly a week after advocates settled with Facebook, HUD charged the tech giant with housing discrimination over its targeted advertising practices.¹⁴ These cases show how discrimination in our housing markets today can look very different than it did one or two decades ago.

HUD's Roll-Backs of Hard-Fought Protections

Secretary Carson has come under fire for decisions and inactions that were perceived by many observers to undermine or put at risk critical fair housing protections. Some of these instances are described below.

Secretary-Initiated Complaints. A December 24, 2018 article from the Washington Post highlighted HUD's comparative underuse of its power of Secretary-Initiated Complaints to address systemic discrimination.¹⁵ Specifically, Secretary Carson has used this authority just once since the Trump administration took office. Both the Bush and Obama administrations leveraged this secretarial authority an average of five and ten times per year respectively, to investigate insurance companies, real estate brokers, and mortgage lenders that were illegally discriminating against Black and Latinx individuals. President George W. Bush's FHEO Assistant Secretary, Kim Kendrick, advocates, and civil rights

⁸ Center for Budget and Policy Priorities, "Where Families with Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas," 2019.

⁹ *Ibid*

¹⁰ Zillow Group, "Consumer Housing Trends Report," 2018.

¹¹ Eubanks, Virginia. *Automating inequality: How high-tech tools profile, police, and punish the poor.* St. Martin's Press, 2018.

¹² Bartlett, Robert, Adair Morse, Richard Stanton, and Nancy Wallace. "Consumer-Lending Discrimination in the FinTech Era." (2019).

¹³ NPR, "After Lawsuits, Facebook Announces Changes To Alleged Discriminatory Ad Targeting," 2019.

¹⁴ U.S. Department of Housing and Urban Development, "HUD Charges Facebook With Housing Discrimination Over Company's Targeted Advertising Practices," 2019.

¹⁵ Washington Post, "Ben Carson's HUD dials back investigations into housing discrimination," 2018.

attorneys alike have characterized Secretary-Initiated Complaints as one of the few tools to help address structural disparities in a way that has widespread impact.¹⁶

Affirmatively Furthering Fair Housing. The mandate to affirmatively further fair housing (AFFH) is a central mandate of the Fair Housing Act, which is intended to require recipients of federal housing grants to proactively address structural barriers and affirmatively expand access to opportunity for people of protected classes. However, the statute went largely ignored and unenforced over the past half-century until the Obama Administration released its final AFFH rule in July of 2015. The rule required that jurisdictions receiving federal housing grants conduct assessments of fair housing (AFH) in their districts, with data and community engagement as central components, and create locally tailored plans to address such impediments to show that federal funds would be expended in ways that would not further entrench residential segregation and perpetuate uneven development.

The rule was officially implemented in 2016 with the City of New Orleans submitting the first successful AFH in the country in October 2016.¹⁷ However, in January 2018, HUD published a Federal Register notice that halted implementation of the AFFH rule calling it cumbersome and ineffective, resulting in lawsuits from civil rights groups and states¹⁸ as well as opposition from 16 attorneys general.¹⁹ The agency also later withdrew the “Local Government Assessment Tool” that helped guide local jurisdictions in their AFH planning.²⁰ HUD has effectively suspended the AFFH rule until at least 2024 and asked jurisdictions to revert back to the pre-2015 Analysis of Impediments process, which the National Fair Housing Alliance characterized as “just a report on a shelf.”²¹ Despite HUD’s suspension, cities like New York City have decided to move forward with AFH-like processes.²²

Disparate Impact. Under the Fair Housing Act, it is not just unlawful to intentionally discriminate against a person based on their status as a member of a protected class, it can also run afoul of the Act if an entity or individual maintains a seemingly neutral policy that has an unjustified discriminatory impact on members of a protected class. Referred to as the “disparate impact” standard under the Fair Housing Act, this analysis allows plaintiffs to bring suit if they are alleging that a policy has a discriminatory impact, allows defendants to provide legitimate business justifications for their policies, and then plaintiffs are given an opportunity to show that there is a less discriminatory alternative that meets the same business justifications. In 2013, HUD issued a final rule under the Obama administration that would determine whether a practice has an unjustified discriminatory effect under the Fair Housing Act. The Supreme Court’s 2014 *Inclusive Communities Project v. Texas Department of Housing and Community Affairs* decision confirmed what advocates had maintained for years and what each of the eleven circuit courts that had addressed the issue had ruled—that the disparate impact standard applies under the Fair Housing Act.²³

¹⁶ Ibid

¹⁷ City of New Orleans, “Assessment of Fair Housing,” 2016.

¹⁸ National Fair Housing Alliance, “Civil Rights Groups Sue HUD over Suspended Implementation of Affirmatively Furthering Fair Housing Rule,” 2018.

¹⁹ State of California Department of Justice, “Attorney General Becerra Leads Coalition Opposing Trump Administration’s Suspension of Fair Housing Rule,” 2018.

²⁰ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments,” 2018.

²¹ National Fair Housing Alliance, “Fair Housing Trends Report,” 2017.

²² Curbed New York, “NYC launches fair housing planning process, despite HUD delays,” 2018.

²³ Texas Department of Housing and Community Affairs, et al., *Petitioners v. The Inclusive Communities Project, Inc., Et Al.* 576 U. S. 4 (2015)

On February 1, 2019, HUD Secretary Carson submitted proposed changes to the disparate impact rule to the Office of Management and Budget.²⁴ Action to alter the rule stems from a February 2017 Executive Order by President Trump, which called for the Department of Treasury to review all federal financial laws.²⁵ Treasury subsequently released a report in October 2017 calling for HUD to reconsider the disparate impact rule, especially its effects on the insurance industry, which has filed lawsuits challenging the rule in the courts.²⁶

LGBTQ Protections. HUD issued the “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” (Equal Access) final rule in 2016, which required HUD-funded programs to provide equal treatment regardless of a person’s perceived gender status, sex orientation, or marital status.²⁷ However, in March 2017, HUD withdrew a Federal Register notice regarding a proposal to require owners and operators of HUD-funded homeless shelters to post a notice informing individuals of their rights under HUD’s Equal Access rule,²⁸ even though LGBTQ youth in the U.S. are 120 percent more likely to experience homelessness than non-LGBTQ youth²⁹ and 94 percent of service providers report working with LGBTQ youth.³⁰

Legislative Proposals

- The “Restoring Fair Housing Protections Eliminated by HUD Act of 2018,” is a discussion draft that restores several fair housing protections that HUD Secretary Ben Carson has eliminated, including the AFFH rule which mandates that recipients of federal housing grants take proactive steps to further fair housing.
- H.R. 5, “Equality Act of 2019” introduced by Rep. Cicilline seeks to provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service. The portion of the bill that implicate this Committee’s jurisdiction is Section 10, which amends the Fair Housing Act to explicitly clarify that sexual orientation and gender identity are covered under the Fair Housing Act.
- H.R. 149, “Housing Fairness Act of 2019,” introduced by Rep. Green would: establish a new program (authorized at \$15 million for five years) at HUD to proactively test for discrimination in housing; establish a new competitive grant program at HUD to assist nonprofits in studying the causes and effects of discrimination, including against veterans, and implement pilot projects to test solutions; and authorize increased funding for FHIP.
- The “Sexual Harassment Awareness and Prevention Act of 2018” is a discussion draft from Rep. Velazquez that requires HUD to include in its annual report on fair housing, detailed reporting on complaints regarding sexual harassment. The bill also requires a GAO report on federal monitoring and enforcement of the Fair Housing Act as it related to victims of sexual harassment, and establishes an interagency task force to address sexual harassment in housing across federal programs.

²⁴ Office of Information and Regulatory Affairs, “List of Regulatory Actions Currently Under Review,” Available at: <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>

²⁵ Executive Order 13772 on Core Principles for Regulating the United States Financial System

²⁶ U.S. Department of Treasury, “A Financial System That Creates Economic Opportunities: Asset Management and Insurance,” 2017.

²⁷ 81 FR 64763 (October 21, 2016)

²⁸ 82 FR 13359 (March 10, 2017)

²⁹ Chaplin Hall at the University of Chicago, “Missed Opportunities: Youth Homelessness in America,” 2017.

³⁰ Durso, Laura E. and Gates, Gary J., “Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless,” (2012).