Testimony before the

NATIONAL COMMISISON ON FAIR HOUSING AND EQUAL OPPORTUNITY

"Still Separate and Unequal: The State of Fair Housing in America"

July 15, 2008

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I. Introduction

Good afternoon. Mr. Chairmen and Honorable Members of the Commission, thank you very much for this opportunity to discuss the State of Fair Housing in America. My name is Jim McCarthy, and I am the President and CEO of the Miami Valley Fair Housing Center in Dayton, Ohio. I also currently serve as the Chair of the Board of Directors of the National Fair Housing Alliance.

The Miami Valley Fair Housing Center (MVFHC) is the only private, non-profit fair housing organization in the Dayton, Montgomery County, Ohio area, and an operating member of the National Fair Housing Alliance. Our mission is to eliminate housing discrimination and ensure equal housing opportunity for all people in our region. MVFHC works to educate the public and local housing professionals about their rights and obligations under fair housing laws and it conducts investigations into discriminatory rental, real estate sales, mortgage lending and homeowners insurance practices. The Miami Valley Fair Housing Center is one of the 39 qualified full-service, private nonprofit fair housing organizations nationwide that is currently funded under HUD's Fair Housing Initiatives Program (FHIP) Performance-Based, three-year grant cycle.

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

The members of the Alliance are dedicated to working to develop and implement strategies to reduce, and eventually eliminate, racially, ethnically and economically segregated housing patterns and to make all housing accessible regardless of race, color, religion, sex, familial status, disability or national origin. Since 1990, the Alliance has focused on developing investigative tools in the areas of discriminatory sales, lending and homeowners insurance practices. NFHA has shared with its membership as well as staff of federal, state and local governmental enforcement bodies the techniques used to investigate and test complaints in these areas. Additionally, the Alliance remains committed to providing programs that focus on prevention of discriminatory conduct and will continue to work with members of the housing, lending and insurance industry to provide education and outreach, guidance and self-testing programs.

The National Fair Housing Alliance estimates that nearly four million violations occur annually against African-Americans, Latinos, Native Americans and Asian Pacific Islanders alone. Millions more violations are committed against people in all of the seven protected classes.

The Fair Housing Act, passed by Congress 40 years ago, stated that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the country."

The Fair Housing Act has two purposes as outlined in the law, legislative history and discussed by the U.S. Supreme Court in its decision in the 1972 case ***Trafficante v Metropolitan Life Insurance Co.***–

1. to eliminate housing discrimination in the United States, and
2. to replace ghettos with truly balanced and integrated living patterns.

The Supreme Court recognized in Trafficante that it is not only the individual who is victimized by housing discrimination but the whole community.

Despite the promises embodied in the federal Fair Housing Act, racial segregation and housing discrimination continues today, largely unabated from the levels and patterns seen years ago.

Fair housing enforcement is the most important fair housing issue facing our nation. However, there has not been and there continues not to be a sufficient commitment by the federal government to enforcement of fair housing laws.

HUD: Inconsistent Standards and Inadequate Investigations

To be certain, there are many good people who work at the U.S. Department of Housing and Urban Development, specifically within Office of Fair Housing & Equal Opportunity. The comments offered in this testimony are in no way meant to reflect personally or individually upon HUD employees. Rather, this testimony is focused on the failure of the federal enforcement mechanisms available through HUD and DOJ to have a serious impact upon residential segregation and housing discrimination since the passage of the Fair Housing Act. An earnest assessment of what our challenges have been in realizing the promises embodied in the law is required, given that most Americans still live in communities largely divided by race and ethnicity, despite forty years of effort from the people's government. Our failure to realize the promises embodied within the federal Fair Housing Act are bi-partisan and span multiple federal administrations.

HUD enforcement efforts operate largely through ten "HUB" regional offices. HUD allows these offices in many cases to create their own policies and practices. NFHA has provided information to HUD and met with HUD officials on many occasions reflecting the variance in experiences of its members in dealing with HUD and state and local agencies, and to object to the fact that fair housing case processing and the application of legal standards differ from region to region. Many investigators lack information related to basic fair housing case law and many are unable to properly investigate a case.

In a recent appellate decision in the Second Circuit 1(**Boykin v. KeyCorp**, C.A.2 (N.Y.), 2008), the Court identified HUD's practice of allowing inconsistent policies between HUBs as a significant problem. In this particular case, HUD's inconsistent policy related to when an administrative case was considered closed and whether or not a regional HUB sent a closure letter to a complainant, even when the matter had been referred to a Fair Housing Assistance Program agency. The court provided the following assessment of HUDs reasoning in the matter: ". . . we note that HUD's own characterization of this interpretation as 'a matter of practice' does not suggest that it was thoroughly considered. Nor can we conclude, on the record before us, that HUD's practice is validly reasoned."

A recent HUD advertising campaign with the theme "One Call: Many Answers" is poignantly accurate and contrary to what complainants should experience when looking for fair housing answers from government enforcers. HUD lacks strong, effective, consistent enforcement answers for victims of discrimination, as illustrated by the experiences of NFHA member agencies throughout the country.

As I relate some of these challenges, keep in mind that NFHA Operating Member agencies are organizations with extensive knowledge of the law, and most have professional staff. Many, like my office, routinely rely on knowledgeable fair housing attorneys and extensive training for their understanding of the law. The fact that NFHA Operating Member organizations have little or no assurance getting consistent results when cases are being accepted and investigated underscores the inadequacies of the federal enforcement mechanism that is currently in place, especially for those individual victims of housing discrimination who seek justice from the federal government, without the assistance of a private fair housing organization. In many cases, NFHA members who disagree with HUD's actions and attempt to resolve their disputes with HUD are met with hostility and disagreeable behavior from HUD employees, and in some cases, with threats of retaliation.

There is a lack of consistency in requirements for reviewing and accepting complaints. NFHA members in several regions have reported that they have repeatedly experienced situations where fair housing enforcement staff have set the bar too high for finding a violation of the Fair Housing Act. The standard for finding a violation under the Act is making a determination of that there is "reasonable cause" to believe that the Fair Housing Act has been violated. However, the standard that many offices apply is not one of "reasonable cause" but rather a standard that the evidence shows discrimination "beyond a reasonable doubt", which is a much higher standard than is required by the Fair Housing Act or HUD written policy. In fact, it is the standard for proving that there has been a criminal violation, and, of course the Fair Housing Act is not a criminal law, but a civil law. This problem of requiring too much

proof before making a determination that a violation has occurred is repeated in office after office, sometimes by HUD investigators and sometimes by HUD or FHAP attorneys. One of NFHA's members in Region 10 has removed all but one of its cases from the HUD office due to the application of this standard.

NFHA members have repeatedly experienced challenges because HUD has kept cases open for long periods of time, well past the 100 days articulated in the Fair Housing Act. Often there is no communication about the status or actions taken in the case. One member agency in the Atlanta HUB has a case that was filed nearly two years ago, in August 2006, that is still pending. In this case, the complainant alleged that he was charged different rent amount than others in rental complex and that the difference was due to his race. Another member has reported on a internet-based complaint that was filed 22 months ago, in October, 2006 and that is still pending. To the best of the members' knowledge, the complaint was transferred by the Atlanta HUB to the Chicago HUD sometime in 2007.

NFHA has received reports from members in HUD Region 6 that there are several rental race/color/harassment complaints that have been filed and pending with HUD since 2004.

Even on complaints that in many ways should be easier to investigate - accessibility design and construction cases, HUD does not have a consistent or acceptable record. Accessibility design & construction cases typically involve less subjectivity or weighing of evidence, since the investigation involves an examination of the bricks and mortar of certain apartment complexes built for first occupancy after March 13, 1991 to determine if they were constructed in accordance to the Fair Housing Act requirements. Unfortunately, these complaints are routinely open for more than 365 days and often remain pending with HUD for more than 3+ years. NFHA's 2008 Fair Housing Trends Report documented how one NFHA member organization has several Design and Construction complaints that were filed with HUD more than 4 years ago that are still pending final outcomes.

Equally disturbing is the case from Region 6 where HUD investigated a case and made a finding of "No Probable Cause", only to have the complainant pursue the complaint in Court and later reach a significant settlement with the respondent, in spite of and after HUD's "No Probable Cause" finding.

HUD not only has an inconsistent record in conducting timely and accurate investigations, but also in its work to coordinate conciliation and/or settlement negotiations.

A NFHA member from Region 8 reported that a HUD investigator told them that a settlement request that included $400.00 in damages was "too much" to request in a rental discrimination case, and that investigator initially refused to convey the monetary request to respondent in the case.

In California, in a disability case involving a client with mental disabilities who was represented by an attorney, the HUD investigator settled the case without the knowledge or consent of the client's attorney who had made an appearance in the case. Since discovering the situation, the attorney has been stonewalled in getting HUD to reconsider the settlement. Private fair housing groups who serve as personal representatives for complainants, with proper documentation sent to HUD, and even those that file a complaint in their own name, are often not contacted by investigators or conciliations to discuss developments in the investigation or negotiations to resolve a case.

HUD also has had difficulty in appropriately administering the Fair Housing Initiatives Program (FHIP) – the only direct source of federal funding for private fair housing organizations. In 2006, NFHA received reports from members in Region 4, regarding extended payment delays after FHIP grant quarterly reports were submitted AND accepted by the GTM/GTR. This problem occurred again just last month, in June 2008. It was not until NFHA and the member organization contacted HUD headquarters in Washington, DC that the funds were released so that the organization could meet its payroll obligations.
It is also noteworthy that NFHA has been made aware that this type of payment problem with is not restricted to the FHIP program, but NFHA has also received reports of payment problems from several agencies that have Fair Housing Assistance Program (FHAP) contracts.

Case Study: Crestbrook Apartments

NFHA also has direct experience with HUD's difficulty in handling cases appropriately. Beginning in 2005, NFHA conducted an investigation of the rental practices of Crestbrook Apartments in Burleson, TX. After revealing multiple instances of housing discrimination, NFHA filed a complaint with HUD on December 28, 2006. Through its own subsequent investigation, HUD verified that Crestbrook agents discouraged Black potential applicants by providing false information about the application process and by providing Black potential applicants with less favorable service and information about available units than was provided to White potential applicants. Additionally, HUD uncovered evidence of a practice of discrimination against Black applicants in application procedures.

Despite these discoveries, HUD did not attempt to conciliate or move forward with a charge of discrimination based on the evidence collected. HUD then erroneously and without appropriate process issued a "no reasonable cause" determination in the matter. Yet the evidence clearly meets the standards for housing discrimination set out in HUD's own regulations.[1] Moreover, in its Determination of No Reasonable Cause, HUD distorted facts by ignoring and suppressing the evidence of violations in order to justify its decision. Further,

[1] See 24 CFR 100.

HUD neglected to provide NFHA with standard information about the investigation as it progressed and failed to follow procedures established in the federal regulations.

NFHA has since requested that HUD reopen and complete this investigation, issue a finding of reasonable cause, and evaluate the investigative procedures that led to the unwarranted "no reasonable cause" determination. NFHA's request for reconsideration was granted, and the case has been reopened. Fortunately, NFHA has the resources and knowledge with which to make such a request; most housing discrimination complainants would be unable to identify and counteract HUD's failures in a similar manner.

The Department of Justice and the Fair Housing Act

Segregation and discrimination in America are so systematic and so widespread that nothing short of major institutional solutions will do. Indeed, this was the perspective of the Fair Housing Act and its 1988 Amendments, and these pieces of legislation place much authority and responsibility in the hands of the Department of Justice (DOJ).

The 1968 Fair Housing Act gave DOJ the authority to prosecute cases involving a "pattern or practice" of housing discrimination, as well as cases involving acts of discrimination that raise "an issue of general public importance." However, the Department of Justice has filed fewer fair housing cases in the past two years than in previous years. DOJ filed only 35 fair housing cases in 2007 and 31 cases in 2006, compared to 42 in 2005, and down from 53 in 2001. The number of cases filed each year since 2003 is significantly lower than the number of cases filed from 1999-2002.

Data provided by DOJ to NFHA for Fiscal Years 1999-2007, reveal some disturbing trends:

- In the four years 1999-2002, DOJ brought 195 cases; in the five years 2003-2007, DOJ brought 175 cases.
- In the four years 1999-2002, DOJ brought 35 pattern and practice cases based on race; in the five years 2003-2007, DOJ brought only 24 pattern and practice cases based on race.
- In the four years 1999-2002, DOJ filed 24 pattern and practice cases based on its testing program; in the five years 2003-2007, DOJ filed only 11 pattern and practice cases based on its testing program.
- In the four years 1999-2002, DOJ filed 15 ***amicus curiae*** briefs; in the five years 2003-2007, DOJ filed 3 ***amicus*** briefs.

My own agency's experience with the Department of Justice underscores the challenges outlined in the data. On a number of different occasions, the Miami Valley Fair Housing Center has sought the assistance of the DOJ on cases involving a need for systemic investigations or injunctive relief, only to be disappointed.

The response from DOJ in each of these cases is relatively consistent and goes something like this: "We are always interested in any cases that you ***(the private fair housing organization)*** believe merit our involvement. We encourage you to plan, coordinate and conduct your investigation, then assemble your testing and other documentation, reports and analysis and send it to us for review. Once we have reviewed the materials that you submit, we will notify you regarding whether or not the Department is interested in pursuing the matter."

This amounts to a ludicrous policy that inappropriately abdicates the DOJ's authority and responsibility under the law. DOJ is the principal legal authority tasked with enforcing federal fair housing laws and it has both a clear mandate and wide discretion with respect to fair housing enforcement. The DOJ should be a ***partner and resource*** to private fair housing organizations in their work to identify, address and ultimately eliminate illegal housing discrimination. Instead, our experience is that DOJ encourages us to use scarce resources without any assistance or coordinated effort from DOJ, even when directly requested; DOJ then will then "cherry pick" a marginal few cases to engage upon, often after months of consideration, leaving the remaining cases to be pursued by under-resourced private fair housing organizations with the invaluable assistance of private attorneys.

The full engagement of DOJ is also an essential component of any serious effort to combat lending discrimination in all of its many, evolving forms. Private organizations do not have the resources needed to undertake investigation, analysis, and litigation of fair lending violations on a routine basis. This requires review and analysis of a wide range of documents related to marketing practices, underwriting and loan servicing policies, confidential personal data from actual loan files, and a variety of other information that lenders deem proprietary and that often requires use of subpoena authority to collect. While fair housing organizations provide a vital service in conducting testing and research activities to uncover fair lending violations, for both policy and practical reasons, the federal government must also be an integral partner the effort to enforce fair housing laws to address lending discrimination.

In the realm of mortgage lending, both HUD and the Department of Justice failed to recognize and combat the deleterious and discriminatory effects of practices within the subprime market. It also did little to induce or require conventional lenders to operate within minority communities. Although it brought a series of successful, high-profile lawsuits against mortgage lenders engaged in "pattern or practice" discrimination in the 1990s, DOJ has prosecuted only a handful of new lending discrimination cases since 2000, despite the significant discriminatory predatory lending that has been going on throughout the past several years.

Moreover, despite continuing indications of redlining in the homeowners insurance industry, the Division has missed several opportunities to confront the discrimination directly and to correct underlying practices. Aside from two cases in the mid 1990s against the insurance companies Nationwide and American Family, the Division has missed the opportunity to take enforcement efforts in this area, again leaving the leaving it to the private fair housing groups and their lawyers. One suit brought against Nationwide Insurance Company by Housing Opportunities Made Equal, a private fair housing group in Richmond, Virginia, was initiated because the housing group was so dissatisfied by a DOJ settlement with Nationwide. The subsequent suit resulted in the largest jury verdict ever in a Fair Housing Act case – over $100 million dollars.

If the government fails to pursue such cases or does not engage in a competent effort to uncover patterns of discrimination by the lenders under its authority, then most systemic discrimination will go unchecked. Indeed for the entire history of our country, it has. Lack of forceful federal enforcement actually provides a form of safe harbor for those in the industry engaging in discriminatory practices.

Another significant problem is DOJ's refusal to prosecute disparate impact cases. In 2003, DOJ announced publicly and told HUD that it would no longer file disparate impact cases involving housing discrimination.[2] The federal government is often the only entity with the capacity to investigate and litigate fair housing complaints because they often require statistical and other evidence to establish that a policy or practice that is facially neutral and consistently applied nonetheless has a disparate impact on a group protected against discrimination.

Disparate impact cases are crucial in the fight against housing discrimination. As the courts emphasized in permitting disparate impact cases in the first place, many rental, sales, insurance, and related policies are not discriminatory on their face, but they have a disparate impact that is at odds with the purpose of fair housing legislation. Recent examples of proposed ordinances and policies that have a disparate impact include (1) placing a limit on the number of persons per bedroom, which has a disparate impact against families with children, and (2) imposing a minimum loan or insurance amount, which has a disparate impact on properties located in minority neighborhoods.

Thank you for the opportunity to testify today. I welcome any questions that you may have. Despite the challenges and failures outlined in my testimony, I can tell you that the private fair housing movement remains committed to achieving the dream of fair housing and equal housing opportunity for all people in our country.

[2] HUD HUB Directors' meeting (Rhode Island, 2003).