

Special Alert:

National Fair Housing Alliance Alleges Race-Based Disparities in Treatment of REO Properties in Violation of the Fair Housing Act

July 12, 2011

In a recently published investigative report ("the Report"), the National Fair Housing Alliance ("NFHA") released the results of its examination of treatment of Real Estate Owned ("REO") properties maintained by eight banks¹ in four major metropolitan areas. The Report, entitled "Here Comes the Bank, There Goes Our Neighborhood," concluded that in three of the four areas evaluated,² banks maintained and marketed REO properties in majority African-American and Latino census tracts in a manner than was less favorable than properties in majority Caucasian or stably integrated census tracts.

In the Report, the NFHA asserts that differential treatment of REO properties, based on the racial composition of the neighborhoods in which they are located, violates the Fair Housing Act. The NFHA has signaled its intention to take legal action based on the alleged disparities and is encouraging government regulators and private plaintiffs to do the same. The Report is likely to trigger a new wave of fair housing enforcement actions and litigation based upon this novel legal theory.

The NFHA's investigation was conducted between April 2009 and February 2011 in conjunction with three of its member organizations - the Connecticut Fair Housing Center in Hartford, Connecticut; the Miami Valley Fair Housing Center in Dayton, Ohio; and Housing Opportunities Made Equal of Virginia, Inc. in Richmond, Virginia. Investigative work was funded, in part, through grants received from the U.S. Housing and Urban Development's ("HUD") Fair Housing Initiatives Program and Fannie Mae.³

Staff from the participating fair housing organizations visited a total of 624 REO properties owned by eight major banks.⁴ In so doing, they evaluated exterior condition on a 100-point scale to determine whether or not the banks and their third-party contractors were taking necessary steps to equally maintain and market REO properties. Metrics evaluated included curb appeal, structure, signage/occupancy, paint/siding, gutters, water damage, and exposed utilities.

The NFHA concluded that the lowest scoring REO properties in the four metropolitan areas typically were located in African-American neighborhoods.⁵ Specifically, REO properties in Caucasian neighborhoods were more likely to have well-maintained lawns, secured entrances, and professional sales marketing, while REO properties in African-American and Latino neighborhoods were more likely to look vacant and have poorly maintained yards, unsecured entrances, and poor curb appeal. The NFHA asserts that the differential treatment of REO properties by neighborhood racial demographic damages those neighborhoods, preventing neighborhood stabilization and economic recovery and depressing property values.

The NFHA is exploring available administrative and legal options, including potential legal causes of action under both the Fair Housing Act and the Civil Rights Act of 1866. In addition, the Report explicitly encourages federal banking agencies to increase oversight and take action against banks, servicers, and investors to ensure that they fully comply with federal fair lending laws in the maintenance of REO property. The study further recommends that the U.S. Department of Justice and HUD initiate systemic investigations into ways in which servicers dispose of their REO properties and encourages local municipalities to take action against banks to ensure compliance with fair housing obligations.

The NFHA's investigative methodology has significant limitations, calling into question the accuracy of its purported conclusions. Likewise, it will be challenging for would-be litigants to prevail in litigation predicated on the legal theories set forth in the NFHA's Report. With respect to actions by municipalities in particular, challenges to standing will be difficult for municipalities to surmount.

Notwithstanding, the investigation raises the specter that banks may soon face investigations and/or enforcement actions by government regulators and private litigation (including actions filed by consumer rights organizations), as well as legal



action by municipalities seeking to recover purported damages to local tax bases and fees for maintenance of vacant properties.

In view of emerging allegations of differential treatment of REO properties based on the racial composition of the neighborhoods in which they are located, BuckleySandler recommends that financial institutions: i) carefully review the NFHA's Report; ii) evaluate existing policies, procedures, and practices relating to REO property maintenance, marketing, and sales; and iii) consider privileged self-assessments to ensure that care and disposition of REO properties comply with applicable fair lending and civil rights laws.

For a copy of the NFHA study, please see http://www.buckleysandler.com/There-Goes-Our-Neighborhood_REO-report.pdf.

¹ The study defines the term "bank" to include lenders, servicers, and government-sponsored enterprises, such as Fannie Mae and Freddie Mac.

² The metropolitan areas studied by the NFHA and its partners included Hartford and New Haven, Connecticut; Montgomery County and Prince George's County, Maryland; Dayton, Ohio; and Richmond, Virginia.

³ The Acknowledgements section of the Report indicates that Relman, Dane & Colfax, PLLC, a law firm which has brought fair lending actions against numerous financial institutions, provided legal assistance in connection with the investigation.

⁴ The names of the banks were not identified in the study.

⁵ The NFHA has indicated that future investigations will include greater focus on neighborhoods with high Latino, Asian-American, and/or immigrant populations.

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