

Testimony
before the
National Commission on Fair Housing
and Equal Opportunity

by

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INTRODUCTION

Good afternoon, Commissioners, and thank you for the opportunity to provide testimony to you today. My name is Cathy Cloud, and I am Senior Vice President of the National Fair Housing Alliance in Washington, DC. I have submitted written testimony of some length and will limit my testimony today to the highlights of my written testimony.

My testimony is designed to cover two areas: (1) some of the failures related to fair housing that occurred after the Gulf Coast hurricanes in 2005 (other panelists will provide evidence of other fair housing failures in the Gulf Coast region); and (2) how these problems are part of the larger systemic failure of the federal fair housing enforcement system.

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 National Fair Housing Alliance (NFHA) has considerable interest in the fair housing situation in the Gulf Coast, particularly since it created the private fair housing organizations in New Orleans, Gulfport/Biloxi, and Houston. We have provided continued support to these organizations, and the Fair Housing Center, Inc., in Mobile, Alabama, since their creation, and we have worked with them since the 2005 hurricanes to provide funding and technical assistance which allows them to address more fully the needs of homeowners and others in the region.

FAIR HOUSING INFRASTRUCTURE IN THE WAKE OF THE STORMS

The Local Issue

The 2005 hurricanes dealt devastating blows to communities all along the Gulf Coast from Texas to Florida. Louisiana and Mississippi were particularly hard hit. Hundreds of thousands of people were evacuated to other parts of the country, inundating local housing markets and creating conditions ripe for discrimination, as demonstrated by the testing conducted by NFHA (which is addressed in the next section). In communities along the Gulf Coast, competition for scarce housing units was even more intense, as homeowners whose homes were uninhabitable and relatively high paid

recovery workers entered a rental market that had been decimated by the storms. This also provided fertile ground for housing discrimination, so that as hurricane victims struggled to put a roof over their heads, many faced the triple whammy of limited financial resources, scarce housing availability, and illegal discrimination. Post-hurricane, both in the Gulf and in the Diaspora, the need for strong fair housing organizations was at an all-time high.

Yet, the fair housing infrastructure had not been spared by the storm. In New Orleans and Gulfport, the fair housing groups lost their offices and had to relocate. Communications were disrupted for quite some time, making it difficult to locate and keep in touch with colleagues. Financial systems were also disrupted, complicating efforts to make temporary office arrangements. Staff and/or board members evacuated from the region and were unavailable for work. Some never returned, forcing the groups to rebuild their human capital as well as relocate their physical offices in extremely difficult job and real estate markets. The remaining staff and board had to deal with their personal losses at the same time they were rebuilding their organizations. And the conditions created by the storm placed considerable new demands on the limited resources of the fair housing groups in the region. Not only did the groups have to respond to the usual types of fair housing complaints, but they also needed to play an active role in the recovery effort itself - with a raft of state, local and federal government agencies making myriad decisions that would affect the future housing opportunities of the region. The fair housing groups in the cities to which large numbers of evacuees were relocated also faced an increased demand for their services, particularly here in Houston.

The U.S Department of Housing and Urban Development (HUD), however, failed to respond effectively to this critical need. HUD did meet with groups in the region after the storm to assess their needs. Hearing that financial resources were at the top of the list, it attempted to respond. But HUD's response was a day late and a dollar short. Not until more than six months after Katrina, the agency provided \$50,000 to the fair housing center in New Orleans and a smaller amount to the group in Gulfport. HUD did create a special category of Katrina-related FHIP funding for 2006. But rather than making these limited funds available in addition to the regular FHIP funding to address the increased need, HUD required groups to choose the Katrina funding or one of the other funding categories. The result was that no organization applied for the special Katrina funding. Nor did HUD give priority to groups in the Gulf in awarding other FHIP funds, and several groups in the region did not receive enough funding from HUD to address critical fair housing demands in the region.

The Systemic Issue

HUD's actions related to funding fair housing organizations after Katrina reflect its actions in funding fair housing organizations overall. The Fair Housing Initiatives Program, the primary funding source for private fair housing organizations, is administered by HUD in a method designed to ensure that fair housing groups cannot consistently and effectively maintain professional staff, provide education of consumers and the industry and enforce fair housing laws. Fair housing groups in the Gulf Coast community have not received consistent funding. This has affected not only their ability to provide fair housing services but their very survival. Further testimony about the broken fair housing funding mechanism will be provided at the Boston hearing.

Recommendation: HUD's administration of the Fair Housing Initiatives Program must be totally revamped to promote and maintain successful fair housing education and enforcement at the local level.

Recommendation: The 2005 hurricanes teach an important lesson about the needs of local non-profit organizations, including fair housing groups, in the wake of a large-scale disaster. In the immediate aftermath, they must be provided prompt assistance to restore and stabilize their operations. In the mid-term, they must have help to expand their capacity in order to respond to the increased demand for their services and expertise. And because recovery from an event like Katrina is a long-term effort, the groups need long-term increases in support to see the job through.

NFHA'S POST-KATRINA RENTAL TESTS

The Local/Regional Issue

A history of illegal housing discrimination and residential steering based on race created the segregation in New Orleans, the Gulf Coast and most other communities throughout the United States. Given the high incidence of housing discrimination in this nation, NFHA realized immediately that many of those persons forced to evacuate after the 2005 Gulf Coast hurricanes were likely to be victims of discrimination when seeking alternative housing in other communities. In order to ascertain whether or not those forced to relocate would experience discrimination, NFHA conducted testing of rental housing providers in seventeen communities.

Although housing discrimination based upon race, color, religion, sex, national origin, disability or familial status is illegal, NFHA's investigation into rental housing practices

following the hurricanes documented violations of the federal Fair Housing Act in five states to which many hurricane victims fled. *Out of 65 paired tests of rental housing providers, African-Americans experienced discrimination in 43, or 66 percent, of the transactions.*

Within three weeks of Katrina striking the Gulf Coast, NFHA implemented a rental testing investigation to determine if racial discrimination was limiting or denying housing to families who were forced to evacuate their homes. Initially, NFHA attempted testing in Louisiana and Mississippi, but found that there was no housing available. So NFHA focused its testing in five nearby states where many of the evacuees were trying to relocate: Alabama, Georgia, Florida, Tennessee and Texas. Several testers were actually people who had to evacuate because of Hurricane Katrina. The testers identified themselves as Katrina relocatees in their conversation with the apartment manager and also indicated that they were employed and relocating to the city because of job transfers. The tests were conducted with African American and White tester teams.

The African American and White callers asked for the same size apartment and had the same number of people in their family, but the African American made more money than the White tester. In 43 of the 65 tests, Whites were given truthful information about the availability of units or the terms and conditions for securing an apartment; in contrast, information was withheld from or provided differently to their African-American counterparts. Many types of differential treatment were detected in the tests, but most fell into the following categories:

- Failure to tell African-Americans about available apartments;
- Failure to return telephone messages left by African Americans, but calls returned for Whites;
- Failure to provide information to African-American testers;
- Quoting higher rent prices or security deposits to African-American testers;
- Offering special inducements or discounts to White renters.

NFHA utilized telephone testing extensively for this project. Almost all housing transactions these days begin with a phone call. Many people never even have an opportunity to see an apartment or house because some housing providers identify persons by race or ethnicity over the phone and refuse to do business with the callers. The methodology used in NFHA's tests incorporates this behavior of "linguistic

profiling” and utilizes the research of linguistics experts such as John Baugh.¹ In this specific project, NFHA also utilized a number of testers from the south. Several of the testers were originally from New Orleans and had linguistic characteristics that were both racially and geographically identifiable.

To counteract these widespread findings of race discrimination against hurricane survivors, NFHA filed with HUD in December, 2005, five complaints against the most egregious violators of the federal Fair Housing Act. NFHA conducted additional testing in 2006 and filed two additional complaints. As of July, 2008, more than two and a half years later, only one of those cases has been successfully resolved through HUD’s conciliation process. The remainder are apparently still being investigated by HUD.

HUD learned in 2006 about rampant discrimination in housing-related advertising on the internet, including on a website sponsored by FEMA for persons displaced in the aftermath of the hurricanes. The Greater New Orleans Fair Housing Action Center identified many blatantly discriminatory ads and brought fair housing cases against the internet service providers (including language such as: “not racist but white only;” “prefers 2 White females;” and “Whites are preferred.”). HUD still has not processed these cases which are complicated by a defense raised under the Communications Decency Act for Internet Service Providers (ISPs). However, HUD should have taken several actions to address this problem, including informing ISPs that it is illegal for advertisers to discriminate under the Fair Housing Act, educating the community about the illegality of such ads and investigating many of the housing providers who placed the ads. A few swift cases brought by HUD and/or the Department of Justice would have been quick deterrent to the placement of many of the ads.

The Systemic Issue: Enforcement Failures at HUD

The Office of Fair Housing and Equal Opportunity (FHEO) is notorious for its inadequate, uninformed and inconsistent processing and prosecution of fair housing complaints. NFHA itself has filed close to thirty cases with HUD. NFHA is the strongest, best-resourced private fair housing organization in the country. Its top three professional staff have more than 80 years of combined experience in fair housing, and they have brought some of the most complex fair housing, lending, and insurance cases in the nation. NFHA’s Director of Enforcement has more than ten years of fair housing experience and is a seasoned fair housing attorney. We have support from many of the

¹ See e.g. Baugh, John, "Perceptual and Phonetic Experiments on American English Dialect Identification," (with Thomas Purnell and William Idsardi). *Journal of Language and Social Psychology*, Vol. 18 No. 1, pp. 10-30 (1999).

nation's best fair housing attorneys. Yet, with few exceptions, NFHA's cases have been mishandled horribly by FHEO at both headquarters and in regional offices. Cases against four major insurance companies were never fully investigated and languished for years (one for seven years) because HUD failed to allocate sufficient resources to the investigations. Fortunately, NFHA was able to reach settlements with these companies and withdraw the HUD complaints, four of which were withdrawn once it became known that HUD was not going to charge them for political reasons (NFHA did not have the resources at the time to take these cases to federal court as intended).

NFHA has filed eleven cases based on testing done as a follow up to HUD's Housing Discrimination Study 2000. Although the cases were filed in late 2005/early 2006, none has been resolved. Only one of seven Katrina cases has been conciliated, and two others at least have resulted in botched investigations:

Crestbrook Apartments, Burleson, Texas: NFHA filed a complaint with HUD against this apartment complex in December, 2006. In a series of tests, the White testers were always given information about available apartments while the African-American testers either were not called back or were given different information regarding availability. In addition, the African-American testers were given different information about application standards: for example African-Americans were told that they needed to supply a month's worth of pay stubs and that criminal background checks would be conducted. White testers were told they could fax in an application and that it could be processed in one to three hours. HUD conducted an investigation, but never interviewed NFHA staff or testers.

Instead, HUD conducted an on-site investigation of Crestbrook and uncovered information about discriminatory practices from Crestbrook's own records. For example, HUD reviewed a sample of 36 active files for Crestbrook residents. HUD learned from this review of files that 80 percent of Black residents, but only 41 percent of White residents, provided pay stubs when applying for housing. (Interestingly, the investigation also uncovered that 75 percent of Latino residents were required to submit pay stubs.) For 59 percent of Whites, Crestbrook verified income with a simple phone call to the employer and no pay stubs. Income was verified in this manner for only 20 percent of Blacks. There is a palpable difference between requiring paper documentation of income versus making a phone call to an employer.

Despite the fact that HUD's investigation and Crestbrook's own records reflect the discriminatory terms and conditions also told to NFHA's testers, HUD issued

a determination of “no reasonable cause” and closed the case. NFHA wrote a detailed request for reconsideration outlining the failures in the Fort Worth Investigation of this case, and HUD headquarters re-opened the case and sent it back to Fort Worth for additional investigation in July, 2007. It is still pending at HUD, although the investigator finally interviewed both NFHA staff and testers.

Equally troubling were statements made by Fort Worth that it made no determination regarding the efficacy of the Complainant’s assertion that the Respondent’s employees were able to discern the racial identity of the callers (testers), but noted that the testers couldn’t identify the race of the agents they had spoken to. NFHA is not alleging, nor has it ever alleged, that the agents tested have racially identifiable voices. NFHA does not request testers to identify the race of agents in phone calls on its forms, and to request testers to do so years after the test is unfathomable and irrelevant to the question of whether illegal housing discrimination has occurred. NFHA utilizes *testers* who do have racially identifiable voices. This type of evidence has been accepted both by federal courts and HUD’s administrative law judges. It has also been the subject of numerous research studies by linguistics, clearly demonstrating that the vast majority of the time, we can determine someone’s race simply by hearing them say the word “hello.” Given the fact that so many housing transactions today begin with a phone call, HUD investigators must be current with the research, federal court cases, and decisions by its own administrative law judges.

Eagle View Apartments, Birmingham, Alabama: As a result of the Katrina testing, NFHA filed a complaint with HUD against an apartment complex located in Birmingham, Alabama on December 20, 2005. In that case, the White Katrina tester was told that the security deposit and application were waived for her as a Katrina survivor. The African-American tester was told that she would have to pay the security deposit and application fee. Both White testers were told that they would have to make 2.5 times the rent in order to qualify. The African-American tester was told that she would have to make 3 times the rent to qualify. NFHA has worked with the HUD investigator and facilitated interviews of testers and provided relevant documentation and information. The tester interviews were completed in mid-2006. The complaint was amended in early 2007 to add allegations of familial status discrimination and terms and conditions discrimination. Despite the fact that the investigator conducted interviews and collected information in 2006, no action has been taken on this case since April, 2007.

Through all of these cases and the experiences of its member organizations, NFHA has learned first hand that HUD investigators do not have consistent training on the Fair Housing Act, investigation strategies and techniques, legal standards and case law, testing and more. There are also significant levels of inconsistent treatment of complaints and investigative processes between the ten HUB regional offices, so that different complainants with identical cases would have different treatment, different outcomes, and different levels of access to justice depending upon which region in which they filed a complaint.

Equally as important, HUD has no method of implementing and sustaining systemic investigations and it has repeatedly failed to initiate systemic investigations, even when presented with evidence which strongly supports a conclusion that investigations should be initiated or expanded to address systemic patterns of illegal discrimination. HUD should have implemented its own post-Katrina testing program. HUD should have undertaken multiple systemic investigations of subprime mortgage lending institutions and discriminatory lending practices. HUD should have brought systemic design and construction cases against large developers to eliminate barriers for persons with disabilities. HUD should have utilized many of NFHA's tests and cases, as well as those of others, to initiate systemic investigations in many cases and should have worked with private fair housing groups to expand its investigations in complaints filed by individuals. Small scale funding by HUD in the mid nineties to support testing by private fair housing groups as part of the investigation of individual cases was modestly successful, but eventually lapsed when administrations changed. These efforts if continued could have resulted in large scale changes on at least a regional basis.

In both NFHA's "No Home for the Holidays" report issued in December, 2005 and NFHA President Shanna Smith's testimony before Congress in February, 2006, NFHA urged HUD to use discretionary funds for two targeted enforcement investigations: national rental enforcement testing project to uncover the nature and extent of housing discrimination against people displaced by the recent hurricanes and a second enforcement project to identify predatory lending, repair, rebuilding schemes for homeowners in the Gulf Coast region. This suggestion was never implemented.

Shortly after NFHA released its "No Home for the Holidays Report", the Justice Department announced its "Operation Home Sweet Home" testing program. The February, 2006 Justice Department news release indicated that the testing program would include – "[c]oncentrated testing for housing discrimination in areas recovering from the effects of Hurricane Katrina and in areas where Katrina victims have been relocated. Hurricane Katrina has resulted in a large number of displaced persons, many

of them minorities, who are seeking new housing.” Based on a search of Justice’s list of filed cases, news releases, and cases filed as a result of its testing program, it appears that not a single case has been filed by Justice as a result of its post-Katrina testing.

Recommendation: HUD’s system of case processing and investigation must be entirely restructured to provide consistent treatment of all complaints with application of consistent standards consistent with current law and practice.

Recommendation: The fair housing enforcement mechanism must include a strong component for developing thoughtful, systemic cases to address discriminatory policies and practices on a broad scale, whether in response to national or regional discrimination or to discrimination by entities that have multiple locations or multiple forms of illegal discrimination. Fair housing enforcement must include some form of rapid response unit charged with identifying and addressing in a timely manner emerging forms of discrimination, such as the post-Katrina discriminatory ads on the internet and systemic discrimination in multiple locations, such as the proliferation of discriminatory subprime loans.

Recommendation: HUD and DOJ must re-tool the application of their standards for making determinations and initiating litigation to conform to long-recognized standards of proof for fair housing cases, including the prompt and correct application of a reasonable cause determination and mandated filing of litigation after the issuance of such a determination. Similar guidance should be issued by HUD to state and local enforcement agencies that participate in the FHAP program.

DISCRIMINATORY PREDATORY LENDING

The Local Issue

Given the level of unaffordable mortgage loans and foreclosures across the nation, it is not surprising that the Gulf Coast community suffers from a similar problem. Many homeowners, especially those of color, had 2/28 ARM loans that reset at the worst possible time—after their homes sustained damage due to the hurricanes and when many become under- or unemployed. NFHA and its member fair housing organizations in the region have been working to provide assistance to many of these homeowners. Ironically, despite prolonged delinquencies, foreclosures in the Gulf Coast region have lagged behind those in some other parts of the country, even after the expiration of the various foreclosure moratoria. The primary reason for lenders’ lack of

action has been the number of homes still in need of repair. However, as repairs progress, foreclosures in the Gulf Coast states are beginning to increase, with potentially serious implications for the region's recovery. We are aware of no actions by FHEO to address this problem.

The Systemic Issue

Lax Oversight by State and Federal Regulators

One factor that contributed prominently to the ballooning of the subprime mortgage market was the opportunity for lenders to provide financial services in a highly unregulated atmosphere. Many lenders who peddled subprime loans were non-depository financial institutions who, in lieu of being regulated at the federal level, were regulated by various state agencies. Unfortunately, state regulators, hindered by weak laws or a lack of resources, were not able to keep abreast of the abusive practices being perpetuated in communities across the nation. While many states and localities passed strong anti-predatory lending laws, state regulators were unable to keep up with the practices of the increasing number of lenders doing business within their borders.

In addition, many lenders increasingly relied upon the services of mortgage brokers to generate loans on their behalf. Many mortgage brokers, regulated at the state level, benefited from the lack of resources and regulatory authority of state agencies to effectively monitor and police their practices. Some states did not even bother to license mortgage brokers. For example, the state of Ohio only passed a law requiring mortgage brokers to be licensed in 2002. The law also required a civil and criminal background check on anyone seeking to obtain a license.

Federal banking regulators failed to reign in abusive practices at the lending institutions they regulated. Further, they prevented states from taking action against those institutions. Federally regulated lenders also took advantage of this lax oversight to originate huge volumes of loans. Depository institutions were able to use rules from the Office of the Comptroller of the Currency (OCC) and other regulators to their benefit. The OCC, following a similar rule issued by the Office of Thrift Supervision, issued a statement providing an exemption for its member institutions from state anti-predatory lending laws. Not only did it provide pre-emption for the member bank, but the pre-emption extended to the affiliates and third party vendors of the member institution. Thus mortgage brokers doing business on behalf of the company and any subprime subsidiary would, according to the federal regulators, be exempt from state regulation and state lending laws that prohibited abusive lending practices. This was damaging to communities because many states that had responded more quickly than

the federal government and established stringent anti-predatory lending statutes were unable to apply those statutes to the subprime affiliates of some federally regulated banks. However, the OCC rule and others like it were a boon to lenders who were able to make larger profit margins on subprime loans. Lenders, who for years had been telling civil rights and consumer advocacy groups that there was insufficient need for credit in minority neighborhoods, were now able to do high levels of lending through their subprime affiliates in central city neighborhoods – much to the detriment of homeowners and buyers in minority neighborhoods. And while this was going on, the federal financial regulatory agencies did *nothing* except inhibit the efforts of state regulators to take any meaningful action. At the same time, FHEO failed in its responsibility to ensure that all federal departments work to affirmatively further fair housing.

Targeting Minority Borrowers

Homeownership contributes a far larger share of assets for minorities than for Whites: home equity constitutes two-thirds of African-American families' assets, as opposed to two-fifths for White families'.² In large part because Black homeownership rates still lag significantly behind those for White families, the median net worth of African-American households in 2002 was \$5,988, while median net worth for White households stood at \$88,651.³ Done correctly, increasing homeownership could be of tremendous benefit to people of color.

For many years, subprime lending was touted as the means to achieve the goal of increased minority homeownership. However, even before the current foreclosure crisis occurred, it was never true that subprime lending expanded homeownership for people of color. In fact, the evidence indicates that the opposite was true. HUD's research has found that 80 percent of subprime mortgages were refinance loans, made to customers who already own their home.⁴

Several recent studies document the existence of severe racial discrimination in the subprime market. For example, according to one study that analyzed more than 177,000 subprime loans, borrowers of color are more than 30 percent more likely to

² Gregory D. Squires, "The New Redlining," in Squires, ed., *Why the Poor Pay More* (Westport, CT: Praeger, 2004), pp. 1-23, p. 5.

³ Miriam Jordan, "Wealth Gap Widens in US Between Minorities, Whites," *Wall Street Journal* (Oct. 18, 2004), p. A2.

⁴ See HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (Washington, D.C.: HUD, 2000).

receive a higher-rate loan than White borrowers, *even after accounting for differences in creditworthiness*.⁵

Another analysis shows that borrowers residing in zip codes whose population is at least 50 percent minority are 35 percent more likely to receive loans with “prepayment penalties” than financially similar borrowers in zip codes where minorities make up less than 10 percent of the population.⁶ More than 70 percent of all subprime loans come with such penalties, which box borrowers into high-rate loans even after they’ve bettered their credit and wish to refinance.⁷ For example, for a family with a \$150,000 mortgage at an interest rate of 10 percent, a typical prepayment penalty imposes a fee of \$6,000 for an early payoff—an amount *greater than the wealth owned by the median African-American family*.⁸

Another striking study of discriminatory lending practices has found that *high-income* African-Americans in predominantly Black neighborhoods are three times more likely to receive a subprime purchase loan than *low-income* White borrowers.⁹

African-American and Latino borrowers are disproportionately represented in the high-cost loan market, with 55 and 46 percent of African-American and Latino borrowers, respectively, receiving high-cost loans. In contrast, only 19 percent of White borrowers are given high-cost loans.¹⁰

⁵ See Bocian, D. G., K. S. Ernst, and W. Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending, May 2006, p. 3. Available at www.responsiblelending.org.

⁶ See *Borrowers In Higher Minority Areas More Likely to Receive Prepayment Penalties on Subprime Loans*, *op. cit.*, p. 1.

⁷ Keith Ernst, D. N. Goldstein, and C. A. Richardson, “Legal and Economic Inducements to Predatory Practices,” in Squires, ed., *Why the Poor Pay More*, *op. cit.*, p. 108. See also Josh Nassar, “Abusive Lending and Pricing Disparities in the Subprime Market,” presentation on behalf of Center for Responsible Lending, given at annual conference of the National Fair Housing Alliance, July 10, 2006. On file with the National Fair Housing Alliance; and “Snapshot of the Subprime Market,” Center for Responsible Lending, November 28, 2007, p. 3, available at <http://www.responsiblelending.org/pdfs/snapshot-of-the-subprime-market.pdf>.

⁸ See Bocian, D. G. and R. Zhai, *Borrowers In Higher Minority Areas More Likely to Receive Prepayment Penalties on Subprime Loans*, Center for Responsible Lending, January 2005. Available at www.responsiblelending.org.

⁹ Center for Responsible Lending’s *Fact Sheet on Predatory Mortgage Lending*, *op. cit.* See also *Unequal Burden*, *op. cit.*, and *The Impending Rate Shock: A Study of Home Mortgages in 130 American Cities*, ACORN, August 15, 2006, available at www.acorn.org.

¹⁰ Calculations from data reported in Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner, Higher-Priced Home Lending and the 2005 HMDA Data, Federal Reserve Bulletin A123, A160-161 (September 8, 2006). See also <http://oversight.house.gov/documents/20070322175553-40982.pdf>. These figures are based on combining the statistics for both purchases and refinances.

To make matters worse, many borrowers who end up in the subprime market don't even belong there. They actually qualify for loans in the prime market. Fannie Mae and Freddie Mac have found that up to 50 percent of those who end up with a subprime loan would have qualified for a mainstream, "prime-rate" conventional loan in the first place.¹¹ (According to a study conducted by the Wall Street Journal, this number may be as high as 61 percent.¹²)

Systemic Federal Failure by HUD and DOJ to Address Subprime Mortgage Discrimination

Although it has been known for more than a decade that a large percentage of subprime borrowers actually qualified for prime credit and that African Americans and Latinos are disproportionately represented in the subprime market, no federal institution has made a pro-active effort to address the systemic discriminatory practices that contribute to this pattern. Many of the financial institutions that might be the subject of HUD fair lending investigations are the agency's partners in its other housing and community development efforts. This sets up an internal conflict of interest, pitting the agency's fair housing enforcement mandate against its urban development mandate. To date, this conflict of interest appears to have been resolved in favor of the latter. This suggests that to be effective, the entity charged with enforcing fair housing must be given independent status, either within HUD or outside it, rather than being a division of the agency.

The failure of FHEO to address discriminatory predatory lending is just another chapter in the book of the failure of FHEO to address discriminatory lending practices at all. In the early 1990s, HUD awarded to the National Fair Housing Alliance (NFHA) a \$1 million grant to conduct testing of mortgage lending institutions in eight cities. The test results showed that the rate of discrimination against African American and Latino borrowers was 68 percent. Due to limited resources, NFHA filed four (of what could have been several more) complaints against major mortgage lenders. After years, NFHA learned that FHEO had essentially been instructed by someone higher up at HUD that it could not make a finding of reasonable cause in any case. In one of the cases, the investigator actually said that, since the lender had made loans to other African American borrowers, it could not have discriminated against the testers. Incidentally, shortly thereafter, that investigator began working for the lender formerly

¹¹ See the Center for Responsible Lending's *Fact Sheet on Predatory Mortgage Lending* at <http://www.responsiblelending.org/pdfs/2b003-mortgage2005.pdf>, and ACORN's report *The Impending Rate Shock*, op. cit.

¹² See "Subprime Debacle Traps Even Very Creditworthy," December 3, 2007.

under investigation. One of the lenders against whom NFHA filed a complaint was Countrywide, long one of the nation's largest prime and subprime mortgage lenders, now under investigation for both discriminatory and predatory lending practices on a massive scale.

In a similar vein, the Department of Justice also failed to address predatory lending practices, although it possessed the expertise to do so. DOJ did bring a predatory lending case in the mid-1990s against Long Beach Mortgage, alleging discrimination against African Americans, Latinos and older borrowers. It also brought a case in 1999 against Delta Funding in New York (HUD was a part of that case as it related to violations of the Real Estate Settlement and Procedures Act, not the Fair Housing Act) and filed an amicus brief in a case brought by private counsel and the Federal Trade Commission against Capital Cities Mortgage in the Washington, DC, metropolitan area. Despite the breadth of the subprime lending market and the extensive research demonstrating differential patterns based on race and ethnicity, the Department of Justice has brought few fair lending cases since 2000 and *no* predatory lending discrimination cases.

Recommendation: The fair housing enforcement system, including that of DOJ, must include a strong mechanism for developing thoughtful, systemic cases to address discriminatory policies and practices on a broad scale. This should include some form of rapid response unit charged with identifying and addressing in a timely manner emerging types of discrimination, such as predatory lending, discriminatory lending, homeowners insurance underwriting, design and construction issues, etc.

Recommendation: Fair housing enforcement operations should occur independently of political considerations; federal fair housing enforcement must be conducted fairly, impartially, and systematically, using consistent and effective strategies, throughout our country, regardless of who discriminates, or which political party leads the country.

Recommendation: Fair housing requirements must be strengthened in all of HUD's programs and by all federal regulators of lending practices; an independent fair housing enforcement agency must have full authority and adequate resources and expertise to investigate lending discrimination no matter which lender engages in it, even if that lender is HUD or another federal agency.

FAILURE TO AFFIRMATIVELY FURTHER FAIR HOUSING

The Local Issue

Almost three years after Hurricane Katrina, people of color and low- and moderate-income people in communities all across the Gulf Coast still have nowhere to live or insufficient funds to fully rebuild their homes. More resources are needed to complete the task of rebuilding in a way that provides safe, decent and affordable options to all residents of the region.

The Housing and Community Development Act of 1974 requires federal, state and local entities, including states, cities and counties, to act affirmatively to further fair housing. This “affirmatively furthering” obligation requires that entities that receive funding from HUD take steps to identify and address housing discrimination throughout their communities. This includes recipients of Community Development Block Grant (CDBG) funds. CDBG funds have been the single largest federal resource for rebuilding housing in the Gulf Coast region. If used effectively, these funds could also been a means to ensure that the region’s rebuilding takes place in an equitable and inclusive manner: a manner that affirmatively furthers fair housing. Unfortunately, to date, HUD has failed to use the leverage of the CDBG program to achieve this goal.

After the hurricanes of 2005, Congress approved and HUD allocated CDBG supplemental appropriations to hurricane affected areas, with particular emphasis placed on the repair, rehabilitation and reconstruction of affordable rental housing. Although standard CDBG program regulations require that a grantee use not less than 70 percent of CDBG funds for activities that benefit low- and moderate-income persons, the statute appropriating the Hurricane Katrina emergency CDBG funds gave HUD the authority to lower that requirement to 50 percent, a step that HUD took immediately. The statute also authorized HUD to lower this requirement further upon request, if the Secretary found there to be a compelling need for such action.

Mississippi was the only state to seek such waivers subsequent to the hurricanes and HUD fully complied with the state’s requests with little to no careful examination of standards, rationale or the effects of diverting such funding away from the people most in need. As the result of these waivers, \$4 billion of Mississippi’s \$5.481 CDBG disaster recovery funds need not be spent to benefit low and moderate income persons.

Recently, HUD granted Mississippi’s request to divert \$600 million of its disaster CDBG funds from housing recovery to an expansion of the Port of Gulfport. The expansion was not a hurricane relief expense; rather it was originally formulated as a “Twenty

Year Vision Plan” in March 2003, two years before the hurricane.¹³ The Port suffered approximately \$50 million in Katrina-related damages, which are covered by FEMA and private insurance.¹⁴ The Port of Gulfport is a self-sufficient agency that has funded previous expansion through internal sources of funds, borrowing and bonded indebtedness and limited state appropriations. It has not attempted to tap any of these sources for its current expansion plans. Yet, HUD approved the waiver request, effectively diverting CDBG funding to the Port expansion while many people on the Mississippi Gulf Coast are still without a home.

As a result, more than two years after Hurricane Katrina, only 13.2 percent of Mississippi’s disaster recovery funds fulfill this low and moderate income benefit objective. While CDBG funds are required to affirmatively further fair housing, many of those in need are members of classes protected under the Fair Housing Act, yet these households are last in line for assistance from the State. HUD’s approval of requests for waivers time after time was based on unfulfilled promises that the needs of low and moderate income people would be met with remaining CDBG funds.

There are also CDBG related issues with Louisiana’s Road Home Program. The State has developed a formula to calculate the amount of assistance a homeowner can receive. It begins with the pre-Katrina value of the home and the cost of damage, and uses the *lower* of these figures as the starting point for calculations. Insurance settlements, FEMA assistance and SBA loans that cover structural damage are then subtracted from this amount. The result is the amount of Road Home assistance for which the homeowner is eligible, up to a maximum of \$150,000.

Yet the cost of repairing a home is not directly related to the value of the home. The Road Home formula fails to take into account the legacy of racial discrimination in the housing market, which has resulted in systematically lower values for homes in communities of color. In New Orleans, as in cities all across the country, a house in a community of color is generally worth less than a similar house located in a predominantly white community.

The result is that homeowners in communities of color in Louisiana are receiving less assistance to rebuild than their neighbors in white communities. In fact, because of their lower home values, the vast majority of African-American and Hispanic homeowners in New Orleans – in stark contrast to their white neighbors – would be ineligible for the maximum Road Home grant, even if they didn’t receive a penny in

¹³ 2003 State Port at Gulfport Master Plan.

¹⁴ Mississippi Legislative PEER Report # 487, p. 23.

insurance or FEMA benefits. The Road Home program is funded with CDBG funds. Given its discriminatory formula for homeowner assistance, it does not appear to us that the Road Home complies with the standard for CDBG recipients to affirmatively further fair housing.

In short, HUD is responsible for administering the funding provided through the Community Development Block Grant program. HUD has not made any requirements that the funds be used to integrate the Gulf Coast and to include the people most affected into the decision-making process. Given the overwhelming evidence of the hurricanes' toll, the waivers, especially in the Gulf States, have a disparate impact on people of color, families with children, and people with disabilities.

While disbursing the funds, rather than reporting on them, is an understandable priority in the aftermath of a disaster the magnitude of the 2005 hurricane season, good public reporting systems are also critical to ensuring that those funds are spent appropriately. For CDBG grantees in the Gulf, there have been considerable time lags in making accurate, understandable information about their spending available to the public in a readily accessible form. Further, current regulations do not require grantees to make public any information about the extent to which the funds benefit members of classes protected under the Fair Housing Act. It is important, therefore, for HUD to work with grantees to improve the CDBG reporting systems and for Congress to strengthen the fair housing reporting and public disclosure requirements.

Furthermore, disaster recovery funds must get into the hands of those who need them more quickly, more fairly and with a more transparent process. Almost three years after the hurricanes, too many people in the Gulf still have not received the assistance they need to rebuild or return to their homes. Some grantees have established guidelines that arbitrarily and unfairly exclude particular groups from eligibility for assistance. In Mississippi, residents whose homes experienced damage from hurricane-force winds, but no storm surge damage, cannot receive assistance. In Mobile County, AL, homeowners who had "deferred maintenance" prior to the storm cannot receive assistance. And in all of the locations where NFHA and its members are working, homeowners have great difficulty getting timely and accurate information about how eligibility for assistance is determined, how their grants were calculated, and the status of their applications.

The Systemic Issue

One of the most significant federal funding streams for local communities is the Community Development Block Grant program, used to develop housing and

community infrastructure, and to fund programs and activities that benefit low- and moderate-income families and the community at large. HUD requires states, cities and counties that receive this funding to prepare an Analysis of Impediments to Fair Housing Choice (AI) as part of their planning process. CDBG is potential funding for fair housing centers across the country—for fair housing education, outreach and enforcement, assistance in developing and monitoring AIs, and helping to ensure that the recipients of CDBG funding act in a way that is consistent with the Fair Housing Act.

NFHA estimates that less than 10 percent of the more than 1,100 CDBG entitlement jurisdictions in the country actually have any program that addresses fair housing concerns in their communities. Even fewer provide funding to private fair housing organizations serving their jurisdiction and almost no communities provide enough funding to make a meaningful difference in the advancement of fair housing in their communities. Without doubt, it has been difficult to enforce this requirement because HUD has not promulgated regulations that define and implement the affirmatively furthering requirement, although the law was passed in 1974.

Many communities fail to prepare an acceptable AI that fully and accurately assesses the barriers to fair housing; in addition, those that do often fail to follow them or do not update them when their communities experience changes. Despite its authority to do so, HUD has almost never imposed sanctions on communities that have failed to affirmatively further fair housing, has not required communities to update their AIs at least every five years, and has not required communities to follow their AIs. HUD could put some teeth into its scant efforts at monitoring AIs by reducing or terminating funding for those communities that do not follow these minimum requirements.

In February 2007, HUD issued a memorandum of guidance outlining local jurisdictions' obligations to affirmatively further fair housing and to include fair housing in their comprehensive plans and CDBG funding decisions. Building on similar memos by HUD Assistant Secretaries in 1988 and 1991, HUD Assistant Secretary for Community Planning and Development, Pamela H. Patenaude, and HUD Assistant Secretary for Fair Housing and Equal Opportunity, Kim Kendrick, outlined CDBG recipients' obligations to certify that they will use these funds to affirmatively further fair housing within their jurisdictions. This guidance discusses the requirement to conduct and implement an AI. It also states that "one major method for achieving these purposes is funding of local fair housing agencies."¹⁵ As stated above, however, HUD has not

¹⁵ HUD, *Memorandum for Community Planning and Development Field Directors and Fair Housing and Equal Opportunity Regional Directors, et. al., Re: Affirmatively Furthering Fair Housing in the Community Development Block Grant Program* (February 9, 2007), available at

promulgated sufficient regulations to enforce this guidance and has provided no clear guidance about adequate levels of funding for private fair housing groups, about what would be appropriate fair housing activities to fund, or even what type of fair housing activities would be meaningful.

One fair housing center has taken a unique approach to addressing local jurisdictions that take government funds but do not affirmatively further fair housing: a charge under the False Claims Act of 1863. In 2006, the Anti-Discrimination Center of Metro New York filed *US ex rel, Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, NY*, in which the Center claims that the County presented false claims to the federal government when it repeatedly certified that it had affirmatively furthered fair housing; the County accepted \$45 million in CDBG funds during that time period, and allegedly violated the federal False Claims Act by making false certifications as a condition of receiving funding. The lawsuit alleges that Westchester County is strongly segregated by race and national origin and that the county's AI failed to address the residential segregation over a period of years. The lawsuit charts the numerous situations in which the County has failed to encourage or worked to oppose housing that will serve people of color.

On July 13, 2007, a judge denied Westchester's motion to dismiss the suit. The ruling highlighted Westchester's own admission that it had not conducted an appropriate Analysis of Impediments, which would require a study of housing discrimination based on race. The judge went on to note that it is quite unclear why Westchester would think this absolves Westchester from its federal obligations. The case is currently in discovery and depositions stage, with summary judgment motions due in late 2008.

Similar patterns of a failure to address fair housing issues have been reported to NFHA by many of its members all over the country, including members in the Gulf. CDBG funds are required to be spent in ways that affirmatively further fair housing, but the specifics of this mandate remain ambiguous and because HUD has not taken any meaningful action to sanction these communities, their failure to fulfill their fair housing mandate goes unchecked.

Recommendation: HUD must promulgate enforceable and meaningful regulations requiring local jurisdictions to include fair housing in their Consolidated Plans and their funding decisions. Those regulations should require that Analyses of Impediments to Fair Housing Choice be prepared, that they accurately reflect the community's needs and describe strategies to improve

fair housing compliance, that plans to address discriminatory behavior are followed, and that the AIs are updated at least every five years. If a state or local government fails to comply with these obligations, the regulations should require that HUD reduce or terminate CDBG funding. HUD's Office of Community Planning and Development (CPD) should require recipients to set aside no less than 2% of their CDBG funds for fair housing education and enforcement.

Recommendation: Congress should strengthen or transfer HUD's authority to monitor CDBG entitlement communities to ensure that every community not only complies with the Fair Housing Act but works to eliminate impediments to the achievement of fair housing and affirmatively furthers fair housing.

ACCESSIBLE HOUSING

The Local Issue

In the aftermath of the hurricanes, a number of troubling accounts emerged concerning housing accessibility, visibility and assistance services for people with disabilities. Under the Fair Housing Act, both FEMA and HUD have a responsibility to affirmatively further fair housing. In order that they meet accessibility standards and fulfill their obligation, it is important that these agencies incorporate the perspective of disabled citizens in all stages of rebuilding. Doing so will ensure that they construct shelters and trailers with accessible entrances and place these trailers on pavement easily navigable by standard wheelchairs; train staff on disability rights and assistance in order to more ably provide accommodations such as Braille, closed captioned information and other assistive devices; and assure that trailers and shelters be integrated with the larger community. Government agencies at all levels should ensure that rehabilitated and newly constructed housing meet the highest standards of accessibility.

Prior to the hurricanes of 2005, roughly 25 percent of residents of the Gulf Coast had a disability according to the U.S. Census. Such a considerable number necessitates a rebuilding strategy that adopts the universal home design requirements for all housing, including federally assisted housing.

In the period of recovery and reconstruction, a number of problems emerged concerning FEMA's response to housing accessibility and assistance services for survivors. Housing provided by FEMA often came in the form of inaccessible trailers lacking wheelchair ramps, grab bars in the bathroom and wheelchair maneuvering

room.¹⁶ In February 2006, disability rights, legal and advocacy organizations had to sue FEMA (see *Brou v. FEMA, cite*) to force the agency to fulfill the federal requirement that it provide people with disabilities temporary housing that was accessible. A settlement agreement was obtained which required that FEMA reach out to the disability community and release public service announcements to media outlets in Louisiana, Mississippi, and surrounding states. Under the agreement, five percent of trailers at FEMA group trailer sites and common areas of FEMA trailer sites must meet Uniform Federal Accessibility Standards.¹⁷

Yet, questions remain as to FEMA's commitment not only to accessible housing but to fair housing in general. It does not appear that FEMA has adjusted its intake system to collect upfront the information it needs to determine whether applicants need accessible housing and to track the progress of their cases. Further, it is unclear how FEMA handles housing discrimination complaints, how the agency informs people of their fair housing rights during an emergency, how it receives and processes fair housing complaints by those living in housing paid for through FEMA's programs either directly or indirectly, how it investigates and resolves these complaints, how it monitors progress in complaint resolution and what training FEMA provides its staff and contractors in fair housing and other civil rights laws. To the extent that FEMA is providing temporary housing through the private sector, such as private mobile home parks and hotels, how does FEMA ensure that those providers are aware of their fair housing obligations and does it provide any notice or education?

As mentioned earlier, after the hurricanes, the Greater New Orleans Fair Housing Action Center found numerous fair housing violations on websites created to connect evacuees with housing opportunities. One of the sites with discriminatory ads was created by FEMA. The site has since been taken down, but questions linger as to how it was allowed to be publicized and whether FEMA and HUD have instituted systems since to monitor such violations and to prevent discrimination.

Another barrier to equitable recovery from the hurricanes has been the use of zoning and other powers by local jurisdictions across the Gulf Coast to outlaw FEMA trailer parks and otherwise hinder FEMA's ability to deliver temporary housing where it was needed. As rebuilding efforts have moved forward, local jurisdictions have taken similar steps to prevent the development of affordable rental housing within their borders, opposing the placement of Low Income Housing Tax Credit developments, and other housing for low and moderate income renters. Yet FEMA and HUD did little

¹⁶ http://www.femaanswers.org/images/5/5b/Brou_v_FEMA_complaint.pdf.

¹⁷ http://www.fema.gov/pdf/library/brou_fema.pdf.

to nothing to monitor and intervene to prevent the discriminatory effect on devastated communities. In fact, in the aftermath of the hurricanes, HUD did not initiate any investigations or charge any complaints to combat these discriminatory practices. Nor has HUD used the leverage it has with CDBG funds to encourage local jurisdiction to fulfill their obligations to affirmatively further fair housing.

In short, it is unclear what arrangements are in place for HUD and FEMA to cooperate to ensure that fair housing rights are enforced. While HUD oversees fair housing for the entire federal government, there is no written agreement between HUD and FEMA on how to address fair housing complaints that arise in FEMA trailer parks or in any other FEMA housing due to accessibility, race discrimination or any other violation of the Fair Housing Act. The effect in some cases has been that FEMA has removed complainants rather than punish landlords, or has outright refused to provide assistance to complainants or fair housing centers. Simultaneously, HUD has refused to investigate the allegations quickly to avoid evictions and additional discrimination. HUD has made some marginal effort in the area of increasing accessibility to persons with physical disabilities, but its biggest effort in this area occurred after a lawsuit was already decided against FEMA, rather than proactive work that would have avoided the need for a lawsuit.

The Systemic Issue

HUD's monitoring for purposes of ensuring compliance with the Fair Housing Act has been almost non-existent when it comes to other federal agencies. The FEMA problems are emblematic of FHEO's failure to integrate fair housing and accessibility features into other federal programs, all of which are required to affirmatively further fair housing.

FHEO has long diverted million of dollars from the Fair Housing Initiatives Program to a program called "Accessibility First" which provides training to the industry on design and construction requirements. Yet, twenty years after the Fair Housing Act was amended in 1988 and seventeen years after the requirements went into effect, there are still widespread violations of accessibility requirements that make much of the nation's housing inaccessible to persons with disabilities. In 2007, NFHA filed two cases against very large developers in an effort to bring about comprehensive systemic change. HUD has failed to investigate these cases or to turn these or other design and construction complaints into systemic cases that would have been effective in both making housing accessible *and* sending a message to the industry that inaccessible design features would no longer be tolerated. In addition, the use of FHIP funds for this purpose meant that the viability of fair housing organizations in some parts of the country was threatened because of the depleted pool of already meager FHIP funds. Yet these groups were

ones that have brought the most, and most comprehensive, design and construction cases in the country. So, HUD has not utilized its authority to establish Secretary-initiated investigations for design and construction violations nor has it turned the many individual cases into systemic cases designed to address large-scale violations.

At the same time, the Department of Justice has abdicated its authority to bring pattern and practices cases against housing developers. While DOJ did bring some design and construction cases in the 1990s, it has brought only a handful since 2000. One of the cases brought by DOJ was against Pacific Properties; apparently, the DOJ monitoring system was inadequate as principals in Pacific Properties built properties with a new company, Ovation, against which NFHA filed a federal lawsuit in 2007. Equally as important, NFHA is unaware of a single case in the last ten years brought by DOJ to address a pattern or practice of residential racial segregation.

The U.S. Department of Agriculture funded NFHA to conduct 1001 test parts examining discrimination on the basis of race, national origin, disability and familial status. NFHA tested 337 rural rental projects in 24 states from late 2002 through early 2004. In 53% of the tests, NFHA discovered differential treatment or found the property to be inaccessible to persons with disabilities. NFHA recommended that USDA take enforcement actions or return the tests to NFHA so it could take enforcement actions. USDA took no action, although it has a Memorandum of Understanding with HUD's Office of Fair Housing and Equal Opportunity for the investigation and prosecution of complaints. HUD also did not take any actions on these cases.

Other witnesses before this commission will provide evidence that the Department of Treasury's oversight of the Low Income Housing Tax Credit program fails to ensure compliance with the program's fair housing requirements.

Recommendation: Government agencies at all levels should ensure that rehabilitated and newly constructed housing meet all accessibility requirements; the minimum numbers of accessible housing units must be expanded in federally funded housing.

Recommendation: HUD and the Department of Justice must bring systemic and pattern and practice cases to effect large-scale change in discriminatory housing policies and practices, including specifically initiation of cases addressing residential segregation based on race, national origin or disability, and expansion of cases involving a failure to design and construct accessible housing to address all violations by parties to the design or the construction of the property, wherever or whenever they occur.

Recommendation: In order that they meet accessibility standards and fulfill their obligation, FEMA and HUD must incorporate the perspective of disabled citizens in all stages of building and rebuilding in disaster-affected communities by thoroughly and effectively complying with federal civil rights laws. Doing so will ensure that they construct shelters and trailers with accessible entrances and place these trailers on pavement easily navigable by standard wheelchairs; train staff on disability rights and assistance in order to more ably provide accommodations such as Braille, closed captioned information and other assistive devices; and assure that trailers and shelters be integrated with the larger community.