

**Report to the
UN Human Rights Council
as Part of the Universal Periodic Review of the United States
Regarding**



**The Unchecked Discriminatory Impact
of the
Foreclosure Crisis
on
Minority Families and Communities
in the United States**

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Summary: Laws and policies of the United States federal and state governments regarding home foreclosures violate obligations under a ratified human rights treaty, the International Convention on the Elimination All Forms of Racial Discrimination (ICERD), by failing to abate the racially discriminatory effect of mortgage servicers' practice of refusing to modify loans and instead to foreclose and then sell the foreclosed property at reduced rates to new, often non-minority, purchasers.

I. Introduction

The United States, through its federal and various state governments, has adopted and maintains laws which prescribe and authorize the mortgage and eviction processes that mortgage servicers use to foreclose and evict. In addition, through ineffective and unenforced policies that were adopted with the expressed but unfulfilled promise of protecting families from foreclosure and maintaining them in their homes (most recently the Making Home Affordable Modification Program or HAMP), the United States continues to allow mortgage servicers to foreclose home mortgages and evict families at historic levels.¹ The United States maintains these policies without regard for the disproportionate negative impact of such policies (policies of commission and omission) on families and communities of color.

¹ It is well documented that mortgage servicers have multiple financial incentives to foreclose rather than to make reasonable, affordable, and sustainable loan modifications that would succeed in maintaining families in their homes, even when foreclosure is contrary to the mortgage owners' interests. See *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences*, Diane E. Thompson, National Consumer Law Center, Inc. (October 2009). See also Comments to the Federal Deposit Insurance Corporation, 12 CFR Part 360, Advance Notice of Proposed Rulemaking by the National Consumer Law Center (February 22, 2010), especially Section 4, *Servicer Incentives Should Be Aligned to Favor Loan Modifications Over Foreclosures When Investors' Interests Would Be Served*, pages 12-18. http://www.consumerlaw.org/issues/predatory_mortgage/content/CommentsFDIC-Feb2010.pdf.

II. Failure to Acknowledge & Prevent Disproportionate Impact of Mortgage Crisis on Minority Families and Communities

The United States' failure to acknowledge and prevent the disproportionate negative impact of these mortgage foreclosure laws and policies on families and communities of color is particularly egregious in light of

1) the well-documented disparate impact of mortgage foreclosures and associated evictions on families and communities of color;²

2) the historical exclusion of families of color from homeownership;³

3) the fact that subprime loans were five times more likely to be made in neighborhoods of African American people, were particularly marketed to minorities even in cases where individuals qualified for traditional loan products,⁴ and were even more particularly

² See, for example, *The Unraveling of the American Dream: Foreclosures in the Immigrant Community of Minneapolis*, Ryan Allen, (February 2009) http://www.cura.umn.edu/Programs/Housing-Forum/2009/Foreclosures_and_Immigrants.pdf. While this study focused primarily on the foreclosure impact on immigrant communities (Somali and Latino), it also documented the disparate impact upon African-Americans and their communities. See also the Testimony of Mark Ireland before the U.S. Senate's Committee on Financial Services, Subcommittee on Housing and Community Opportunity (Minneapolis- January 23, 2010): titled "The Impact of the Foreclosure Crisis on Public and Affordable Housing." Regarding the disparate impact of mortgage foreclosures on communities of color, Mark Ireland, an attorney with the Housing Preservation Project, stated:

"In every study I've seen, the foreclosure crisis and the housing crisis disproportionately impact people of color and communities of color."

³ For an historical review of the obstacles placed in the path of four different racialized groups with respect to asset building by government actions and inactions and details of the advantages given to white people by public policy, see *The Color of Wealth: The Story Behind the U.S. Racial Wealth Divide*, Meizhu Lui, Barbara Robles, Betsy Leondar-Wright, Rose Brewer, Rebecca Adamson (The New Press, 2006). "Thoroughly researched and written in an accessible style, *The Color of Wealth* is a comprehensive guide to understanding America's great wealth divide." Thomas Shapiro, *Black Wealth / White Wealth*.

⁴ See National Community Reinvestment Coalition, *Income Is No Shield Part III* at 3 (June 2009) and National Community Reinvestment Coalition, *Black 2006 Subprime Disparity Index by Congressional District* (2009)

<http://www.ncrc.org/images/stories/pdf/research/black%20subprime%20disparity%20by%20congressional%20district.pdf>. See also Myron Orfield, *Communities in Crisis: Race and Mortgage Lending in the Twin Cities*, Institute on Race and Poverty (February 2009) http://www.irpumn.org/uls/resources/projects/IRP_mortgage_study_Feb.11th.pdf and Jeffrey Crump, *Subprime Lending and Foreclosure in Hennepin and Ramsey Counties* at 15, CURA Reporter (Summer 2007) <http://www.cura.umn.edu/reporter/07-Summ/Crump.pdf>.

marketed to minority women;⁵ and

4) the observation that many buyers of foreclosed properties formerly owned by minority families, buyers that purchase these homes at substantially discounted prices (far below what the foreclosed families were being required to pay by the mortgage servicers to avoid foreclosure/sale/eviction) and often at prices subsidized by government funding, are non-minority individuals or businesses.

In doing so, the United States is failing to abide by obligations it undertook when it ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD forbids policies that have the effect of nullifying or impairing the exercise of human rights and fundamental freedoms by minority persons on an equal footing with all other members of society.⁶

By its laws authorizing foreclosure and eviction and its *de facto* policy of not protecting minority families from the disparate harm summarized above, the United States is engaging in acts of racial discrimination as defined in ICERD , Article 1 (1)⁷ against persons and groups of persons

⁵ See Allen J. Fishbein & Patrick Woodall, Consumer Federation of America, *Women are Prime Targets for Subprime Lending; Women are Disproportionately Represented in High-Cost Mortgage Market* 8 (December 2006), citing U.S. Census Bureau, “American Housing Survey for the United States: 2005,” H150/05, Table 3-9, at 136 (August 2006). Women of color “are the most likely to receive subprime loans and white men are the least likely to receive subprime loans at every income and the gap grows with income.” *Id.* at 4. The most egregious disparity occurs among rates for “upper income African American women,” who are “nearly five times more likely to receive subprime purchase mortgages than upper income white men.” *Id.* at 16.

⁶ The ICERD’s results-based standard of what constitutes prohibited discrimination differs from the intent-based standard applied to claims of racial discrimination under either the 5th or 14th Amendments of the United States Constitution, and since the United States has ratified the ICERD, its provisions have become the law of the land pursuant to Article VI, Section 2 of the US Constitution. The Committee on the Elimination of Racial Discrimination (CERD), which is the United Nations body charged with reviewing nations’ compliance with the ICERD, has recently emphasized that the ICERD’s results-based definition of racial discrimination prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.” See United Nations Report on the Committee on the Elimination of Racial Discrimination 72nd and 73rd Sessions, ¶ 481 (2008).

⁷ Article 1(1) defines unlawful racial discrimination as “a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” International Convention on the Elimination of All Forms of Racial

(minority families) and institutions (minority communities) in violation of ICERD's Article 2 (1)(a) and is supporting racially discriminatory action by persons or organizations (in this instance, by mortgage servicers).

In addition, the United States' above-referenced foreclosure policies (*de lege* and *de facto*) violate Article 5 of the ICERD by failing to ensure that racial minorities experience "equality before the law" with respect to the right to own property (Article 5(d) (v)) and the right to housing (Article 5(e)(iii)). Specifically, minority persons owning homes that are being foreclosed are not being accorded "equality before the law" *vis a vis* persons purchasing the property post-foreclosure (often white) because current law allows mortgage servicers to require the family to pay per the full face amount of their mortgage as a condition of their continued ownership of the foreclosed premises, while subsequent purchasers (often white) are not required to meet the same condition (price) and are allowed to purchase and live in (or simply own and hold on speculation) the foreclosed home for a significantly reduced amount, in many instances additionally aided by a significant government subsidy to do so.⁸

III. Transfer of Property from Minority Families and Communities: The Current Foreclosure Cycle

Viewed in aggregate, the cycle of foreclosure/eviction/subsequent-purchases-at-reduced -prices (market prices) has transferred and continues to transfer significant amounts of home ownership property from minority families to non-minority ownership, reversing the tentative gains in homeownership that minority families have made in recent years to overcome the legacy of discriminatory laws and practices that has largely excluded minorities from homeownership.

Discrimination, Art. 1, 660 U.N.T.S 195, *entered into force* 4 January 1969, *ratified by the United States* 20 November 1994 (emphasis added).

⁸ There are many different government assistance programs available to homebuyers who haven't owned "real estate" in the last three years. Information about these programs is very effectively communicated. See, for example <http://www.justinfoxhomes.com/firstbuyer.html?gclid=CLjvhfOa16ACFQsMDQodpkq-Bw> which announces: "**Assistance is available from:** State of Minnesota, several Minnesota Counties, several Minnesota Cities, specific neighborhoods within Minnesota Cities, non-profit organizations, and even a local hospital. **Programs include:** No interest loans, reduced interest fixed loans, monthly payment assistance, down payment grants. Many of the programs can be combined to offer larger amounts of assistance in certain situations. For example, using Ramsey County's current program and the State's current program we can get a qualified buyer \$23,000 in down payment assistance! Not to mention, a fixed 40-year mortgage and monthly payment assistance." Though not limited to purchases of foreclosed properties, these subsidies do apply to purchases of foreclosed properties. Together with the fact that new owners buy the foreclosed property at its current market value, these government subsidies further reduce the price that must be paid by the new owners to own the property below what the distressed homeowners must pay to save their homes (the exact same property) from foreclosure.

This disproportionate loss of minority homeownership, while not necessarily intended by any party, is an inevitable by-product of the foreclosure/eviction/subsequent-purchases-at-reduced (market)-prices cycle. The cycle is sanctioned, legalized, and enforced by current state and federal foreclosure and eviction laws. Because of its commitments under the ICERD to eliminate all forms of racial discrimination, the United States has an obligation to prevent, through its federal and state governments, the perpetuation of that cycle and that cycle's racially discriminatory results.

The United States, however, has failed and continues to fail to do so, as reviewed in the following section.

IV. Ineffective Government Steps to Protect

Examples of ineffective measures to prevent foreclosures at the federal and state level include foreclosure mediation programs,⁹ HOPE NOW (2007), Hope for Homeowners (July 2008),¹⁰ and the Making Home Affordable Modification Program (HAMP) (February 2009)¹¹.

Despite promising language in the HAMP program, achievements have been hampered by implementation problems, on-going mortgage servicer resistance, and lack of effective oversight.

Whether through design or as a result of bureaucratic inertia, servicers' practices have led to widespread evasion of their obligations under HAMP contracts.

[Footnote 38: *See generally* Testimony of Diane E. Thompson, National Consumer Law Center, U.S. Senate Committee on Banking, Housing, & Urban Affairs July 16, 2009.]

These practices have included:

_ Soliciting eligible homeowners to waive their right to be considered for a loan modification under the HAMP guidelines;

⁹ See "State and Local Foreclosure Mediation Programs: Can They Save Homes?", Geoffrey Walsh, National Consumer Law Center (September 2009).

http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-Sept09.pdf

¹⁰ *Id.* at page 7.

¹¹ *Id.* at pages 7-10. See also "*Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences*", Diane E. Thompson, National Consumer Law Center (October 2009) and "Preserving Homeownership: Progress Needed to Prevent Foreclosures", Written Testimony of Diane E. Thompson, National Consumer Law Center and National Association of Consumer Advocates, United States Senate Committee on Banking, Housing, & Urban Affairs (July 16, 2009).

- _ Offering homeowners loan modifications that do not comply with the HAMP affordability guidelines, including modifications with unaffordable payments, impermissibly high interest rates, and modifications for short time periods not authorized by the guidelines;
- _ Falsely informing eligible homeowners that the servicer does not participate in the HAMP program;
- _ Proceeding with sales and commencing foreclosure actions while delaying decisions on requests for a loan modification;
- _ Charging fees to consider or implement loan modifications despite HAMP guidelines prohibiting such charges;
- _ Refusing to inform homeowners of the grounds for denial of a HAMP modification, including refusal to disclose how a payment level was calculated, what NPV test was performed, and failing to provide any documentation related to denial or approval decision;
- _ Altering terms of trial modifications when it is time to implement the permanent modification;
- _ Adding improper late fees and other post-default fees;
- _ Demanding excessive documents from homeowners beyond what HAMP requires, and denying modifications for lack of documentation;
- _ Denying any review or appeal from denial decisions, and failure to inform the homeowner of decisions;
- _ Extensive delays in deciding modification requests or requiring homeowners to sign documents on short notice without a chance for review;
- _ Failing to coordinate modification negotiations with second lienholders.

Servicer practices like these have been endemic since the announcement of the HAMP program.¹² For additional discussion of the failure to implement HAMP and ensure compliance with its mortgage loan modification requirements, see HAMP Mortgage Modification Survey 2010, National

¹² “*State and Local Foreclosure Mediation Programs: Can They Save Homes?*”, Geoffrey Walsh, National Consumer Law Center, Inc. (September 2009) at pages 9-10.

Community Reinvestment Coalition and Mark Ireland, *Bending Toward Justice: an Empirical Study of Foreclosures in One Neighborhood Three Years after Impact and a Proposed Framework for a Better Community*, Kirwan Institute for the Study of Race and Ethnicity, section entitled “Lack of Oversight for Mortgage Loan Modifications”, pages 23-25. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492777

Moreover, a March 25, 2010 study by the National Community Reinvestment Coalition (NCRC) strongly suggests that in addition to being generally ineffective for all homeowners, the HAMP measures written to protect homeowners are being implemented by mortgage servicers in a racially discriminatory manner and with racially discriminatory results. Main findings of the study included the following:

1. Loan servicers foreclose upon delinquent Black or African-American borrowers more quickly than delinquent White or Hispanic borrowers.
2. White HAMP-eligible borrowers are almost 50% more likely to receive a modification than African-American HAMP-eligible borrowers.¹³

In light of the financial industry’s record of denying credit to minorities on an equal basis, the United States commitment under ICERD to eliminate all forms of racial discrimination in housing and the right to own property should have led to forming a HAMP program with effective implementation and prudent accountability mechanisms in the first place. Having failed to do so at the outset, the Administration is now announcing changes to HAMP that will perpetuate its shortcomings by maintaining the same basic approach: lack of enforcement and continued reliance on providing incentives to mortgage servicers to do the right thing, as discussed in the next section.

V. Government Steps to Increase the Pace of Home Loss by Current Homeowners

Rather than working to overcome HAMP’s deficiencies (slow implementation and lack of enforcement) as initially reported,¹⁴ the Obama Administration announced in late

¹³ “NCRC HAMP Modification Survey 2010,” National Community Reinvestment Coalition (March 25, 2010), page 3.

¹⁴ Initially, there was a report that the Administration was considering stricter enforcement of the HAMP requirements:

The Obama administration, under intense pressure to help millions of people in danger of losing their homes, is considering a ban on foreclosures unless they have first been examined for potential modification, according to a set of draft proposals.

“U.S. Weighs Requiring Lenders to Consider Changes Before Foreclosures”, David Streitfield, New York Times (February 25, 2010) <http://www.nytimes.com/2010/02/26/business/economy/26modify.html>.

February a new policy to deal with the foreclosure crisis, effective April 5, 2010.¹⁵ The new federal policy undertakes to resolve the foreclosure crisis by facilitating short-sales of the homeowner's property and the quiet departure of the homeowner to make way for the new owner, the short-sale purchaser. Under a short-sale, the property is not sold at the current mortgage amount (the amount that the current soon-to-be-departed owner is required to pay in order to stay), but is sold at a reduced price based on the property's current market value.

To facilitate agreement by the mortgage servicers to short sales, the new program pays them a \$1,000 fee. To facilitate the homeowner's acquiescence and quiet departure, the program promises that the homeowner's credit will be less damaged by a short sale than by foreclosure and gives them an additional \$1,500 for "relocation assistance", \$3,000 in total. In essence, the new program would replace the formal foreclosure process but would produce the same result: home loss for homeowners generally and continued disproportionate home loss for minority families and their communities.

This was a regrettable turn, since for all its shortcomings, the HAMP program did enunciate the goal of maintaining families in their homes and required (on its face) that mortgage servicers modify the terms of a mortgage in distress if, based on an objective present value test, foreclosure would produce a greater loss to investors than an affordable loan modification. By contrast, the new policy is actually likely to accelerate the loss of homes by current owners through expediting short sales of their homes.

On March 26, 2010, in a conference call with housing advocates, Treasury Department and HUD officials discussed the short-sale policy in the context of a set of new HAMP foreclosure policies that they promised would expand the effectiveness of HAMP and help families retain their homes, so that the short sale would be the last resort. However, these assurances did little to alter the analysis that the previously announced short-sale policy would have a detrimental and discriminatory impact on minority homeownership.

- First: the implementation of all these new policies remains largely in the hands of the mortgage servicers that have foreclosed the largest number of home mortgages since the Great Depression and have effectively thwarted significant permanent mortgage modifications to date.¹⁶

¹⁵ "Program Will Pay Homeowners to Sell at a Loss," David Streitfield, New York Times, March 8, 2010. <http://www.nytimes.com/2010/03/08/business/08short.html>

¹⁶ "State and Local Foreclosure Mediation Programs: Can They Save Homes?," Geoffrey Walsh, National Consumer Law Center (September 2009). http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-Sept09.pdf. Commenting on the new HAMP policies announced March 26, 2010, Jaret Seiberg, an analyst with Concept Capital's

- Second, the new policies will not be accompanied by any new measures to enforce compliance with HAMP I or HAMP II.
- Third, while the short-sale policy will be implemented April 5, 2010, the new HAMP home protection policies will not go into effect until several months later and the most substantive of these policies (the principal reduction policy) will not go into effect, the Treasury Department official said, until sometime in “the summer ... or fall” and then will only apply to homeowners who are current on their mortgage payments. Rather than being a last resort, short-sale promotion is being fast-tracked, with mortgage reduction coming along a distant and narrowly scoped third.
- Fourth, no provision has been made to overcome the mortgage servicers’ established pattern of ignoring of the HAMP guidelines identified by the National Consumer Law Center¹⁷ and to counter the racial discriminatory results of the servicers’ HAMP activities identified in the NCRC survey.

In light of these facts, it is inevitable that home losses through foreclosure will continue the historic pattern of falling disproportionately on minority families and their communities.

Conclusion

United States laws and policies at the state and federal regarding home foreclosures include those which 1) allow foreclosure and eviction even when those homes have been foreclosed in disregard of HAMP standards and will undoubtedly be sold at prices far below what the foreclosed family is required to pay to maintain ownership and occupancy; 2) provide subsidies to purchasers of homes even when those homes have been foreclosed in disregard of HAMP standards; and 3) provide financial incentives to homeowners to acquiesce to loss of their homes regardless of whether the HAMP standards have been observed and regardless of the manifest injustice of their having been required to pay a substantially higher amount to save their home than is required of any subsequent purchaser.

Objectionable practices engaged in by mortgage services that result in the disproportionate loss of homeownership by minority families and their communities include 1) refusal to modify loans and requiring payment of full mortgage amount, 2) foreclosing when they should modify, 3)

Washington Research Group wrote: “So far none of them have lived up to expectations and we see little reason to believe the latest effort will turn out any different.”

¹⁷ Testimony of Diane E. Thompson, National Consumer Law Center, U.S. Senate Committee on Banking, Housing, & Urban Affairs July 16, 2009 and “State and Local Foreclosure Mediation Programs: Can They Save Homes?”, Geoffrey Walsh, National Consumer Law Center (September 2009).

selling the foreclosed property at market (substantially reduced) rates to new purchasers, and 4) the HAMP-evading practices listed above in Section IV.

In sum: United States laws and policies, by effectively condoning and reinforcing the mortgage servicers' practices that have a disproportionately negative impact upon minority families and their communities, violate the nation's obligations under ICERD to eliminate the racial discriminatory effect of these practices¹⁸ on minority families and their communities.

Proposed Findings and Comments

It is recommended that the Human Rights Council's Final UPR Report include a finding that the United States' state and federal governments have obligations under the ICERD to protect against and to correct any disparate impact on minorities with respect to homeownership resulting from the home foreclosure crisis and, since the foreclosure crisis disproportionately impacts minority homeownership, to adopt effective laws, policies, and practices to protect all homeowners from involuntary loss of their homes during the current economic crisis, whether through foreclosure or through short-sale.

It is recommended that the Human Rights Council's Final UPR Report include a finding that the United States' state and federal governments have obligations under the ICERD to track the impact of the foreclosure crisis (and measures taken in response to it) on its majority and minority populations, to swiftly and thoroughly determine the sources of any disparate impact upon minority populations, and to adopt effective foreclosure prevention laws, policies, and practices that eliminate those disparate impacts, to the end that the foreclosure crisis not result in even wider gap in homeownership rates between minority and majority populations in the United States.

¹⁸ See list of mortgage servicer practices above in Section IV. Note that in addition to evading or violating HAMP requirements, some or all of these practices are also likely to be "unlawful practices" under many state consumer protection laws. See, e.g. Minn. Stat. §§ 8.31 <https://www.revisor.mn.gov/statutes/?id=8.31> and 325F.69 <https://www.revisor.mn.gov/statutes/?year=2009&id=325F.69>. Inaction by state attorneys general to pursue mortgage servicers for violation of the states' broadly written consumer protection statutes with respect to these practices is a significant missed opportunity to stem the racially disparate impact of the foreclosure crisis. Inaction by state attorneys general is consistent with and part of the *de facto* governmental policy of not acting effectively to protect minority families and their communities from the disproportionately adverse impacts of the mortgage crisis.