



Fair Housing in America and the Challenges Ahead

Testimony of

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Introduction

Good morning, Chairwoman Waters, Ranking Member McHenry, and members of the Committee. My name is Debby Goldberg, and I am Vice President for Housing Policy and Special Projects at the National Fair Housing Alliance.

The National Fair Housing Alliance is the nation's only national civil rights organization dedicated to eliminating all forms of housing discrimination and ensuring equal housing opportunity through leadership, education, outreach, membership services, public policy initiatives, community development, advocacy, and enforcement. NFHA is a trade association comprised of over 200 members located throughout the United States.

I want to thank you for the opportunity to testify today, and I commend the Committee for holding this hearing to review our efforts to eliminate housing discrimination and promote opportunity in housing. April is Fair Housing Month, and it is both timely and appropriate to begin the month by reviewing our efforts to protect the rights afforded to each of us under the Fair Housing Act and to promote opportunity. It is also a good time to assess how well positioned we are as a nation to tackle some of the threats to fair housing that arise from the use of technology, big data and artificial intelligence, which are shaping the housing market in ways that none of us could have anticipated in 1968, when the Fair Housing Act was passed.

The topic before the Committee today has many facets. My testimony will focus primarily on three of them: the status of our fair housing infrastructure, the importance of preserving key tools to ensure fair housing, including two important regulations that are currently under attack by HUD, and the fair housing issues associated with the growing use of technology and big data in the housing market.

Background

"It is the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States."¹

Achieving this goal that Congress set out in the Fair Housing Act requires us to do three things. First, we need to take stock of our history and understand how problems of the past affect our current landscape. Second, we must bolster the infrastructure we have created to provide fair housing and ensure that all of its components have the tools and resources needed for success. Third, we must consider the changes underway in the housing market and the new or revised tools we may need to ensure that those changes do not enable new forms of housing discrimination. NFHA's 2017 report, "The Case for Fair Housing: 2017 Fair Housing Trends Report,"² describes the role played by the federal government in creating the segregated communities that we see today in all of

¹ 42 U.S.C. §3601

² National Fair Housing Alliance, "The Case for Fair Housing: 2017 Fair Housing Trends Report." Washington, DC. 2017. <https://nationalfairhousing.org/2017-fair-housing-trends-report/>

our cities, and in making it possible for White families to climb the path to the middle class, achieving economic prosperity and stability, while preventing families of color from following that same path. As that report notes, the federal government was not the only player in this saga, but the importance of its role and the negative impact of its policies cannot be overemphasized. It begins in the early days of our country and our policies and practices with respect to granting land ownership to White families but not families of color.³ It continues with some of the policies of the New Deal era, when the Home Owners Loan Corporation institutionalized a methodology for rating the level of risk associated with investing in particular neighborhoods that was based on the racial composition and homogeneity, or lack thereof, of those neighborhoods. That methodology ranked as the most risky neighborhoods in which African Americans, other people of color, people of certain faiths, and immigrants from certain countries. Also at the bottom of the ranking were neighborhoods that were integrated, or at risk of “infiltration” by racial, ethnic and religious groups deemed undesirable. This methodology, and the so-called “residential risk” maps upon which it was encoded, guided the policies of other federal agencies involved in the mortgage market, including the Federal Housing Administration and the Veterans’ Administration, and were a major determinant of which neighborhoods and which borrowers would have access to affordable mortgage credit and which would not.

Over many decades, these policies and practices, in concert with others adopted by state and local governments, shaped the residential patterns of our cities, creating neighborhoods that were segregated by race and other national origin. In many places, those patterns persist to this day. NFHA’s 2017 Trends report goes on to describe in detail the impact of those segregated living patterns on individuals – their educational attainment, health and well-being, access to transportation, involvement with the criminal justice system, employment opportunities, access to homeownership and ability to build wealth – and on the communities in which they live. The disparities are stark, and they work to the detriment of our nation’s stability, vitality and prosperity.

The prologue to NFHA’s 2018 report on trends in fair housing illustrates how important effective enforcement of the Fair Housing Act is, and why, as a nation, we must not only care about fair housing but be vigorous in defending and enforcing it.

“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

³ Rice, Lisa. “*Long Before Redlining: Racial Disparities in Homeownership Need Intentional Policies*,” ShelterForce, February 15, 2018. <https://shelterforce.org/2019/02/15/long-before-redlining-racial-disparities-in-homeownership-need-intentional-policies/>

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 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.”⁴

This is what Congress set out to accomplish in enacting the Fair Housing Act, adopting it as the policy of the United States to provide for fair housing and employing a two-pronged approach to implementing this policy. First, it laid out a set of specific requirements and prohibitions designed to ensure that providers of housing and housing-related services do not discriminate against people seeking housing based on a set of protected characteristics. Those include race, color, religion, sex, national origin, familial status and disability. These protections recognized the discriminatory policies and practices, with which our communities have been rife, that can impede people’s ability to gain access to the housing they seek and for which they qualify. Fully enforced, these provisions should ensure that protected characteristics do not disadvantage individuals and families in their efforts to obtain housing. They would eliminate the barriers that discrimination has created for members of protected classes.

⁴ National Fair Housing Alliance, *“Making Every Neighborhood a Place of Opportunity: 2016 Fair Housing Trends Report.”* Washington, DC. 2018. <https://nationalfairhousing.org/reports-research/>

But Congress recognized that eliminating discrimination alone would not be sufficient to create truly open housing markets. Eliminating those barriers would not level the playing field, because the field itself is distorted. Over many decades, through a series of policies and practices carried out by the private sector and by government at all levels – with the federal government playing a prominent role – we have deeply entrenched segregated living patterns in our communities. Eliminating those, and overcoming the lasting harms they have produced, requires additional, deliberate efforts. Therefore, in the Fair Housing Act, Congress also mandated that HUD and other federal agencies involved in housing and urban development activities undertake those efforts. This mandate is embodied in the “affirmatively furthering fair housing” (AFFH) provisions of the Act.⁵

Below we discuss in more detail the infrastructure created to ensure the goals of the Fair Housing Act are achieved and how it can be bolstered, the critical tools needed to protect all of us from discrimination and the need to preserve them, and some of the fair housing challenges ahead that arise from technological developments that are changing the way the housing market operates.

Strengthening Our Fair Housing Infrastructure

The infrastructure for fair housing enforcement in the U.S. has three key components, one at the federal level, which consists of HUD and DOJ. The second two components operate at the state and local level. One consists of state and local government civil and human rights agencies with fair housing enforcement responsibilities. The other consists of local, private, non-profit fair housing centers that provide a variety of fair housing services in their communities.

At the federal level, HUD has several roles. One is to receive, investigate and adjudicate complaints submitted by those who believe they may have encountered illegal discrimination. HUD also has the responsibility to ensure that its own programs comply with the Fair Housing Act, as well as the programs of the cities, counties, states and other entities to which it provides funding for housing and community development activities. HUD also administers the Fair Housing Initiatives Program (FHIP), which is the only federal source of funds for private enforcement of the Act, and the Fair Housing Assistance Program (FHAP), which reimburses state and local civil and human rights agencies that investigate fair housing complaints. DOJ’s principal role is to bring suit on behalf of individuals whose cases have been referred to it by HUD. HUD makes such referrals after it has concluded that there is reasonable cause to believe that discrimination has occurred in a particular case, it has issued a “charge” of discrimination, the case has been heard before an administrative law judge, and one or the other party elects to have the case referred to DOJ. DOJ also has sole authority in cases involving a pattern or practice of discrimination, or when HUD receives a complaint that concerns zoning issues.

The other two components of the fair housing infrastructure operate at the state and local level. Of these, state and local government civil and human rights agencies enforce laws that are substantially equivalent to the federal Fair Housing Act, and are responsible for resolving housing discrimination complaints. With agencies that it deems substantially equivalent, HUD enters into a memorandum of understanding under which those state and local agencies process complaints of housing discrimination

⁵ 42 U.S.C. §3608 (d) and (e).

within their jurisdictions. This partnership allows federal and state agencies to coordinate investigations and avoid duplication of effort. These agencies receive complaints from the public, initiate investigations, conciliate agreements and litigate fair housing allegations in their respective jurisdictions. They are allowed to take these actions for complaints received within 180 days of the alleged incident. All complaints that are received outside of the 180-day time limit are referred to HUD for processing. HUD may also refer complaints filed through its own administrative complaint system to FHAP agencies which serve the area from which a complaint is made. HUD reimburses these agencies for expenses associated with processing housing discrimination complaints through the FHAP program.

The third component of our fair housing enforcement infrastructure consists of local private, non-profit fair housing organizations in many cities and states across the country. Most of them receive their primary funding from HUD through the FHIP program⁶, which was created in 1987 with broad bipartisan support and the endorsement of Presidents Ronald Reagan and George H.W. Bush. With FHIP, Congress recognized the need to support the development of experienced, private, nonprofit fair housing organizations to foster compliance with the Fair Housing Act; complement the work of local and state government agencies and the federal government; and assist the public in better understanding its rights and local housing providers in complying with civil rights laws.

FHIP provides unique and vital services to the public and the housing industry by supporting a network of private-public partnerships with local nonprofit fair housing organizations working in their communities to carry out fair housing enforcement and education. These are the only private organizations in the country that educate communities and the housing industry and enforce the laws intended to protect us all from housing discrimination. They form an essential component of the nation's fair housing education and enforcement infrastructure. The FHIP program saves the federal government taxpayer dollars through the unique services in which its grantees specialize and it ensures a high standard of relief to victims of discrimination and the communities that it harms.

FHIP agencies are uniquely suited to provide a first line of defense against housing discrimination: they are the mostly likely to receive a complaint of housing discrimination from the public given their local presence and effective public education strategies, and they advocate on behalf of victims of discrimination throughout the administrative complaint processes. For every individual conciliation or settlement stemming from an action initiated by a FHIP-grantee, many more housing units that would have otherwise been kept off the market for persons in protected classes are made available through improvements in policies and practices that increase housing choice. Families with children and people with disabilities are among the most likely persons to file complaints of discrimination, and the FHIP program is absolutely vital to protecting their freedom of housing choice. The primary reason these groups file the most complaints is that discrimination against these persons is often obvious or stated by housing providers, such as statements that a housing complex limits occupancy to one person per bedroom or that a request for a reasonable accommodation for a service animal is denied.

FHIP-funded organizations work at the national, regional, and local levels to expand fair housing opportunities for all Americans at all income levels. These organizations:

⁶ For more information about the FHIP program, see the testimony of Keenya Robertson, President & CEO of the Housing Opportunities Project for Excellence (HOPE) Fair Housing Center, Inc. before the House Appropriations Committee Subcommittee on Transportation, Housing and Urban Development and Related Agencies, February 27, 2019.

- Train local housing providers on how to avoid running afoul of the Fair Housing Act;
- Educate consumers about their rights and how to recognize and report situations that ^[1]_{SEP} appear to violate the law;
- Provide direct assistance to victims of discrimination;
- Work with leaders and public officials at the local level to create and expand the availability of safe, affordable, and decent housing;
- Work with stakeholders at the local level to ensure that every community has access to important opportunities like quality schools, healthcare, jobs, transportation, food, credit, etc.; and
- Engage in efforts to stabilize neighborhoods and strengthen communities.

While this fair housing infrastructure has proven very effective, it is significantly under-resourced. This lack of resources undermines its ability to fully meet our country’s fair housing needs. These include ensuring that both the public and housing providers are aware of their rights and responsibilities under the Fair Housing Act, monitoring practices in the housing market to identify those that may be discriminatory and taking appropriate steps to eliminate them, and responding to the complaints of discrimination that are reported by individuals searching for housing.

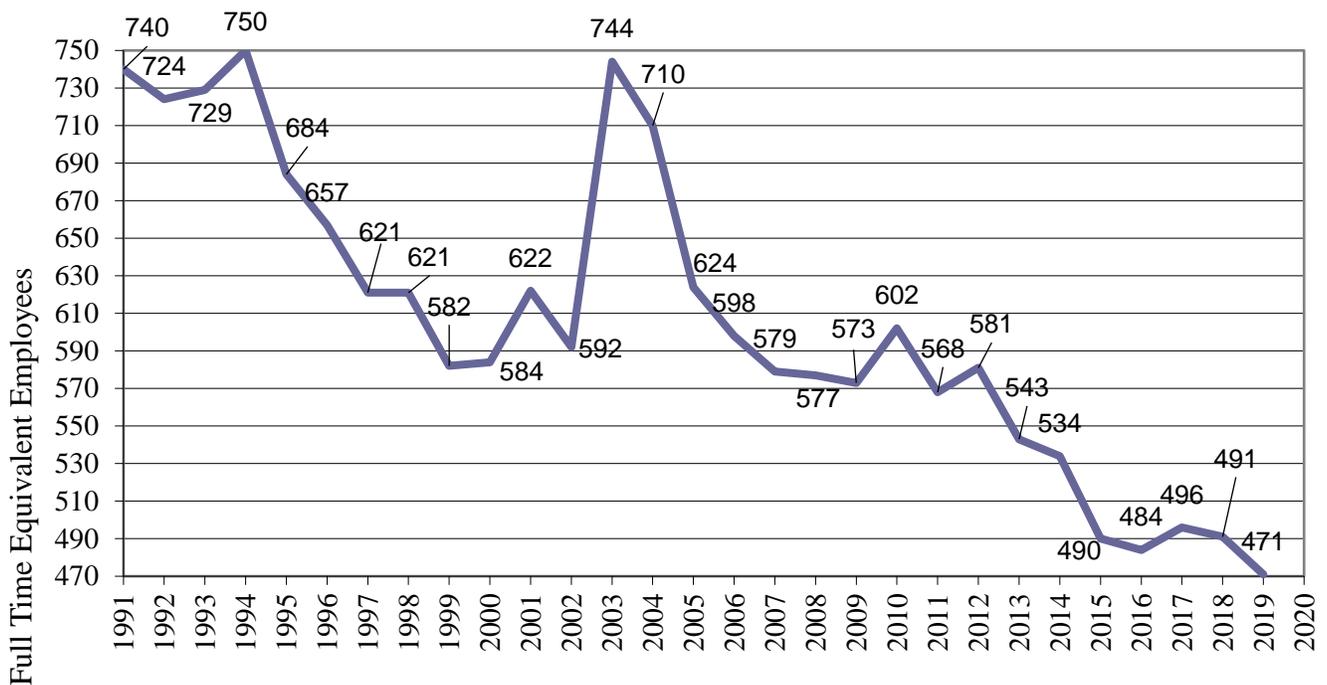
At the state and local level, the FHIP program needs additional funding to enable fair housing groups to meet the needs in their communities and to enable new fair housing groups to be established in communities where they do not currently exist. The program is currently funded at \$39.2 million for FY19. NFHA recommends that funding be increased to \$52 million, and we are grateful to Congressman Al Green and Congresswoman Barbara Lee for their leadership and support in requesting this level of funding for FHIP for FY 20. In addition, the program needs better management by HUD to ensure that the funding stream is consistent, timely and reliable.

Federal Fair Housing Funding Levels FY12-FY20

HUD Line Item	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19	President’s FY20 Request	NFHA FY20 Request
FHIP	\$42.50	\$40.30	\$40.10	\$40.10	\$39.20	\$39.20	\$39.60	\$39.60	\$36.20	\$52
FHAP	\$28.40	\$27	\$25.60	\$23.30	\$24.30	\$24.30	\$23.90	\$23.40	\$24.30	\$35.20
FHEO Salaries + Expenses	\$71	\$73	\$68.20	\$68	\$72	\$72	\$69.80	\$72	\$69.60	\$102

At the federal level, HUD’s Office of Fair Housing and Equal Opportunity lacks the staff, funding, technology and other resources it needs to carry out its responsibilities, including smooth and effective management of the FHIP program.

Staffing Levels (FTEs) for HUD's Office of Fair Housing & Equal Opportunity 1991-2019*



* Data drawn from HUD Congressional Budget Justifications, FY1992-2020.

These resource constraints at HUD have serious implications for the effective operation of the FHIP program and other HUD fair housing-related functions. Over the past several years, FHIP-grantees have observed a deterioration in the management and implementation of the Fair Housing Initiatives Program. Constant delays in Notices of Funding Availability, award decisions, and timing of payments to grantees have resulted in serious damage to long-established fair housing organizations that often are the only agency serving their housing market, or even state. Additionally, FHIP-grantees have observed challenges in the use of excess funds that remain unspent after the completion of stated grant goals, and wide variation in grant payment protocols among HUD regions.

With each new fiscal year, HUD pushes back the FHIP grant process, leaving private nonprofit fair housing organizations that deliver critical direct services at risk of closure. For example, in 2016, many three-year PEI grants were scheduled to begin their second or third year on November 1. However, grant recipients were not informed until October 31 that the second or third years of their three-year grants would not commence on November 1 but instead would commence later. FY17 awards were not officially announced until March 2018, well over five months after the end of the fiscal year for which the awards were intended. For FY18, HUD opened the FHIP NOFA on October 29, 2018 with an application deadline of December 19, 2018. HUD has yet to award new grants for FY18, leaving several private fair housing organizations with funding gaps that again will affect their ability to provide direct fair housing services in their housing markets. In each of these instances, similarly-situated organizations had different start dates for grants that began or were to continue during the same fiscal year, and each FHIP agency has had to spend considerable time and energy to secure reasonable grant start dates. This has been especially harmful to the work of agencies that experienced delays while in the middle of existing three-year grants, which have work planned for each year.

The result of these delays has been devastating for many organizations. Many private fair housing organizations have been forced to take out lines of credit – for which they must pay interest – to complete existing work, continue paying employees, and maintain basic operations. Some have been forced to shut their doors for a period of time, impacting existing investigations upon which potential victims of discrimination were relying. Without consistent and timely release of the FHIP NOFA and awards, organizations are forced to use reserve funding that is intended serve as a last resort to weather the gap, jeopardizing the long-term health of their organization.

FHIP-funded agencies are the first line of defense for victims of discrimination for entire housing markets, states, and sometimes regions. Each time the FHIP NOFA and awards are delayed HUD runs the risk of jeopardizing the key services that private fair housing organizations provide to victims; the localized expertise they can employ to examine or address persistent housing discrimination or the impacts of residential segregation; and the testing and vetting of complaints that FHAP agencies and HUD receive as cases. Additionally, local housing providers, real estate agents, lenders, and insurers rely on training and education from private nonprofit fair housing organizations which is interrupted by lapses in FHIP funding. As of today, HUD has yet to make new FY18 awards or issue an FY19 FHIP NOFA.

Recent program and policy reversals at HUD are causes for concern

In addition to these damaging delays in funding its fair housing programs, HUD has taken a number of other actions that are cause for concern. For example, in 2017 HUD announced a 2-year delay in implementation of the Small Area Fair Market Rent (SAFMR) regulation, an important tool for enabling low- and moderate-income tenants with Housing Choice Vouchers to afford housing units in lower-poverty, higher-resourced communities. Advocates successfully sued HUD to reverse this decision, which would have dealt a major setback to efforts to expand access to opportunity.

In January 2018, HUD effectively suspended its Affirmatively Furthering Fair Housing (AFFH) regulation after only a year and half of implementation.⁷ Discussed in more detail below, the AFFH rule was adopted in 2015, nearly half a century after the Fair Housing Act itself, and represented HUD's first meaningful effort to implement the AFFH provisions contained in the 1968 statute. The rule was the result of a lengthy and deliberative process that included extensive stakeholder consultation, multiple opportunities for public input and substantial field testing. In suspending the rule, HUD has instructed its grantees to return to a fair housing planning process that has been found ineffective by the Government Accountability Office, HUD itself, and its grantees. In May 2018, NFHA and other advocates sued HUD over the suspension. The case was initially dismissed for lack of standing, but it has been refiled and remains pending.

Last summer, in June 2018, HUD issued an Advance Notice of Proposed Rule Making on disparate impact, signaling its intent to rewrite its disparate impact (or discriminatory effect) regulation. Also discussed in more detail below, that regulation reflects long-standing HUD policy and well-established jurisprudence, including decisions in 11 district courts and the Supreme Court. Disparate impact is a critical tool for protecting all of us from forms of illegal discrimination that may be difficult to detect.

⁷ 83 FR No. 4, p. 683 et. seq.

The notion that HUD would dismantle this tool is extremely troubling and bodes ill for our continuing ability to identify and eliminate discrimination in housing.

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,⁸ as well as in HUD's Native American and Native Hawaiian programs.⁹ It also required that individuals have equal access to HUD-assisted shelter programs in accordance with their self-identified gender identity.¹⁰ We are concerned about HUD's implementation of the aforementioned rules and encourage this Committee to fully examine the Department's overall enforcement of its Equal Access Rule and shelter guidance.

Each of these actions is cause for concern. Together, they paint an alarming picture of HUD's efforts to ensure that we have the tools necessary to secure fair housing throughout the United States. We encourage the Committee to examine them closely and take any corrective actions that may be needed.

Preserving Critical Fair Housing Tools: AFFH and Disparate Impact

Affirmatively Furthering Fair Housing

Two of the most important tools we have for eliminating discrimination from our housing market and for promoting access to opportunity currently appear to be at risk of being weakened or even dismantled by HUD. One of these is its 2015 Affirmatively Furthering Fair Housing (AFFH) regulation, which established a new process for fair housing planning. It established a robust community engagement process, and provided grantees with a format for their fair housing plan, known as an Assessment of Fair Housing (AFH), along with an analytical framework, a substantial set of relevant data and the capacity to create maps that display that data geographically. The regulation required that the AFH contain goals and priorities, with metrics and timetables for measuring progress, and that these be reflected in the grantees' subsequent spending plans, known as Consolidated Plans. AFHs were to be conducted every 3-5 years, in advance of the Consolidated Plan, and submitted to HUD for review and acceptance. This process allowed HUD to provide feedback and highlight any specific changes that might be needed to make a plan acceptable. HUD also created a detailed guide to help grantees through the planning process, with illustrative examples for each step along the way.

⁸ 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.

⁹ 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.

¹⁰ 24 CFR Part 5, "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs," September 2016.

The 2015 regulation replaced an earlier regulation that required HUD grantees to conduct a periodic Analysis of Impediments to Fair Housing Choice, also known as an AI. While HUD published a fair housing planning guide to assist grantees in conducting an AI, it never provided regulatory guidance or parameters. Thus, there was no required format, content or community input for the document, nor was there any requirement for it to contain priorities, goals, metrics or timetables. There was no schedule by which the AI was to be completed, it was not submitted to HUD for review, and it was not connected to any other planning the grantee might conduct, including its Consolidated Plan for spending HUD funds over the subsequent three to five year period.

As NFHA commented in its response to HUD’s 2018 ANPR on the 2015 AFFH rule, this rule “represents an extremely important and long overdue effort by HUD to take meaningful steps to implement the affirmatively furthering fair housing provisions of the 1968 Fair Housing Act. It was the result of several years of consultation with many different stakeholders, including program participants of various types, sizes and geographic locations, fair housing organizations and others. It went through the required public comment process, during which HUD received over 1,000 comments.¹¹ These included comments from housing providers, trade associations, government jurisdictions and agencies, and fair housing and civil rights advocates. Through this long and deliberate process, HUD was able to strike a fine balance between the real concerns of government entities that would be subject to the rule, as well as their constituencies who are directly impacted by decisions concerning the use of housing and community development dollars in their communities. That rule was extensively vetted internally at HUD, and field tested in 74 jurisdictions through the Sustainable Communities Initiative. It was a careful, inclusive and deliberative rulemaking process that produced a regulation that is flexible enough to accommodate a wide variety of local circumstances, clear and structured enough to provide program participants with the direction and guidance they sought, and rigorous enough to ensure that jurisdictions make meaningful progress in addressing some of the most pressing problems – problems that government had a role in creating and perpetuating – that plague our society.”¹²

One of the very important aspects of the 2015 rule is its definition of “affirmatively furthering fair housing.” As our comments on the AFFH ANPR explained, “Previously, HUD’s definition of AFFH was tied to the AI, which itself lacked definition, structure and standards. This left program participants with tremendous uncertainty about how to ensure that they were fulfilling their AFFH obligations and in compliance with the law. The definition in the 2015 rule eliminates that uncertainty, replacing it with the clarity that program participants sought, stating:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and

¹¹ See Regulations.gov at <https://www.regulations.gov/document?D=HUD-2013-0066-0001>.

¹² See comments of the National Fair Housing Alliance on FR-6123-A-01, “Affirmatively Furthering Fair Housing: Streamlining and Enhancements,” October 15, 2018.

maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.¹³

This definition clearly states that AFFH requires program participants to go beyond just making plans; they must take meaningful steps to implement those plans. It lays out the necessary balance between the need to take action to dismantle the barriers of segregation by expanding access to housing in high opportunity areas and *also* by uplifting disinvested neighborhoods to ensure that their residents have equitable access to opportunity. The definition also clarifies the scope of the AFFH obligation, noting that it is not limited to the expenditure of federal funds, a point that is underscored in the section of the regulations that addresses certification requirements. Additionally, the definition requires program participants to engage in activities that promote compliance with fair housing and civil rights laws, including working with stakeholders to combat illegal discrimination.

Further, the sections of regulation that deal with certification requirements note the comprehensive nature of the AFFH obligation. A program participant cannot fulfill that obligation if it takes appropriate actions in some of its programs or policies while taking other actions that are inconsistent with its obligations under the Fair Housing Act. In other words, it cannot give with one hand and take away with the other. Those sections state, "Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR §5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."¹⁴ This definition, in combination with other provisions of the rule and the Assessment Tool, provides program participants the clarity they need to understand their AFFH obligations and take meaningful steps to fulfill them. Such clarity was lacking in the AI process, which created confusion about what program participants should do to fulfill their AFFH obligations. As the result of that confusion, and their subsequent failure to take effective steps to affirmatively further fair housing, some jurisdictions found themselves subject to various sorts of enforcement actions under the Fair Housing Act and other laws. The clarity provided in the 2015 rule is reinforced by the requirement that AFHs be submitted to HUD for review and acceptance, and the provision for HUD to reject initial submissions that it deems unacceptable while also offering specific guidance about revisions jurisdictions can make to correct those shortcomings. These are critical components of the rule and must be preserved.

While the rule provides clarity and direction, it does not take a "one size fits all" approach. It establishes a robust process through which community input must be solicited and considered, so that the AFH reflects local concerns. Based on that input, jurisdictions then identify their most pressing fair housing problems, set their own goals and priorities, and design their own strategies for achieving those goals. Nowhere does the rule state that program participants must address any particular fair housing issue, set any particular goal or number of goals, or take any particular action to overcome barriers to fair housing choice. The rule combines the structure that program participants need to analyze fair housing issues effectively, with the flexibility that is also needed to accommodate a diversity of local conditions.

¹³ See 24 CFR §5.152.

¹⁴ See 24 CFR §91.225; also §91.324 and §91.425

HUD Has Mischaracterized the Early Results of the 2015 Rule, Which Were Promising

In suspending the AFFH rule, HUD asserted that the rule was essentially unworkable. It pointed to the number of jurisdictions that were unable to produce an AFH that was accepted upon initial submission to HUD. What HUD failed to acknowledge was that this was a new regulation, establishing a process with which grantees were not yet familiar, and that HUD itself had anticipated that not all AFHs would be acceptable on the first go around. In fact, the regulation itself accounted for this, providing for back and forth between HUD and grantees to identify and rectify any shortcomings in their AFHs while still allowing for timely submission. And, while 63% of the initial 49 submissions were deemed unacceptable by HUD, by HUD's own accounting, 65% were deemed acceptable after the grantees made the changes that HUD indicated were needed, and some additional number – which likely would have achieved the same success – were never modified because HUD suspended the rule.¹⁵ Rather than taking the prudent course of continuing to implement the 2015 regulation while providing additional feedback and support to its grantees, HUD instead instructed them to revert to the old AI process.

In 2010, the Government Accountability Office found the AI process was not an effective means for HUD to fulfill its own statutory obligation to affirmatively further fair housing or for HUD to ensure that its program participants were fulfilling their AFFH obligations.¹⁶

Too often, AIs were done without input from fair housing organizations, members of protected classes, or other stakeholders. They lacked a consistent format and often lacked a fair housing focus. Many failed to consider the barriers facing members of key protected classes under the Fair Housing Act, including people of particular races and ethnicities, families with children, and people with disabilities. Most did not contain concrete goals for addressing local barriers to fair housing, nor did they include specific steps to be taken, timelines for taking those steps, or metrics for assessing progress. Without a clear timeframe for conducting AIs, many were out of date. Without a requirement that they be updated when there is a material change in local conditions, such as the two hurricanes that have devastated large parts of the Southeast United States within the last few months, some were irrelevant. Without a direct link to the jurisdiction's Consolidated Plan, they had little, if any, impact on decisions about how to use housing and community development resources. Because they were not required to be submitted to HUD for review, HUD had no way to ensure their timeliness, monitor their content, or assess their impact. In sum, the AI process was a failure that the AFFH rule had intentionally set out to correct with extensive input from stakeholders and program participants.

The early results under the 2015 rule were extremely promising, contrary to HUD's erroneous and unfounded characterization of them as, "highly prescriptive regulations [that] give participants inadequate autonomy in developing fair housing goals as suggested by the principles of federalism."¹⁷ In fact, there were a number of extremely positive aspects of the AFH process conducted by the initial cohorts. For example, they undertook more robust community engagement efforts, offering more opportunities for public input and involving a larger number and wider range of stakeholders than was

¹⁵ See FR-5173-N-17, "Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments," <https://www.regulations.gov/document?D=HUD-2018-0039-0001>.

¹⁶ See GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," October 14, 2010.

¹⁷ See HUD's ANPR on the AFFH rule at 83 FR 40713.

typical under the AI process.¹⁸ Jurisdictions analyzed residential patterns and trends through a focused, fair housing lens, assessing the extent to which members of protected classes have equitable access to important community assets, resources and opportunities. They set priorities for addressing their particular local (and in some cases, regional) fair housing problems, and adopted concrete goals, with metrics and milestones to measure their progress toward achieving those goals.¹⁹ The Committee will hear more about this from Cashauna Hill, Executive Director of the Greater New Orleans Fair Housing Action Center, who is also testifying today. Ms. Hill was deeply engaged in the development of the AFH in New Orleans, which was one of the first jurisdictions to go through the process under the 2015 rule.

These initial AFHs were a substantial improvement over the Analyses of Impediments to Fair Housing Choice AIs) which preceded them, and to which HUD has now returned.

For all of these reasons and more, HUD's suspension of the 2015 AFFH rule is cause for great concern. Just as HUD was beginning to take the first meaningful steps to fulfill the mandate that Congress gave it more than 50 years ago to dismantle the structures of segregation and use its programs to ensure equitable access to opportunity, HUD has stopped that effort in its tracks. This year and next, according to information provided by HUD, some 1,061 jurisdictions that receive funding under the Community Development Block Grant and other HUD programs are scheduled to submit to HUD their Consolidated Plans, which detail how they intend to spend those funds. Had HUD not suspended the rule, each of these jurisdictions would be conducting fair housing planning first. They would be engaging local residents in analyzing the barriers to fair housing that exist in their communities, identifying the forces that created and perpetuate those barriers, setting priorities for the most pressing issues to address, developing goals with associated timelines and metrics for addressing those priorities, and incorporating those goals into their Consolidated Plans. Over the subsequent five years, each of those jurisdictions would implement those strategies and report, to both HUD and the public, on their progress in doing so. This would represent concrete progress toward increasing access to opportunity in communities across the country. But because HUD has suspended the AFFH rule, it does not know and we cannot say which, if any, of those jurisdictions are undertaking meaningful efforts to affirmatively further fair housing in compliance with their statutory obligation to do so.

This reversal on HUD's part represents the enormous loss of an opportunity to make real progress toward achieving the Fair Housing Act's goal of eliminating segregation and overcoming the harms it has caused to both individuals whose lives it has constrained and our society as a whole.

¹⁸ See Been, Vicki and Katherine O'Regan, "The Potential Costs to Public Engagement of HUD's Assessment of Fair Housing Delay," NYU Furman Center, March 9, 2018.

¹⁹ See, for example, the research of Justin Steil and Nicholas Kelly, "The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance," Working Paper for the Future of Housing Policy in the U.S. Conference, University of Pennsylvania, September 15, 2017.

Disparate Impact

In 1968, Congress envisioned the Fair Housing Act as a treaty with the American people which essentially stated that housing discrimination, whether overt or seemingly unintentional, would not be tolerated in this country.²⁰ Not only does the Act prohibit blatant acts of discrimination but it also allows individuals to challenge unjustified policies or practices that appear facially neutral but have a discriminatory effect on protected classes by using the disparate impact doctrine. Transcending party lines, this doctrine has been used by both Democratic and Republican Administrations. Upheld in every federal circuit court and by the Supreme Court, it has been a longstanding enforcement tool used to challenge some of the most impactful discriminatory practices affecting everyday people. This is because disparate impact is a tool that gets at the heart of a multitude of discriminatory outcomes that people experience.

Examples of policies or practices that the disparate impact doctrine is used include instances in which:

- A bank could charge a costly deposit fee to those who seek home mortgage loans. With this high barrier, older Americans, veterans or persons of color with limited means would be forced to take on more risky and costly loans or not have access to financing at all.²¹
- An apartment building could restrict occupancy to one person per bedroom. Families with children would be barred from renting or would be forced to rent more costly multi-bedroom apartments.²²
- An insurance company could refuse to insure homes under a certain dollar value. In many communities, this would exclude homes in neighborhoods of color, and would prevent homeowners in those neighborhoods from fully protecting their homes from damage due to fire, hurricanes or other hazards.²³
- A landlord could evict a tenant if police were called to that tenant's unit numerous times, even if that tenant was the victim of abuse seeking protection from their abuser. This would place women—the primary victims of domestic abuse—and their children at risk of homelessness and further violence.²⁴

²⁰ Amicus Brief of current and former Members of Congress, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities*, available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_affirmance_Congress.authcheckdam.pdf (disparate impact was a part of the 1968 and 1988 Congressional record).

²¹ See e.g. *United States v. Countrywide Corporation, Countrywide Home Loans and Countrywide Bank*, 2011, available at <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>.

²² See e.g. *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992), available at <https://openjurist.org/976/f2d/1176/united-states-v-j-badgett>.

²³ See e.g. *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 58-60 (D. D.C. 2002), available at <https://casetext.com/case/national-fair-housing-alli-v-prudential-ins-co>.

²⁴ See e.g. *Hope Fair Housing Center v. City of Peoria, Illinois*, available at https://www.reلمانlaw.com/media/cases/46_Complaint.pdf.

Since the early days of the Act, disparate impact claims have been used to challenge policies with discriminatory effects, beginning in the early years under the Act with a case against the City of Black Jack, Missouri, brought by the Department of Justice under President Richard Nixon. The case challenged an exclusionary zoning ordinance that had the effect of excluding African-American residents in the newly-created community in St. Louis County, MO.²⁵ Since that time, subsequent Republican and Democratic administrations have used the doctrine.

Over the next several decades, every Circuit Court that considered the question of whether or not disparate impact claims are cognizable under the Fair Housing Act affirmed its validity. However, they applied different pleading standards, burdens of proof, and other procedural requirements to bring and defend against a disparate impact claim. To address the lack of standardization across Circuit Courts in 2013 HUD issued an important rule that created a unified standard for bringing and defending against a disparate impact claim. And in 2015, the Supreme Court heard arguments in *Inclusive Communities Project v. Texas Department of Housing and Community Affairs* about the use of disparate impact in fair housing cases. The Court's decision in that case, written by Justice Kennedy, held that the disparate impact doctrine is a necessary and viable means to challenge policies or practices with a discriminatory effect under the Fair Housing Act.

Despite the well-established validity of the disparate impact doctrine, the insurance industry has made attempts at every possible turn to challenge its applicability to its business. Recently, and troublingly, it appears the federal government may adopt to the insurance industry's spurious arguments. 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 Act²⁶ and state law.²⁷ 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 insurers²⁸ and that this prohibition is not in conflict with the McCarran-Ferguson Act or state law. In its 2013 rulemaking HUD took an appropriately nuanced position on this matter that is consistent with the McCarran-Ferguson Act itself:

²⁵ *United States v. City of Black Jack, Missouri*, 508 F. 2d 1179. See Myron Orfield, "Symposium: Romney was right about disparate-impact," SCOTUSblog, January 8, 2015, accessible at <https://www.scotusblog.com/2015/01/symposium-romney-was-right-about-disparate-impact/>.

²⁶ The McCarran-Ferguson Act at a basic level states that regulation of the insurance industry is retained at the state level. See 15 U.S. Code § 6701.

²⁷ 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.

²⁸ See, e.g., *Ojo v. Farmers Group Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110, 1117-1122 (W.D. Wash. 2004); *National Fair Hous. Alliance v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994).

“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.”²⁹

Despite the insurance industry’s repeated protestations otherwise, HUD’s current disparate impact rule is consistent with long-standing jurisprudence.

In response to the Treasury Department’s request for reconsideration of its disparate impact rule, HUD issued an Advanced Notice of Proposed Rulemaking (ANPR) in the summer of 2018 suggesting that possible changes may be considered to the rule. The types of questions that HUD posed in the ANPR, the Department of the Treasury’s stance, and the repeated challenges to the rule all suggest that the rule may be in grave danger of evisceration. Among the questions the ANPR asked was whether there should be any blanket safe harbors or defenses to disparate impact claims, suggesting possible carve-outs for the insurance or lending industries.³⁰

Some have erroneously characterized HUD’s disparate impact rule as being in conflict with the Supreme Court’s decision in the *Inclusive Communities Project* case. In November 2017, a small group of Republican congressional representatives wrote to HUD and incorrectly asserted that the Disparate Impact Rule is inconsistent with recent Supreme Court precedent. 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.”³¹ Following that decision, 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 approved of disparate-impact liability under the FHA and did not identify any aspect of HUD’s burden-shifting approach that requires correction.”³² In short, as federal courts have recognized, nothing in the *Inclusive Communities* decision—in its holding or dicta—necessitates any reconsideration of the current Disparate Impact Rule.

When defending the Disparate Impact Rule in a challenge by an insurance trade group subsequent to *Inclusive Communities* in August 2016, HUD itself argued that the Supreme Court’s decision is “fully consistent with the standard that HUD promulgated” relying on existing jurisprudence.³³ Again in March 2017, in response to the insurance trade group’s motion to file an amended complaint against the Rule, HUD stated that the Rule is wholly in line with the *Inclusive Communities* decision:

“[T]he Supreme Court’s holding in *Inclusive Communities* is entirely consistent with the Rule’s reaffirmation of HUD’s longstanding interpretation that the FHA authorizes disparate impact claims. 135 S. Ct. at 2516-22. And the portions of the Court’s opinion cited by

²⁹ Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule (Feb. 8, 2013) [78 Fed. Reg. 11459, 11475 (Feb. 15, 2013)].

³⁰ See Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Docket No. FR-6111-A-01.

³¹ *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

³² *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069 at *8 (N.D. Ill. June 20, 2017).

³³ Defendants’ Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, ECF No. 65, at 33, *AIA v. Dep’t of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.).

[PCIA]—which discuss limitations on the application of disparate impact liability that have long been part of the standard—do not give rise to new causes of action, nor do they conflict with the Rule. *See id.* at 2522-25 (“[D]isparate-impact liability has always been properly limited in key respects...”). Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice in support of its analysis. *See* 135 S. Ct. at 2522-23.”³⁴

The proposition raised by the insurance industry that *Inclusive Communities* requires HUD to reconsider the Disparate Impact Rule is simply erroneous. Leading fair housing scholars echo the consensus that *Inclusive Communities* is consistent with the current Disparate Impact Rule. Tulane University Law School Professor Stacy Seicshnaydre, whose scholarship on the subject was cited by Justice Kennedy in the *Inclusive Communities* decision,³⁵ looking to both the language of the opinion and its overarching message about the integration imperative of the Fair Housing Act, writes that the decision is in concert with the HUD rule.³⁶ Additionally, University of Kentucky School of Law Professor Robert Schwemm summarized, “the fact that HUD described [the Disparate Impact Rule] as analogous to the Title VII-*Griggs* standard suggests that it is consistent with the Court’s views in *Inclusive Communities*.”³⁷

However well-established the disparate impact doctrine is, HUD’s rule is in danger of being stripped of its teeth by insurance industry-driven advocacy and Congress should be concerned about the openness of this Administration to ignore the Judicial Branch’s repeated affirmations of the doctrine. Relying on inaccurate representations of landmark Supreme Court rulings would directly contradict HUD’s mission to fully and effectively enforce the Fair Housing Act and would compromise consistent adherence to a long-accepted legal standard.

Ensuring Robust Fair Housing Enforcement in a Changing Housing Market

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.

³⁴ Defendants’ Opposition to Plaintiff’s Motion for Leave to Amend Complaint, ECF. No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.).

³⁵ Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 *Geo. Mason L. Rev.* 663 (2017).

³⁶ Robert Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 *Colum. L. Rev. Sidebar* 106 [now: *CLR Online*] (2015).

³⁷ *Id.*

Built in biases in the analysis of big data create biased outputs

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.³⁸

Unfortunately, the tools used to harness these 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.

In short, artificial intelligence systems mimic societal biases. Analyzing data from an information landscape that derives from the long history of housing discrimination and bias against all protected classes, absent specific fair housing controls, creates an automated system of bias. These outcomes can result 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.

For example, the lending industry has identified that the use of big data and artificial intelligence can be powerful tools for quickly detecting and reacting to schemes hatched by wrongdoers.³⁹ However, "fraud screening" models may result in biased outcomes if one of the strong indicators of fraud is a proxy for a protected class, such as language preference, applications emanating from a particular zip code, or even particular ethnic groups. Regulators should be more active in evaluating the variables that lenders, insurance providers, and other housing-service providers use in mining big data to target their services.

The civil rights community is committed to researching and investigating these practices. 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.⁴⁰ 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.

Big data cannot be allowed to undermine the application of fair housing principles in housing and related transactions. Both industry leaders 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.

³⁸ 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.

³⁹ See BizTech, Phil Goldstein, "How Will AI Affect the Mortgage Lending Process?," Nov. 30, 2018, <https://biztechmagazine.com/article/2018/11/how-will-ai-affect-mortgage-lending-process>.

⁴⁰ 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.

Credit Scoring Companies and Toxic Big Data

The concentration of consumer data at the credit repositories and other big data companies is of concern. Our current credit-scoring systems have a disparate impact on people and communities of color.⁴¹ Many credit-scoring mechanisms include factors that do not just assess the risk characteristics of the borrower; they also reflect the riskiness of the environment in which a consumer is utilizing credit, as well as the riskiness of the types of products a consumer uses.

The use of credit scoring and its disparate impact go far beyond the lending sector, affecting access to many other financial products and services. Employers use credit and other scoring mechanisms to evaluate job applicants, insurers use them to determine auto, life, and homeowners insurance, and landlords use them to screen tenants. Credit-scoring modelers and companies are finding even more creative ways to broaden the use of these systems, such as using credit scores to determine utility rates.⁴² Credit scores are even being used to determine which patients are more likely to take their medication as prescribed.⁴³

The information used to build credit-scoring models comes from a variety of sources; however, modelers tend to rely heavily on credit-reporting data from credit bureaus. The quality or accuracy of the scoring model is intrinsically tied to the quality of data upon which the model is based: the better the data quality, the better the scoring system. If modelers rely on limited or inaccurate data, they will develop scoring models that are less effective and have limited predictive power and market applicability. The less predictive a scoring model, the greater the likelihood for miscalculating risk.

Expanding access to quality, sustainable credit comprises much of NFHA's work since this issue has profound implications for communities of color and other classes protected by our nation's anti-discrimination laws and because the use of consumer credit data has spread precipitously. Businesses use credit data for decision-making in employment, housing, lending, insurance, medical, utility and other areas. The information captured by the credit repositories is being used for more than determining whether a person can obtain a loan or how much a consumer will be charged for a credit card. This information is also being used to determine whether a consumer can receive insurance, obtain a job, rent an apartment, or secure utility services.

While credit repositories capture all types of data from myriad sources, they do not capture information that explains the impact of discrimination and racial inequities that are replete throughout our markets and society. Moreover, repositories adopt policies that favor the provider of the credit data over the consumer, even when the entity has engaged in discriminatory or fraudulent conduct. This makes it

⁴¹ Lisa Rice and Deidra Swesnik, Discriminatory Effects of Credit Scoring on Communities of Color, Suffolk University Law Review, http://suffolklawreview.org/wp-content/uploads/2014/01/Rice-Swesnik_Lead.pdf.

⁴² See Jim Stillman, Your Credit Score Determines the Availability of Credit . . . and the Cost, YAHOO! VOICES (June 20, 2007), <http://voices.yahoo.com/your-credit-score-determines-availability-creditand-392590.html>.

⁴³ See Tara Parker-Pope, Keeping Score on How You Take Your Medicine, N.Y. TIMES WELL BLOG (June 20, 2011, 5:23 PM), <http://well.blogs.nytimes.com/2011/06/20/keeping-score-on-how-you-take-yourmedicine>. Insurers and medical-care facilities use the FICO Medication Adherence Score to identify patients who need follow-up services to ensure they take their medication.

difficult for people to illustrate why a negative entry on their credit report may be erroneous. Further, repositories do not collect alternative or non-traditional credit information that can result in expanded access to quality, sustainable credit for under-served groups.

Discrimination in the marketplace taints the data collected by credit repositories; thus, data can be extremely harmful. Discrimination in the employment, housing, credit, health and other sectors impacts the type and quality of data reflected in our credit repository system. How that data is ultimately used by credit modelling agencies can exacerbate disparities and negatively affect the racial wealth gap, which is getting worse.⁴⁴ Credit scores, which are fundamentally built upon the data housed in the credit repositories, are to a large degree a function of wealth as opposed to willingness or ability to pay a debt. But credit scoring systems behave as though wealth is a function of personal or individual performance when it is, rather, determined by policies that have systemic manifestations – policies that help some and inhibit others. Although discrimination is a common occurrence, it is not accounted for in the way credit data is collected or utilized.

When credit repositories gather data, they do not simultaneously ascertain if a consumer has obtained credit from a predatory, discriminatory or abusive debtor for the purposes of ameliorating any negative fallout. Data is captured as if it is innocuous and benign when the opposite is the case. Data is infused with the discrimination replete throughout our society. When credit repositories collect data, without any assessment of the quality or legitimacy of that data, they help perpetuate the inequities that harm under-served consumers.

Some have attempted to mitigate bias in our markets by moving toward automated systems lulled by the myth that data is blind. Data is not blind, nor is it harmless. It can be dangerous and toxic particularly when it manifests the discrimination inherent in our systems. Researchers at the University of California at Berkeley have found that FinTech lenders that rely on algorithms to generate decisions on loan pricing discriminate against borrowers of color because their systems “have not removed discrimination, but may have shifted the mode.”⁴⁵ It is estimated that borrowers of color are being overcharged by \$250 million to \$500 million per year just in the FinTech space alone. The data gleaned from credit reporting agencies that go into the credit scoring algorithms do not exist in isolation. Each piece of information has appended to it other bits of data that is inherently connecting risk to race. In essence, these data systems manifest systemic and institutional racism.

Credit repositories should adjust their systems and practices to account for how discrimination impacts consumers. For example, there is clear evidence that subprime loans were targeted toward borrowers of color who qualified for prime credit and that these borrowers faced higher instances of delinquency and default because they received unsustainable subprime loans. There is also clear evidence of a pattern of discriminatory pricing behavior toward borrowers of color.⁴⁶ However, settlements for consumers

⁴⁴ Anzilotti, Ellie, “*The racial wealth gap is worse than it was 35 years ago*,” Fast Company, January 15, 2019, Available at: <https://www.fastcompany.com/90292185/the-racial-wealth-gap-is-worse-than-it-was-35-years-ago>.

⁴⁵ Bartlett, Robert P. and Morse, Adair and Stanton, Richard H. and Wallace, Nancy E. 2017. *Consumer Lending Discrimination in the FinTech Era*. UC Berkeley Public Law Research Paper. Available at SSRN: <https://ssrn.com/abstract=3063448> or <http://dx.doi.org/10.2139/ssrn.3063448>.

⁴⁶ See *United States v. Countrywide, United States, et al. v. Wells Fargo, United States v. Suntrust Bank, United States v. PrimeLending, United States v. National City Bank, United States v. Sage Bank*, and more at <https://www.justice.gov/crt/recent-fair-lending-cases-0> and <https://www.justice.gov/crt/housing-and-civil-enforcement-section>.

experiencing discrimination or predatory lending typically did not include having their credit information corrected. When settlements did call for this correction, many victims of discrimination could not be found to take advantage of the correction. This glaring oversight calls for the development of a mechanism to mitigate discrimination in the marketplace within our credit reporting system.

One asymmetry in the credit reporting world occurs when certain creditors do not report favorable consumer data to the credit repositories but do report unfavorable data. Another area where this happens is with rental housing payment information most of which is not captured by repositories. This is unfortunate since rental payment information can be highly predictive of future performance particularly in the mortgage lending context. The Urban Institute completed an analysis⁴⁷ which found that credit risk assessments for renters are being conducted improperly, and that by capturing this information, renters could get a boost when they apply for mortgage credit. This could be a tremendous benefit for borrowers who are credit invisible or unscorable. Less than 1% of credit files contain rental payment information. TransUnion, Equifax and Experian will include rental payment entries if they receive the data. Given the positive benefit many consumers can receive from the reporting of rental payment information, it is imperative to develop a system for easily tracking and reporting this data. Simultaneously, we must create increased protections for tenants so they are not taken advantage of by unscrupulous actors.

Currently, our credit reporting system rates consumers, placing the onus for performance on them. The system does not rate creditors, leaving them off of the hook for discriminatory, fraudulent, and other poor behavior. The discriminatory, fraudulent or harmful behavior of the creditor is reflected, incorrectly and unfairly, in the consumer's credit data.

Credit-scoring mechanisms are negatively affecting the largest growing segments of our population and economy. America cannot be successful if increasing numbers of our residents are isolated from the financial mainstream and subjected to abusive and harmful lending practices. Credit scores have an increasing impact on our daily activities and determine everything from whether we can get a job, to whether we will be able to successfully own a home. The current credit-scoring systems work against the goal of moving qualified consumers into the financial mainstream because they are too much a reflection of our broken dual credit market. This paradigm must change.

In addition to posing accuracy and access challenges, credit-scoring mechanisms lack transparency. The formulas are proprietary and not disclosed to the public. While there are a number of individual factors that help determine the score, only some of them are public. There are potentially thousands of variables that can be included. These variables can be comprised of individual and combined components, including such elements as the number of late payments, inquiries, inquiries by subprime lenders, open trade lines, late mortgage loan payments, or installment loans. Making the scoring systems more transparent will help consumers better manage their financial affairs. It will also help advocates, financial institutions, federal regulators, and legislators.

⁴⁷ Goodman, Laurie, Jun Zhu, Rental pay history should be used to assess the creditworthiness of mortgage borrowers, Urban Institute, April 17, 2018. Available at: <https://www.urban.org/urban-wire/rental-pay-history-should-be-used-assess-creditworthiness-mortgage-borrowers>.

Online Advertising Platforms and Data-based, Discriminatory Targeting

Another arena in which the use of big data may be harnessed to discriminate against housing consumers in online advertising. Online advertising is a form of marketing and advertising which uses the Internet to deliver promotional marketing messages to consumers. Online advertising platforms, like Facebook, compile large troves of data on individual users and allow advertisers to target their advertisements to specific users on the basis of interest, specific location, Internet usage practices, and a variety of other criteria derived from user data, including: race, familial status, sex, religion, and other protected classes. These platforms make the ability to target advertisements with this data “the product” sold to advertisers.

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.

Online advertising platforms have been the subject of much concern among fair housing advocates. In the rental space, enforcement actions against Craigslist⁴⁸ and Roommates.com⁴⁹ 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 a new home. Notably, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit held that immunity under the Communications Decency Act did not apply to Roommates.com’s online housing ad platform – as an interactive online operator – whose questionnaire asked whether housing providers accepted tenants by gender, sexual orientation, and whether they are families with children violated the Fair Housing Act. Despite Communications Decency Act defenses, online publishers may be subject to fair housing liability where they exert some editorial control over the marketing and content of the advertisement.

In October 2016, 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.⁵⁰ 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 antidiscrimination laws.⁵¹

⁴⁸ 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>.

⁴⁹ For information on *Fair Housing Council of San Fernando Valley et al v. Roommates.com, LLC*, see <https://caselaw.findlaw.com/us-9th-circuit/1493375.html>.

⁵⁰ 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>.

⁵¹ 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/>.

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.⁵² 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 – the Fair Housing Justice Center in New York, Housing Opportunities Project for Excellence, Inc. in Florida, 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 alleged in their lawsuit 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.

⁵² Julia Angwin, Ariana Tobin and Madeleine Varner, Facebook (Still) Letting Housing Advertisers Exclude Users by Race, [propublica.org](https://www.propublica.org/article/facebook-advertising-discriminationhousing-race-sex-nationalorigin) (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discriminationhousing-race-sex-nationalorigin>.

Last month, in March 2019, NFHA and its local fair housing center partners settled a historic lawsuit with Facebook that will drive unprecedented and sweeping changes across its advertising platform. The settlement will set new standards across the Tech industry concerning company policies that intersect with civil rights laws.

Under the terms of the fair housing centers' settlement:

- Facebook has now agreed to establish a separate advertising portal for advertisers seeking to create housing, employment, and credit ads on Facebook, Instagram, and Messenger. The portal will limit advertisers' targeting abilities to prevent them from illegally discriminating. Housing advertisers will no longer be allowed to target consumers based on protected classes. Housing advertisers will also be prevented from advertising based on zip code. Instead, they will be permitted to advertise based on a 15-mile radius from a city center or address.
- Facebook will restructure its "Lookalike Audience" feature, which formerly allowed advertisers to target ads to Facebook users who were similar to an advertiser's existing customers. Moving forward, Facebook will restructure and rename this tool so that it will not consider users' age, relationship status, religious or political views, school, interests, zip code or membership in "Facebook Groups."
- Facebook will also create a page for consumers to view all housing ads placed on its platform, post a self-certification agreement that advertisers must agree to regarding all anti-discrimination laws, provide anti-discrimination and civil rights educational materials to advertisers, and work with scholars, organizations, experts, and researchers to examine algorithmic modeling and its potential for discriminatory impact and bias.
- NFHA will work with Facebook to develop an in-house fair housing training program for Facebook leadership and staff in a number of departments. NFHA and the co-plaintiffs will monitor Facebook's advertising platform on a continual basis for the next three years. NFHA will meet with Facebook and others every six months over the next three years to study the platform and consider further changes.

This settlement positively impacts all of Facebook's 210 million users in the U.S. since everyone is protected by our nation's fair housing laws. As the largest digitally-based advertising platform and a leader in Tech, Facebook has an obligation to ensure that the data it collects on millions of people is not used against those same users in a harmful manner. Facebook took in \$8.246 billion in advertising revenue in the U.S. and Canada alone, in the fourth quarter of 2018.

Our settlement agreement with Facebook sets a significant and historic precedent for Big Data and Tech companies throughout the country. As more consumers rely on Big Tech in their daily lives, it is important that companies abide by and enforce civil rights laws across their platforms. Big Tech and Big Data companies must not allow their platforms to become tools for unlawful behavior, including segregation and discrimination in housing and beyond.

Beyond the scope of changes agreed to under the settlement, further analysis will need to be undertaken to assess whether demographic reflection can happen regardless of whether details about protected class features like race are overtly specified by users anywhere on Facebook. Facebook's extensive data about its users may include proxies for protected class membership, and these proxies can lead to a Lookalike Audience whose protected status traits match those of the source audience. One study found that that racially-homogeneous source audiences tended to result in racially-homogeneous Lookalike audiences.⁵³ The researchers concluded that there is a strong inference that "the [Lookalike] audience feature in Facebook is able to both capture the biases in a source audience and propagate the biases to the larger audiences it helps construct."

The National Fair Housing Alliance and our partners look forward to continuing our work with Facebook to ensure that housing discrimination comes to an end and civil rights are upheld for all. Under the settlement, Facebook is removing the directly discriminatory categories for creating a customer base or delivery group and minimizes the indirect effects, but once Facebook changes the customized audience tool, as it has agreed to do, then it will be important to evaluate what impact that is having on the delivery outcomes.

Moving forward, Facebook agreed in the settlement to engage academics, researchers, civil society experts, and privacy and civil rights/liberties advocates to study the potential for unintended biases in algorithmic modeling. Specifically, Facebook will study how the "Lookalike Audience" tool impacts delivery of advertisements in its separate housing, employment, and credit "ad flow" and to study the potential for unintended bias with respect to the tool generally. Facebook has agreed to meet with the National Fair Housing Alliance and others on a regular basis over the next three years to discuss the findings of their studies and any potential modifications to the tool as part of its ongoing commitment to nondiscrimination in advertising on its platform.

Last week, on March 28, HUD announced that it is charging Facebook with violating the Fair Housing Act by encouraging, enabling, and causing housing discrimination through the company's advertising platform. According to HUD's Charge, Facebook enabled advertisers to exclude people based on interests that closely align with the Fair Housing Act's protected classes and based upon their neighborhood by drawing a red line around those neighborhoods on a map. The Charge further asserts that Facebook also uses the protected characteristics of people to determine who will view ads regardless of whether an advertiser wants to reach a broad or narrow audience. Through its Charge, HUD seeks to address unresolved fair housing issues regarding Facebook's advertising practices and to obtain appropriate relief for the harm Facebook caused and continues to cause.

Fair Housing Issues in the Online Shared Economy

Constant innovations are being made to the ways in which housing providers sell, rent, and advertise. The digital age has brought with it changes in every corner of the housing market, reshaping how providers market opportunities and select potential tenants and purchasers.

⁵³ Till Speicher, et al., Potential for Discrimination in Online Targeted Advertising, <http://proceedings.mlr.press/v81/speicher18a/speicher18a.pdf>.

AirBnB is an online community marketplace that connects people looking to rent their homes with people who are looking for accommodations, allowing users to lease and rent short-term housing in more than 65,000 cities and 191 countries. Following a 2015 study by Harvard Business School researchers, however, Airbnb came under scrutiny because the platform allows its hosts to potentially reject renters based on race, gender, and other factors that are protected under the Fair Housing Act. The study examined a sample of properties in the United States, found that Airbnb users with distinctly African American names were 16 percent less likely to be accepted relative to users with distinctly White names.⁵⁴ Users also shared their stories of discrimination on social media using the tag #AirbnbWhiteBlack, generating attention to the prevalence of the discriminatory practices of many Airbnb hosts.

As a result of these findings and related advocacy, Airbnb has adopted a number of changes and rules to combat discrimination by its hosts. These measures include requiring all rental hosts to agree to a “community commitment” and nondiscrimination policy as of November 2016. Airbnb also released a report outlining its plans to address discrimination.⁵⁵ Accompanying the release of the report, Airbnb’s CEO Brian Chesky stated: “Bias and discrimination have no place on Airbnb, and we have zero tolerance for them.”

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 against Black guests in violation of California civil rights laws.⁵⁶ 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.

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.⁵⁷ 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.

⁵⁴ Benjamin Edelman, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, <http://www.benedelman.org/publications/airbnb-guest-discrimination-2016-09-16.pdf>.

⁵⁵ https://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf.

⁵⁶ <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/Press-release-4-27-17.pdf>.

⁵⁷ Online Search Behavior and Trends of Apartment Renters, by Apartments.com and Google, http://costarmultifamily.com/google-whitepaper/Apartment_GoogleWhitePaper.pdf.

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)⁵⁸ 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 to consumers, in plain language, 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. We are hopeful that the Facebook settlement agreement will serve as an example to others in the industry for proactive steps that can be taken with civil rights partners like the National Fair Housing Alliance to address these issues as they pertain to housing and housing-related 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.

Responsible Online Advertising Practices for Housing Providers

Publications or online portals must refrain from publishing discriminatory advertisements, and housing and housing-service providers also bear responsibility to refrain from posting discriminatory advertisements. Housing providers themselves must understand that including or excluding certain audiences or neighborhoods in the settings of advertisements may be discriminatory. Micro-targeting on web-based platforms may facilitate discrimination in advertising placements.

Here are guidelines for housing providers to consider when posting online housing advertisements:

- Ensure advertising is compliant with fair housing laws by focusing on the property and the amenities in rental listing description, rather than on who an ideal renter would be.

⁵⁸ Communications Decency Act of 1966, 47 U.S.C. §§ 230, 560, 561 (2006).

- Do not make statements that exclude persons in protected classes or express a preference for one personal characteristic over others.
- Always include the fair housing logo and/or the “Equal Housing Opportunity” slogan in advertising.
- Do not exclude from marketing campaigns persons in protected classes, such as families with children, people of certain racial or ethnic backgrounds, persons with disabilities, etc.
- Do not exclude interest groups that may be affiliated with persons in protected classes.
- Do not target ads geographically to exclude areas populated predominantly by persons in certain protected classes.
- If human models are featured in advertisements, ensure that the images are inclusive and representative of all communities that need access to housing.
- Always give truthful information about the availability, price, amenities, and features of a housing unit.

The best practice in housing advertisements is to develop ad campaigns that are based on a goal of broadening – not restricting – market outreach, to gain critical exposure to consumers.

Recommendations

NFHA offers the following recommendations to Congress for steps it can take to address the concerns we have identified in this testimony.

Recommendations for strengthening our fair housing infrastructure

Congress has an important role to play in ensuring that our fair housing infrastructure is stable, has sufficient resources and is well-managed. Today’s hearing is an important first step in providing the oversight needed to secure our ability to eliminate discrimination in housing and provide access to opportunity for all residents of this country. We encourage Congress to consider the following recommendations to address the various concerns I have laid out:

1. Increase the level of funding for fair housing. NFHA recommends the following specific funding levels:
 - a. FHIP must be increased to \$52 million;
 - b. FHAP should be increased to \$35.2 million; and
 - c. HUD’s Office of Fair Housing and Equal Opportunity be funded at \$102 million to hire a total of 750 FTE staff.
2. Continue its oversight of HUD’s management of its programs to ensure that funds are flowing on a timely and reliable schedule and that program guidelines are administered consistently across HUD regions.
3. Use its authority to ensure that HUD does not weaken or eliminate critical regulatory tools, including the current disparate impact and affirmatively furthering fair housing regulations, and further that HUD vigorously enforces those and all of its fair housing regulations.

Recommendations to address a constant delays in the Fair Housing Initiatives Program.

1. Announce the FY19 FHIP NOFA as soon as possible;
2. Announce the FY20 FHIP NOFA at least six months before the end of the FY for which funds are appropriated;
3. Establish a permanent calendar for the release of each subsequent FHIP NOFA and awards;
4. Form and convene Technical Evaluation Panels prior to the FHIP NOFA application is due to ensure the panel is familiar with the FHIP program and NOFA requirements and can conduct an informed selection process immediately after the application deadline;
5. Announce awards within 30 days of the NOFA application due date;
6. Create a grant management timetable to ensure grant payments are timely made after a grant work cycle begins and report on its compliance with said grant management timetable;
7. Maintain a list of FHIP agencies that are at risk of experiencing funding gaps due to previous or expected FHIP delays;
8. Reallocate any FHIP FY17-19 funds that have been returned to provide gap funding for high performing and qualified nonprofit fair housing organizations that are at severe risk of closure; and
9. Ensure sufficient staff and subcontractor staff are prepared to adequately administer the NOFA process in a timely manner.⁵⁹

Recommendations to address concerns about the fair housing impact of the growing use of Big Data and Artificial Intelligence in housing-related activities.

1. Congress must authorize the creation of a bicameral task force charged with exploring and reporting on the policy challenges to civil rights, consumer, and privacy rights by the proliferation of big data mining, brokering; the use of AI in automated housing transactions and background reporting services; and specifically the role that social media platforms play in this space. The goal of this bicameral task force is to commit to providing legislative recommendations to address the various challenges addressed in this testimony and in other areas identified by the task force.
2. 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) 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.
3. Congress should conduct further hearings gain a deeper level of understanding and effectively assess the nature and operations of artificial intelligence and big data and their impact on our ability to provide for fair housing throughout the nation. Congress should also assess the implications of these new technologies for the level and type of resources needed by HUD, DOJ,

⁵⁹ For more information about the FHIP program, see the testimony of Keenya Robertson, President & CEO of the Housing Opportunities Project for Excellence (HOPE) Fair Housing Center, Inc. before the House Appropriations Committee Subcommittee on Transportation, Housing and Urban Development and Related Agencies, February 27, 2019.

other federal agencies and the fair housing organizations that are the front lines of defense against housing discrimination to do their jobs effectively, and provide additional resources as necessary.

4. Federal regulators should be more active in evaluating the variables that lenders, insurance providers, and other housing-service providers use in mining big data to target their services, to determine if they operate to result in biased outcomes.
5. Credit repositories should take a number of steps to adjust their systems and practices to account for how discrimination impacts consumers, including:
 - Discrimination, fraud, abuse and other harmful acts must be mitigated in consumer credit data. Credit repository agencies should change their contracts to require information providers to immediately correct consumer information if those entities have been found liable for civil rights, abuse, fraud or other violations or have entered into agreements to correct issues related to these practices. Credit repository agencies should also “turn off” negative entries that might be the result of discrimination, fraud, abuse, etc.
 - Rental housing payments should be reflected in the credit repository system. This must be coupled with tenant protection laws to curtail fraud and abuse. Credit repositories can work with technology firms to provide a low-cost, scalable solution to facilitate the reporting of this data which can benefit millions of consumers. At the same time, lawmakers must step up tenant protections to curtail abuse in the rental market.
 - If a creditor is not reporting positive payment history data, negative data emanating from that creditor must not be captured. Credit repositories should reject any negative data that is sourced from a creditor that does not report positive payment information.
6. 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.
7. Online advertising platforms should take note of the Facebook settlement agreement as an example of proactive steps that can be taken with civil rights partners like the National Fair Housing Alliance to address these issues as they pertain to housing and housing-related services.

Recommendations related to enforcement of HUD’s Equal Access Rule and protections for LGBTQ Americans

- Congress must demand that HUD make available all resources related to its Equal Access Rule, and require that in its annual report to Congress that it describe in detail how it is currently handling complaints of discrimination on the basis of sex due to discrimination against gender non-conforming individuals or those who don’t adhere to traditional sex stereotypes.

Recommendations related to enforcement of HUD’s Disparate Impact Rule

- Congress must stop reconsideration of its existing Disparate Impact Rule, and Congress must vigorously review and question the process by which the Department has initiated proposed changes to the rule. Congress should pay close attention to whether HUD:
 - Appropriately engaged the public, including industry and consumer and civil rights advocates, in the drafting of the proposed rule; and
 - Designated changes to the Disparate Impact Rule as an “economically significant rulemaking” by appropriately considering the true cost of proposed changes to the Disparate Impact Rule, especially as it relates to the cost of housing discrimination on protected classes and the impact of reducing their ability to successfully bring a disparate impact claim.

Recommendations related to HUD’s Affirmatively Furthering Fair Housing Rule

- Congress must scrutinize HUD’s decision to rescind its AFFH rule, and take stock of the rationale behind its decision. Specifically, the Committee must question HUD officials about:
 - How the Department is monitoring compliance with the AFFH requirement; and
 - What instructions, if any, the Department has provided jurisdictions about successfully completing an Analysis of Impediments and how to incorporate into the AI the data and mapping systems HUD has stated it will continue to make available, and what connection should exist between the jurisdiction’s fair housing plan and its decisions about how to spend housing and community development resources it receives from HUD and other sources.

Recommendations Concerning Legislation Expanding Fair Housing Resources or Protections

NFHA recommends Congress support the following legislation:

- “Veterans, Women, Families with Children, Race, and Persons with Disabilities Housing Fairness Act of 2019” - This legislation supports the need to conduct widespread audit testing to uncover patterns of housing discrimination across all protected classes in the major areas of housing transactions; ensures that only mission-driven not-for-profit qualified fair housing enforcement agencies have access to FHIP program funding; and establishes grant-matching programs to explore solutions to alleviate housing discrimination and segregation.
- “Sexual Harassment Awareness and Prevention Act of 2018” – This legislation supports better documentation of sexual harassment in housing by HUD; requires the Government Accountability Office to study the readiness and efficacy of mechanisms at relevant federal departments that operate or support housing programs to challenge sexual harassment; and establishes an interagency task force to implement recommendations developed by Congress.
- “Equality Act of 2019” – This legislation adds sexual orientation and gender identity protections to the Fair Housing Act and Equal Credit Opportunity Act. However, NFHA warns that this legislation must not move forward should any existing protections in the Fair Housing Act or Equal Credit Opportunity Act be undermined via amendment at any point throughout its consideration of the legislation.

- “Restoring Fair Housing Protections Eliminated by HUD Act of 2018” – This legislation restore HUD’s Equal Access Rule and Affirmatively Furthering Fair Housing Rule; reinstate HUD’s Local Government Assessment Tool in relation to its Affirmatively Furthering Fair Housing Rule; and requires HUD to better report on its enforcement actions and maintain a public database of fair housing complaints.

Conclusion

The National Fair Housing Alliance appreciates the opportunity to address the Committee on the importance of ensuring the Fair Housing Act is effectively enforced and implemented. This nation has powerful protections in place for victims of housing discrimination, but these protections only go as far as the federal government is willing to enforce them or this Congress is willing to provide the necessary funding and support for it to do so. The National Fair Housing Alliance looks forward to working with the Committee to discuss the fair housing issues before it and further develop our recommended solutions to address them.