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At Forty-five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-lift, but Will it Integrate America's Cities?

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At Forty-five Years Old the Obligation to Affirmatively Further Fair Housing gets a Face-lift, but Will it Integrate America's Cities?

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Abstract

In July 2013 the U.S. Department of Housing and Urban Development (HUD) issued a draft rule in order to improve implementation of the 1968 Fair Housing Act's mandate to address segregated housing patterns. HUD's 2013 proposed rule replaces its 1995 regulation under Section 3608(e) of the Fair Housing Act, which requires HUD and its grantees to act "affirmatively to further fair housing" (AFFH). This obligation has been in place for over forty-five years and it extends to other federal agencies that administer housing programs. Yet segregated communities persist in cities all across America, leaving large segments of FHA protected classes in high-poverty, low-opportunity neighborhoods. HUD's 2013 proposed AFFH rule provides an improved framework for fair housing planning, but limitations within the 2013 rule and external to HUD may prevent the 2013 rule from integrating America's cities.

Under HUD's 2013 AFFH rule, HUD will provide each jurisdiction with national data on racial segregation, poverty concentration, and access to community assets such as education, transportation, and jobs. The expectation is that HUD grantees (states, local governments and public housing agencies) will use this data in their assessment of fair housing—a new planning process also required under the 2013 rule. Depending on how it is implemented, the 2013 rule stands to improve regional fair housing planning, clarify state and local AFFH obligations and provide for closer HUD oversight of fair housing planning.

However, HUD's 2013 proposed AFFH rule, as initially written, may not be able to integrate America's cities on its own. The 2013 rule fails to require segregated jurisdictions to set integration benchmarks that are necessary to hold jurisdictions accountable. Additionally, the 2013 rule may not influence planning under the Low-Income Housing Tax Credit program, which is responsible for siting and developing more affordable housing than all of HUD's programs combined. The Treasury Department administers the Low-Income Housing Tax Credit program yet it has neglected to promulgate rules to meet its own AFFH obligation. This stands to prevent HUD's 2013 rule from creating diverse, inclusive communities of opportunity. To prevent this, the Treasury Department should adopt the framework set out in HUD's 2013 AFFH rule and apply that framework in the administration of the Low-Income Housing Tax Credit program.

This article begins by explaining the history of the AFFH mandate, including its adoption as part of the Fair Housing Act of 1968 and cases interpreting the mandate. Next, this article discusses HUD's 1995 AFFH rule, compliance reviews and actions brought pursuant to the 1995 rule, and HUD's 2013 rule, which alters how HUD program participants carryout their AFFH obligation. Next, this article analyzes and critiques HUD's 2013 rule, focusing on how it fails to hold cities accountable for ineffective integration efforts and how it may not prevent new residential racial re-segregation created by the Low-Income Housing Tax Credit program. This article concludes with suggestions, for HUD's 2013 proposed rule and other federal actors including the Treasury, which would improve efforts to integrate America's segregated cities and provide opportunities for marginalized members of FHA protected classes.

I. INTRODUCTION

Congress adopted the Fair Housing Act (FHA)[1] in order to broadly remedy the effect of residential racial segregation in all parts of cities throughout the United States, not merely to end discreet discriminatory acts.[2] On July 19, 2013 the U.S. Department of Housing and Urban Development (HUD) issued a proposed rule aimed at improving HUD's implementation of the FHA's mandate to address segregated housing patterns and promote diverse, inclusive communities.[3] Specifically, HUD's proposed rule, if implemented, would replace the 1995 HUD regulation promulgated under the section of the FHA which requires HUD and its state and local grantees to act "affirmatively to further" fair housing (AFFH).[4] After three years of planning, the proposed rule was widely anticipated by civil and housing rights advocates who have hailed it as a step in the right direction despite its imperfections.[5] As of the publishing of this article, HUD has

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1 42 U.S.C. § 3601 *et seq* (2011) (Title VIII of the Civil Rights Act of 1968).

2 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 125 (2012).

3 Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710 (proposed July 19, 2013) [hereinafter HUD Proposed Rule] (to be codified at 24 C.F.R. pt. 5; 24 C.F.R. pt. 91; 24 C.F.R. pt. 92; 24 C.F.R. pt. 570; 24 C.F.R. pt. 574; 24 C.F.R. pt. 576; 24 C.F.R. pt. 903); *Responses to HUD's "Affirmatively Furthering Fair Housing" Proposed Rule*, Poverty and Race Research Action Council, *http://www.prrac.org/full_text.php?item_id=14252&newsletter_id=0&header=Current%20Projects* (last visited November 3, 2013).

4 *Id*; 42 U.S.C. § 3608(e)(5) (2011) ("The Secretary of Housing and Urban Development shall administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter")[hereinafter the duty to AFFH or AFFH obligation].

5 *See Responses to HUD's "Affirmatively Furthering Fair Housing" Proposed Rule*, Poverty and Race Research Action Council, *http://www.prrac.org/full_text.php?item_id=14252&newsletter_id=0&header=Current%20Projects* (last visited November 3, 2013) (stating that HUD has been working on the proposed rule for over three years and that despite concerns about the rule's shortfalls, the rule will involve communities in a long overdue conversation about fair housing); Program Review, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card, Poverty & Race Research Action Council, Part I, 5 (2013), *available at* http://www.prrac.org/pdf/HUDFirstTermReportCard.pdf ("A proposed regulation was widely expected to be released in 2012") [hereinafter HUD's Report Card Part I]. PRRAC summarizes the advocacy community's concerns for the proposed rule:

> [T]here is concern among advocates that the new AFFH rule will be too single-mindedly focused on data and planning, and will not contain the kind of robust enforcement mechanisms that are necessary to force compliance among recalci-

yet to determine the date that the proposed rule will go into effect, and whether it will be amended based upon suggestions during the regulatory comment period.[6] This article will analyze HUD's 2013 proposed AFFH rule, including its likely promise and short-falls for promoting diverse, inclusive communities of opportunity, and this article will suggest additional measures that must be taken, by HUD and other federal actors, in order to fulfill the AFFH mandate of the FHA.[7]

Under the existing HUD regulation, recipients of HUD funding and grants are required to undertake certain tasks to end residential segregation for FHA protected classes and achieve integrated communities.[8] However, since its implementation in 1995, and despite HUD's issuance of the "Fair Housing Planning Guide" in 1996,[9] the current rule has failed, in large part, to influence city and regional planning.[10] This has allowed local governments and developers to undermine

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> trant jurisdictions . . . It remains to be seen whether the rule will include rigorous and well-resourced accountability and enforcement measures. An effective AFFH rule would provide for audits and site visits, frequent evaluations of fair housing plans and progress, a specified process for receiving and investigating complaints, and increased enforcement. Additionally, the rule should incentivize and assess concrete progress in increasing racial and economic integration within and across jurisdictions in metropolitan regions.

Id. (internal citations omitted); *see also Strong Outpouring Of Support For HUD's New Fair Housing Rule*, PR News Wire, http://www.prnewswire.com/news-releases/strong-outpouring-of-support-for-huds-new-fair-housing-rule-224556571.html (last visited November 3, 2013) (noting that the proposed rule received overwhelming support in the regulatory comment period from several national civil rights and progressive policy organizations and the affordable housing industry).

6 *See* Sara Pratt, Deput. Assist. Sec. for Enforcement Prog. Dept. of Hous. & Urban Dev., John Marshall Law School Fair Housing Conference: Implementing the Duty to Affirmatively Further Fair Housing (Sept. 20, 2013) (noting that the regulatory comment period had recently closed and HUD had not announced a date by which a new AFFH rule would be implemented).

7 *See infra* parts IV and V.

8 *See* HUD Proposed Rule *supra* note 3, at 43713 (discussing HUD's current regulatory AFFH framework and the need for its refinement).

9 U.S. DEP'T HOUS. URBAN DEV., FAIR HOUSING PLANNING GUIDE (1996) ("The purpose of the HUD Guide is to help grantees fulfill the "fair housing requirements" of grants such as the CDBG.") [hereinafter 1996 HUD Planning Guide]; *See* ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860 (DLC), (S.D.N.Y. Aug. 10, 2009) (stating that HUD, in its Fair Housing Planning Guide interprets "the objectives of conducting the [Analysis of Impediments], taking appropriate actions, and maintaining records reflecting the analysis and actions taken, to mean, *inter alia*, to "[a]nalyze and eliminate housing discrimination in the jurisdiction" and to "[p]rovide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin").

10 *See* HUD Proposed Rule *supra* note 3, at 43710 (stating that the current practice, laid out in HUD's regulations and planning guide, has not been effective at overcoming the historic patterns of segregation, promote fair hous-

the AFFH mandate, with only occasional challenges brought by HUD or individual, private lawsuits.[11] Furthermore, the AFFH mandate extends to other federal agencies, yet segregated communities still persist, leaving large segments of FHA protected classes in high-poverty, low-opportunity neighborhoods.[12]

Under HUD's 2013 proposed rule, the AFFH assessment and planning framework for program participants will be overhauled and HUD will provide each jurisdiction with national data on racial segregation, poverty concentration, and access to community assets such as education, transportation, and jobs.[13] HUD expects that HUD program participants[14] will use this data to create action plans that meet the AFFH mandate, something not feasible when relying solely on incomplete data-sets self-collected by jurisdictions at the local level.[15]

Depending on how strongly implemented by HUD, the new regulation stands to clarify state and local obligations under the AFFH mandate, and to improve the regional planning proc-

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ing choice, and foster inclusive communities for all); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, REPORT TO CONGRESSIONAL RE-QUESTERS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDIC-TIONS' FAIR HOUSING PLANS (2010) (same).

11 *See infra* part III. A-C (discussing current AFFH enforcement mechanisms and recent history of AFFH enforcement actions).

12 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.") [hereinafter this (and the duty imposed under § 3608(e)(5)) will be referred to as the duty to AFFH or AFFH obligation]; *See infra* Part IV.A.1 (The Persistence of Segregation after forty-five years of the AFFH Mandate); *infra* note 231 and accompanying text (stating the statutory AFFH mandate applies to federal agencies other than HUD, including Treasury Department).

13 *See* HUD Proposed Rule *supra* note 3, at 43710 (stating HUD's proposed rule would refine existing AFFH requirements with a fair housing assessment and planning tool, and under the proposed rule HUD will provide states, local governments, insular areas and public housing agencies and the communities they serve with data for fair housing planning); *infra* part III.D (explaining the AFFH planning framework under HUD's 2013 proposed rule).

14 Program participants required to use the data in order to submit fair housing planning documents includes states, local governments, and insular areas that administer HUD programs, and public housing agencies. HUD proposed rule *supra* note 3, at 43730-43731 (proposed 24 C.F.R. § 5.154 Assessment of Fair Housing (AFH), (b) Requirement to submit AFH).

15 *See* HUD proposed rule *supra* note 3, at 43715 (predicting that the provision of this data will enable program participants to more knowledgeably engage in the proposed rule's fair housing assessment and planning process).

ess so as to promote communities that are diverse.[16] However, this may not be enough to end residential racial segregation caused by thirty years of government enforced separation of the races.[17]

An additional challenge to fulfilling the AFFH mandate is that federal agencies other than HUD, which administer housing programs, have failed to promulgate regulations implementing the AFFH mandate.[18] Specifically, the Treasury Department which is the federal agency over the Low-Income Housing Tax Credit, has failed to promulgate meaningful regulations in order to fulfill its duty to AFFH.[19] The Low-Income Housing Tax Credit (LIHTC) program, administered by the Internal Revenue Service, is the largest source of federal assistance for developing affordable rental housing.[20] LIHTC funds many low-income housing developers without any guidance or adherence to the AFFH mandate.[21] This stands to undermine the new rule's promise for fulfill-

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16 *See Strong Outpouring Of Support For HUD's New Fair Housing Rule*, PR News Wire, http://www.prnewswire.com/news-releases/strong-outpouring-of-support-for-huds-new-fair-housing-rule-224556571.html (last visited November 3, 2013) (opining "the new rule, if strongly implemented, could clarify state and local obligations and improve the regional planning process" and "The long-awaited rule has the potential to improve HUD's enforcement of the Fair Housing Act's mandate to address segregated housing patterns and promote diverse, inclusive communities"); *Responses to HUD's "Affirmatively Furthering Fair Housing" Proposed Rule*, Poverty and Race Research Action Council, *http://www.prrac.org/full_text.php?item_id=14252&newsletter_id=0&header=Current%20Projects* (last visited November 3, 2013) (opining that the proposed rule is important in order to clarify the FHA's mandate to address segregated housing patterns and promote diverse, inclusive communities).

17 *Responses to HUD's "Affirmatively Furthering Fair Housing" Proposed Rule*, Poverty and Race Research Action Council, *http://www.prrac.org/full_text.php?item_id=14252&newsletter_id=0&header=Current%20Projects* (last visited November 3, 2013) (opining that the proposed rule is important in order to clarify the FHA's mandate to address segregated housing patterns and promote diverse, inclusive communities); Letter from NAACP Legal Defense and Educ. Fund, Inc., Leslie Proll, to Dep't Hous. & Urban Dev. (Sept. 17, 2013) (available at http://www.prrac.org/pdf/NAACPLDF_AFFH_Comments.pdf) (stating that HUD, in its AFFH rule, should clarify that the central purpose of the AFFH mandate is to promote integration, not merely access to community assets) [hereinafter NAACP LDF Comments].

18 *See infra* note 231 and accompanying text (stating the statutory AFFH mandate applies to federal agencies other than HUD, including Treasury Department); *infra* note 308 and accompanying text (stating in order to fulfill the AFFH mandate agencies other than HUD must promulgate regulations under 42 U.S.C. § 3608(d) (AFFH Mandate)).

19 *See infra* notes 231-232 and accompanying text (discussing Treasury's failure to promulgate § 3608 regulations in order to AFFH through the Low-Income Housing Tax Credit program).

20 *See infra* note 233 and accompanying text (illustrating how the Low-Income Housing Tax Credit has become the predominant mechanism for developing affordable housing).

21 *See infra* notes 233-237 and accompanying text (discussing housing development under the LIHTC program and stating that Treasury has failed to promulgate regulations implementing the AFFH mandate).

ing the vision of fair housing envisioned by drafters of the FHA.[22] There is a glimmer of hope that HUD's 2013 proposed rule may affect LIHTC siting decisions without Treasury implementing new AFFH regulations.[23] However, in order to meet the AFFH mandate envisioned at the time of the passage of the FHA, stronger regulations from HUD, as well as other federal agencies including the Treasury Department, will most likely be necessary.[24]

Part II of this comment will explain the history of the AFFH mandate, starting with its adoption as part of the Fair Housing Act of 1968, then relevant cases interpreting the AFFH mandate. Part III will discuss the current rule implementing the AFFH mandate, recent cases interpreting the AFFH obligation under the current rule, and HUD's 2013 proposed rule that will alter how HUD program participants carryout their duty to AFFH. Part IV will analyze and critique the proposed AFFH rule, focusing on what we can expect from its promise to influence state and local planning and thereby to further fair housing. Part V will suggest changes, both to HUD's 2013 proposed rule and to the regulations of other federal executive agencies that would likely improve efforts to further fair housing. Part VI will conclude this comment.

II. BACKGROUND

This section will briefly explain the history of the AFFH mandate, starting with U.S. and state policies that necessitated the creation of the AFFH. Then, this section will explain the creation and adoption of the AFFH as part of the Fair Housing Act of 1968, followed by relevant cases interpreting the AFFH mandate. Lastly, this section will introduce and analyze the current regulation implementing the AFFH in 1995, which HUD's 2013 proposed rule will replace.

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22 *See infra* notes 240-241 and accompanying text (contending LIHTC AFFH compliance is necessary for effective AFFH efforts).

23 *See infra* notes 259-269 and accompanying text (discussing the ways that HUD's proposed rule may affect the LIHTC program without Treasury changing its AFFH regulations, which includes HUD review of jurisdictions' fair housing planning tools, treasury's LIHTC regulation adopts HUD's regulations, and jurisdictions'' AFFH certifications).

24 *See infra* Part IV.C (limited reach and possible shortfalls of HUD's 2013 proposed AFFH rule).

A. Pre-1968 Discriminatory Housing Policies and AFFH Mandate 1968 to 1995

Prior to 1968, Federal and state housing policy, as well as actions of private individuals and organizations, helped perpetuate and grow stark patterns of racial segregation in urban neighborhoods across the country.[25] Private real estate agents, rental property owners, and lending institutions often created limited opportunities for minorities to obtain housing in predominantly white neighborhoods by steering, denying, and lying to minority housing and mortgage loan applicants.[26] Private sector discrimination was not the only factor; public policy, including Federal homeownership assistance, public housing, and urban renewal programs, as well as local government exclusionary zoning and land use regulations, together engineered the establishment and maintenance of residential racial segregation.[27]

Although segregation in siting, placement, and maintenance of public facilities was understood to be unlawful after the 1954 Supreme Court decision in *Brown v. Board*,[28] it was not until 1966 that systematic segregation in public housing was challenged in *Gautreaux v. Chicago Housing Authority*.[29] Moreover, the litigation and remedial plan in *Gautreaux* were not settled until after the Supreme Court heard the matter in 1976, eight years after the adoption of the FHA.[30] Only after the Supreme Court's decision did Chicago Housing Authority (CHA) commence action on the consent decree and implementation plan, both of which persist today and guide CHA's efforts to comply with the remedial plan set forth in CHA's Plan for Transforma-

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25 Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 806-07 (2008).

26 *See* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 253 – 253 (2nd ed. 2010) (explaining the discriminatory practices in the private real estate market prevalent before the FHA).

27 *Id.*

28 347 U.S. 483 (1954); *see* Schwemm *supra* note 2, at 128 (stating that "[e]ver since 1954 when the Supreme Court decided *Brown v. Board of Education*, the Constitution had been understood to bar government from maintaining racially separate facilities").

29 *See* Gautreaux v. Chi. Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967) (denying CHA's motions to dismiss); Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 912 (N.D. Ill. 1969) (finding that CHA had intentionally chosen building sites and assigned tenants based on race to maintain segregation in contravention to the Fourteenth Amendment).

30 Hills v. Gautreaux, 425 U.S. 284 (1976) (addressing the remedial order of the district court).

tion.[31] Hence, when the FHA was adopted in 1968 residential racial segregation in America's housing had become entrenched because of governmental and private policies that were explicitly and unlawfully discriminatory.[32]

In 1968 Congress enacted the Fair Housing Act (FHA), which, as amended in 1988 by the Fair Housing Amendments Act prohibits discrimination in the sale, rental, availability, terms, conditions, privileges, and in other housing-related transactions because of race, religion, color, sex, national origin, familial status, and disability.[33] There is ample evidence that Congress, when it passed the FHA, intended to create fair housing opportunities for FHA protected classes by implementing a sweeping reform of residential racial segregation.[34] As discussed *supra*, in the years preceding the FHA, housing policy at federal, state and local levels, as well as actions of private real estate agencies, perpetuated and heightened residential racial segregation through intentionally building segregated communities.[35] To remedy the effects of past intentionally discriminatory policies and actions, the FHA not only prohibits discrimination but also requires proactive steps to "overcome historic patterns of segregation, promote fair housing choice, and

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[31] *See Gautreaux Today*, Business and Professional People for the Public Interest, http://www.bpichicago.org/GtxLit-GtxToday.php (last visited Nov. 3, 2013) (discussing the role of plaintiff's counsel in the implementation process); Roisman *supra* note **Error! Bookmark not defined.**, at 343-44. Only after a 1993 East Texas lawsuit filed against HUD for intentional racial segregation, which produced a substantial record of HUD's complicity in racial discrimination and segregation, was there significant improvement in the national administration of the public housing program. *Id.* at 343 – 344; Young v. Pierce, 628 F. Supp. 1037, 1040 (E.D. Tex. 1985).

[32] Schwemm *supra* note 2, at 130 ("[b]y the time the 1968 FHA was passed, high levels of racial segregation in America's housing had become entrenched as a result of a half-century of explicitly discriminatory policies by both private and public entities"). e.g., racially exclusionary zoning, restrictive covenants, public housing policies, urban renewal, and federal mortgage programs).

[33] 42 U.S.C. § 3604, *et seq* (2011) (Title VIII of the Civil Rights Act of 1968).

[34] *See* 42 U.S.C § 3601 (2011) (declaring that it is "the policy of the United States to provides within Constitutional limits for fair housing throughout the United States"); *see also,* 114 Cong. Rec. 2706, 3422 (1968) (remarks of Sen. Walter Mondale, one of the Act's sponsors, proclaimed that the purpose of the Act was "to replace the ghettos 'by truly integrated and balanced living patterns."') (quoted in Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972)). The FHA was passed the same year as Dr. Martin Luther King's assassination and some have posited that the FHA was a response to the assassination. Schwemm *supra* note 2, at 125.

[35] *supra* notes 25 - 31 and accompanying text; *See also* Simon Kawitzky, et al., *Choice Constrained, Segregation Maintained: Using Federal Tax Credits to Provide Affordable Housing*, FAIR HOUSING JUSTICE CENTER, INC. 7 (2013) (discussing the federal, state and local governments practices that created segregation).

foster inclusive communities for all."[36] To that end, FHA Section 3608 requires that HUD, its program participants (including state and local grantees), and all executive departments and agencies that oversee housing programs act "affirmatively to further fair housing" (AFFH) in the administration of housing and urban development programs.[37] Presidential executive order 12898 interprets § 3608 and clarifies that the AFFH obligation is extended to federal executive agencies and that such agencies have the power to impose sanctions if entities (such as states and local governments) that participate in or are supervised or regulated under a federal housing program or activity, do not comply with the order.[38]

Cases interpreting the AFFH mandate have concluded that the FHA requires more from HUD, its program participants, PHAs and other federal executive agencies than merely refraining from discrimination.[39] Courts have recognized that patterns of residential racial segregation have been perpetuated by federal, state, and local policies, and in order to remedy the effects of such policies, HUD and others must affirmatively act to reduce residential segregation.[40]

In 1972 the Supreme Court interpreted the FHA for the first time in *Trafficante v. Metropolitan Life,*[41] and determined that the FHA's purpose, *inter alia*, was to replace segregated cities

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36 *See* HUD Proposed Rule *supra* note 3, at 43710 & 43712 ("The Fair Housing Act not only prohibits discrimination but, in conjunction with other statutes, directs HUD's program participants to take steps proactively to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all"); *see also* Schwemm *supra* note 2, at 127-128 (discussing the FHA legislative history and the conditions that Congress intended to remedy segregated living patterns and the problems associated with segregation for schools, and lost job opportunities).

37 42 U.S.C. § 3608(d) (2011) (stating that "all executive departments and agencies shall administer their programs and activities relating to housing and urban development … in a manner affirmatively to further the purposes of [Title VII] and shall cooperate with the [HUD] Secretary to further such purposes"); 42 U.S.C. § 3608(e)(5) (2011) (placing identical requirements on the HUD Secretary as are placed in 3608(d)).

38 Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 FR 2939 (1994) (issued by Willam J. Clinton, President of the United States) (clarifying that federal executive agencies are "responsible for ensuring that [their] programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing ….).

39 *See Infra* notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.** and accompanying text.

40 *See. e.g.*, N.A.A.C.P. v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987); Schwemm *supra* note 2, at 142-143 (same).

41 409 U.S. 205, 211 (1972) (citing with approval *Shannon v. Dep't Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970)).

with "truly integrated and balanced living patterns."[42] One year later, in *Otero v. New York City Housing Authority*[43] the Second Circuit determined that HUD's AFFH obligation extended to local entities receiving federal housing funds, and this may require "affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."[44] In 1982 the Seventh Circuit decided *Alschuler v. HUD* and stated that neighborhood residents have standing under the Administrative Procedure Act (APA) to challenge HUD actions as inconsistent with HUD's AFFH obligation.[45] Five years later, in *N.A.A.C.P. v. HUD*[46] the First Circuit went further and determined that the FHA's "broader goal suggests an intent that HUD … use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[47] In a 1989 case,

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42 *Id.* at 211 (quoting Senator Walter Mondale that the purpose of the act is "to replace the ghettos 'by truly integrated and balanced living patterns.'"); Schwemm *supra* note 2, at 176.

43 484 F.2d 1122 (2d Cir. 1973).

44 *Otero*, 484 F.2d at 1124 – 1125. The court held that such entities *Id.*

45 686 F.2d 472, 477-482 (7th Cir. 1982) (specifically, section 808(e)(5) requires HUD to administer its programs "in a manner affirmatively to further the policies" of the FHA). The court first determined that HUD has a "substantive obligation" to promote racial integration under § 3608(d)(5); the HUD regulations at issue complied with the mandate; and the mandate precluded HUD from approving housing projects sited for development in areas of "undue minority concentration" because it would perpetuate residential racial segregation. *Id.* at 482. Quite significantly, the Court determined that HUD must "adopt institutional measures" for carrying out its AFFH duty in an informed manner. *Id.* 482-486 (ultimately finding that (1) HUD's reliance on 1970 census tract data was reliable, although almost ten old, and (2) that other, more recent data about changes in neighborhood racial composition, based on racial composition of public schools and subsidized housing, was not a better source of information for HUD to base its decision). Several U.S. Circuit Courts of Appeals have determined that, under the FHA, HUD must utilize an institutionalized method and set of standards, taking into account the racial and economic characteristics of a neighborhood, when HUD makes siting decisions. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1044-45 (1998). This is necessary in order for HUD to satisfy its obligation to affirmatively promote racial and ethnic integration. *Id.* The first case finding HUD's duty to collect and consider racial and ethnic information in siting decisions was *Shannon*, 436 F.2d at 821-22. Specifically, HUD "must utilize some institutionalized method whereby, in considering site selection . . ., it has before it the relevant racial and socio-economic information necessary . . . to make an informed decision on the effects of site selection . . . on racial concentration." *Id.*

46 817 F.2d 149, 155 (1st Cir. 1987).

47 "It is equally true that the [] supporters [of the FHA] saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed. *See* 114 Cong.Rec. 2274 (statement of Sen. Mondale) (Title VIII is "an absolutely essential first step" toward reversing the trend toward "two separate Americas constantly at war with one another"). In the opinion authored by future Supreme Court Justice Breyer, the court determined that any person adversely affected or aggrieved by HUD's actions or inactions may ask a court to (1) set aside the action that is not in accordance with law, or (2) to compel agency action unlawfully

N.A.A.C.P., Boston Chapter v. Kemp the First Circuit determined that in actions brought against HUD under the APA, courts may order remedies tailored to redress HUD's violation of its statutory obligations through inaction.[48] Presently, the FHA provides no private right of action to enforce § 3608, and so private citizens must bring suit under the APA in order to challenge actions that allegedly violate the AFFH mandate.[49]

B. HUD's 1995 AFFH Rule in Force until the 2013 Rule is Implemented

The current AFFH regulation, which would be replaced if HUD's 2013 proposed rule is implemented, was promulgated in 1995.[50] Under HUD's 1995 AFFH regulation, the affirmative steps that HUD program participants must take depend upon circumstances unique to each jurisdiction and, are determined by the program participant.[51] In some instances affirmative steps are outlined in a settlement between the program participant and HUD or other private fair housing advocacy organization.[52] However, the failure of a jurisdiction to take affirmative steps

withheld.[47] Additionally, to this end the APA allows federal courts to review claims that HUD has not administered its programs in a manner to AFFH. *Id.* at 150.

48 N.A.A.C.P., Boston Chapter v. Kemp, 721 F. Supp. 361, 365 (D. Mass. 1989). In *Kemp* "HUD had failed to satisfy the minimum levels of compliance required by § 3608(e)(5) in two respects." *Id.* First, despite knowing of pervasive racial discrimination in Boston, HUD failed to require the City of Boston to establish an effective fair housing enforcement program. *Id.* Second, despite knowing that a housing emergency existed which had a disproportionate impact on low income black families, HUD failed to condition its provision of federal funds on construction of sufficient affordable integrated public housing. *Id.*

49 *See* 42 U.S.C. § 3602 (2011) (listing the discriminatory housing practices that an aggrieved party may bring a lawsuit to remedy, and not including § 3608 which contains AFFH mandate); 5 U.S.C. § 706 (2011) (currently the only way that a private individual may bring suit to directly enforce the AFFH mandate); Seng, *supra* note **Error! Bookmark not defined.**, at 235.

50 *See* Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878-01 (Jan. 5, 1995) (amending 24 CFR Parts 91, 92, 570, 574, 576, and 968, effective February 6, 1995); 24 CFR §§ 10.1-10.20 (2013) (setting out HUD rule making process, including regulatory comment period and adoption of final rule). The proposed rule will either be implemented unchanged, implemented with changes based, in part, on comments submitted during the regulatory comment period, or not implemented. *See* 24 CFR § §10.16 (2013) (stating that all regulatory comments are considered and significant issues raised in the comments will be addressed in a preamble to the final rule).

51 *See* United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548, 548 (S.D.N.Y. 2009) (private advocacy organization that brought suit to enforce AFFH mandate as applied to program participant's fair housing planning process); Program Review, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card, Poverty & Race Research Action Council, Part II, 3-5 (2013), *available at* http://www.prrac.org/pdf/HUDFirstTermReportCardPartII.pdf (discussing *Westchester* case where a county's fair housing plans and actions were challenged) [hereinafter HUD Report Card II].

52 *See, e.g.*, Stipulation and Order of Settlement and Dismissal, United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County, No. 1:06-cv-2860-DLC (S.D.N.Y. Aug. 10, 2009) *avail-*

may result in HUD recapturing or withholding funding.[53] The types of affirmative steps that HUD has required jurisdictions to take after either settlement or a court has found an AFFH violation include enacting laws that protect against source of income discrimination,[54] changing zoning laws,[55] or other measures to prevent loss of HUD funding.[56]

Generally, the current rule only requires HUD program participants to (1) certify that the participant has conducted an analysis of matters affecting fair housing choice (analysis of impediments), (2) concoct a plan to eliminate those impediments, and (3) keep records of the first two steps in case HUD must review the participant's records.[57] Approximately one year after the current rule was implemented in 1995, HUD issued the Fair Housing Planning Guide to clarify how program participants should go about fulfilling their duties under the rule.[58] The planning guide is not binding of its own force, and merely offers guidance to program participants.[59] In the

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able at http://www.hud.gov/content/releases/settlement-westchester.pdf (order for settlement based on joint agreement of HUD and Westchester County) [hereinafter after Westchester Settlement]; HUD's Report Card Part II *supra* note 51 and accompanying text.

53 42 U.S.C. § 2000d (2011); *See Westchester*, 668 F. Supp. 2d at 548 (HUD's enforcement efforts against the County have resulted in HUD temporarily withholding funds); HUD's Report Card Part II *supra* note 51, at 3-4, and 12 (in Westchester and New Orleans case HUD threatened to cut off future funds; HUD threatened to recapture funds from city of Joliet).

54 *Id.* at 3 (Weshester County was required to pass source of income protection under its settlement agreement with HUD).

55 *Id.* at 4-5 (discussing Greater New Orleans Fair Housing Action Center v. St Bernard Parish which resulted in an agreement that required the parish to change its exclusionary zoning laws).

56 *See infra* notes 103-110 and 120-123 and accompanying text (discussing terms of voluntary compliance agreements between HUD and noncompliant jurisdictions).

57 *See* 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1), 91.425(a)(1)(i) (2013) (respectively stating that each jurisdiction and state is required to submit to HUD a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of impediments identified through that analysis, and maintain records reflecting the analysis and actions); *see also Westchester*, 495 F. Supp. 2d at 387 (Stating that to affirmatively further fair housing, HUD regulations required the county to undertake three tasks: conduct an analysis of impediments to fair housing choice within the area, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard); HUD Proposed Rule, *supra* note 3, at 43713 (stating that HUD requires program participants to undertake an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actins to overcome the effcts of any impediments, and keep records on such efforts).

58 U.S. DEP'T HOUS. URBAN DEV., FAIR HOUSING PLANNING GUIDE, *i (1996) [hereinafter 1996 HUD Planning Guide].

59 *See Westchester*, 495 F. Supp. 2d at 386 (noting that HUD publishes the Fair Housing Planning Guide to assist grantees to fulfill the "fair housing requirements" of grants and that it is an enforcement guideline, which lacks the force of law and does not even warrant Chevron-style deference.); 1996 HUD Planning Guide, *supra* note 58,

guide, HUD first defined the AFFH obligation as requiring a HUD grantee to: "1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction, 2. Take appropriate actions to overcome the effects of any impediments identified through the analysis, 3. Maintain records reflecting the analysis and actions taken in this regard."[60]

First, program participants must use their own local research to conduct an analysis of impediments (AI) to fair housing choice based on the circumstances present in their program or jurisdiction.[61] The 1996 Fair Housing Planning Guide states that an AI is a review of impediments to fair housing choice in the public and private sector and it involves: a review of laws, regulations, and administrative policies, procedures, and practices in order to assess how each affects the location, availability, and accessibility of housing.[62] The AI also involves an assessment of conditions affecting fair housing choice for all protected classes and an assessment of the availability of affordable, accessible housing in a range of unit sizes.[63] Additionally, "AIs will not generally be submitted to HUD for review." [64] The 1996 Fair Housing Planning Guide, the sole source of guidance from HUD as to how program participants should conduct the analysis of impediments, states what an AI involves but it gives little detail to program participants about what limits fair housing choice.[65]

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at iii ("This Guide should be used by State, State-funded, and Entitlement jurisdictions along with applicable HUD regulations pertaining to fair housing").

60 1996 HUD Planning Guide, *supra* note 58, at 1-3 (defining the AFFH obligation and stating that it has never been defined statutorily).

61 *Id.* at 1-2, 2-7 – 2-8.

62 *Id.* at 2-7.

63 *Id.*

64 *Id.* at 2-24.

65 *See* 1996 HUD Planning Guide *supra* note 58, at 2-7 (1996) (stating that "[i]mpediments to fair housing choice are: Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices" and "Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin."). The 1996 Fair Housing Planning Guide goes on to state that "Impediments to fair housing choice are defined as: Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choice; Any actions, omissions, or decisions that have this effect." *Id.* at 2-16 – 2-17. Additionally, fair housing impediments include "[p]olicies, practices, or procedures that ap-

Second, program participants must draft an action plan to eliminate those impediments, either a Consolidated or a PHA plan,[66] that is submitted to HUD for review.[67] The action plan must be directly related to conclusions and recommendations in the AI and should define objectives with measureable goals that will be the sole measure of the program participant's fair housing planning success.[68] Additionally the plan should determine the time period for completion of each objective and identify organizational resources, and individuals, groups and organizations to be involved in each step of the plan. [69]

Lastly, program participants must keep a record of their analysis and the steps taken to affirmatively further fair housing.[70] These records are maintained in order to support the jurisdiction's AFFH certification in the event that it is challenged for any reason.[71] Under the regulations, each program participant must certify to HUD that it has undertaken the analysis of impediments and taken actions to eliminate identified impediments.[72] This is referred to as the jurisdiction's AFFH certification, which is further described in the regulation as a "written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public."[73] Under the current regulation, an assertion is presumptively

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pear neutral on their face, but which operate to deny or adversely affect the availability of housing to persons because of race, ethnicity, disability, and families with children may constitute such impediments."

66 The consolidated plan serves the following functions: (1) A planning document for the jurisdiction, which builds on a participatory process among citizens, organizations, businesses, and other stakeholders;(2) A submission for federal funds under HUD's formula grant programs for jurisdictions;(3) A strategy to be followed in carrying out HUD programs; and (4) A management tool for assessing performance and tracking results. 24 C.F.R. § 91.1 (2013); *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, REPORT TO CONGRESSIONAL REQUESTERS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 7 (2010) (explaining the fair housing plans that program participants must submit in order to receive HUD funds).

67 24 C.F.R. § 91.1(b) (2013); *see also Westchester*, 668 F. Supp. 2d at 552 (explaining that consolidated plans serve four main functions: they are "[a] planning document for the jurisdiction," "[a] submission for federal funds under HUD's formula grant programs," "[a] strategy to be followed in carrying out HUD programs," and "[a] management tool for assessing performance and tracking results." quoting 24 C.F.R. § 91.1(b)).

68 1996 HUD Planning Guide, *supra* note 58, at 2-22.

69 *Id.*

70 *Id. at 2-25.*

71 *Id.*

72 *Id.* at 2-26.

73 24 C.F.R. § 91.5 (2013).

accurate unless HUD finds otherwise.[74]

III. DISCUSSION

This section begins by examining the most significant, recent actions brought under the 1995 HUD regulation (currently in effect). Recent cases illustrate tools that private fair housing advocacy organizations and HUD may use to bring about compliance with the AFFH mandate. This section ends with an explanation of the major changes that stand to be imposed under HUD's 2013 proposed rule.

A. Privately Brought AFFH-Related Cases Challenging State and Local Governments

Under the current rule, HUD program participants have been somewhat insulated from challenges to AFFH certifications, but the False Claims Act provides a means for redressing program participants who make false certifications about their AFFH efforts.[75] In *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County,*[76] the Anti-Discrimination Center of Metro New York, Inc. (ADC) brought suit against Westchester County, New York alleging that the County violated the False Claims Act (FCA) through certifications made to the Secretary of HUD between April 2000 and April 2006 to obtain over $51 million in federal funding for housing and community development.[77] The court denied the County's motion to dismiss, holding that a grantee that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must analyze "the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction."[78]

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[74] *Id.* (stating "[a]n assertion shall be deemed to be accurate unless HUD determines otherwise, after inspecting the evidence and providing due notice and opportunity for comment").

[75] *See* infra part III (discussing how § 3608-based claims must be coupled with other claims brought by HUD and private parties, whether in court or on administrative review); *see Westchester*, 668 F. Supp. 2d at 548 (False Claims Act as a necessary tool for challenging jurisdictions' AFFH efforts (or lack of) in the absence of a private right of action provided under FHA).

[76] 668 F. Supp. 2d at 548.

[77] *Id*; HUD Report Card Part II *supra* note 52, at 3.

[78] United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester Cty., 495 F. Supp. 2d 375, 376 (2007).

In ruling on cross-motions for summary judgment, the court reviewed two consolidated plans submitted by the County to HUD during the false claims period, one covering the years 2000-2004 and one covering the years 2004-2008.[79] The 2000 – 2004 plan discussed ten obstacles to fair housing and mentioned the disabled, those with substance abuse histories, but made no reference to obstacles based on race, national origin, or sex.[80] The 2004 – 2008 plan mentioned thirteen impediments to affordable housing, but nowhere in the plan did it discuss race discrimination or segregation as an impediment to fair housing, other than to set-up a commission to investigate discrimination complaints.[81]

In accordance with HUD regulations, under each consolidated plan the County adopted an annual action plan that it submitted to HUD.[82] On several occasions between 2000 and 2006 HUD notified the County that the analysis in several of the County's submitted plans was insufficient to satisfy the framework for the AFFH obligation set out in the 1995 HUD regulation.[83]

The Court denied the County's motion for summary judgment and granted in part ADC's motion for summary judgment, holding that the County made a claim to the U.S. government that was false, seeking payment from the federal treasury, but that the final element of the FCA (knowledge of the falsity) could be decided either way by a reasonable jury.[84] The court deter-

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79 *See Westchester*, 668 F. Supp. 2d at 552-556 (discussing consolidated plans for 2000 – 2004 and 2004 – 2008).

80 *Id.* at 556-557.

81 *Id.* at 558-559. While establishing a commission to investigate discrimination complaints may have an impact on fair housing choice, the FHA was enacted not only to prohibit discriminatory practices but also to affirmatively further fair housing. *supra* Part II.B. A commission in Westchester County charged to investigate discrimination complaints accomplishes the former but does not completely fulfill the latter purpose of the FHA because it only investigates complaints of discrimination. *Id.*

82 *Id.* at 552-553.

83 *See, e.g.*, *id.* at 570 (As a response to the County's 2002 action plan, HUD's Office of Fair Housing and Equal Opportunity ("FHEO") issued a Matter of Advice noting that, "the Action Plan did not describe activities to address all of the housing needs of racial/ethnic groups with a disproportionate need," and that "[p]olicies or actions that have a discriminatory impact on protected classes were not identified," and that "[f]uture[] submissions could be improved by including such information"; the letter for the 2001 Action Plan had a similar notice."); *see also, Id.* at 555 (listing a 1996 letter from HUD to the County with further recommendations as to how to improve the County's 1996 consolidated plan submitted to HUD).

84 *See Id.* at 567-568 (stating in relevant part that the County's voluntary submission permits the inference that the County did not act in knowing and reckless disregard as to the falsity of its certifications).

mined that both consolidated plans were conducted "through the lens of affordable housing, rather than fair housing" and its protected classes which include race.[85] Although the AIs identified a lack of affordable housing as the "greatest" impediment to fair housing, "a determination that affordable housing is the greatest impediment would not absolve the County from its obligation to analyze race-based impediments to fair housing."[86] Therefore, the County failed to comply with the requirement to AFFH, and as such, its certifications to HUD that it would AFFH were false.[87]

The court's denial of the County's motion for summary judgment and grant of partial summary judgment to ADC resulted in a 2009 settlement between the County and fair housing advocates.[88] The settlement order requires the county to invest $51.6 million in affordable housing over the next 7 years and to undertake and fund marketing, public education, and other outreach efforts to promote fair and affordable housing.[89]

The *Westchester* case and settlement are illustrative for several reasons. First, it tells a

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[85] *Id.* at 562. There was no dispute that the County's AIs did not contain an analysis of segregation and the housing supply. *Id.* at 563.

[86] *Id.* at 561-62.

[87] *Id.* at 565.

[88] *See* Westchester Settlement *supra* note 52 (settlement following the denial of County's motion for summary judgment); U.S. Dep't. of Hous. & Urban Dev., "HUD and Justice Department Announce Landmark Civil Rights Agreement in Westchester County" (news release, Aug. 10, 2009); Dep't. of Just., "Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit" (news release, Aug. 10, 2009).

[89] Westchester Settlement *supra* note 52, at 4 and 6 ($21.6 million to HUD; $30 million to provide equitable relief within the county); U.S. Dep't of Hous. & Urban Dev., "HUD and Justice Department Announce Landmark Civil Rights Agreement in Westchester County" (news release, Aug. 10, 2009); Dept. of Just., "Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit" (news release, Aug. 10, 2009). Unfortunately, compliance with the terms of the settlement agreement has not been easily attained. *See* Program Review, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card, Poverty & Race Research Action Council, Part II, at 3 (2013) (claiming that Westchester has refused to obey the decree). For instance, the County has repeatedly refused to challenge local zoning, has sited housing in ways that do not AFFH, and, contrary to the decree's terms, vetoed a bill that would have prohibited source-of-income discrimination by landlords. *Id*. Moreover, according to the settlement monitor's report for 2012, the Monitor raised concerns with the County's proposed siting for the development of affordable AFFH units required under the settlement order because 70% of the proposed sites were concentrated in four communities while twelve municipalities would not receive any affordable AFFH units. James E. Johnson, Monitor's Report regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 212 Calendar Year, U.S. ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County, No. 1:06-cv-2860-DLC, *9 (S.D.N.Y. Aug. 10, 2009).

state of the law for the AFFH mandate, showing in practice what HUD's current AFFH rule requires of program participants.[90] Second, it illustrates how easily program participants, including state and local governments, have been able to circumscribe the current rule without being noticed by HUD until fair housing advocates bring a challenge.[91] Third, it demonstrates the difficulty for fair housing advocates who, in order to enforce the AFFH mandate, must resort to laws other than the FHA because Section 3608 lacks a private right of action. Moreover, successful implementation of the *Westchester* settlement order would provide a model for communities to follow in order to meet their AFFH obligation.[92]

B. Administrative Complaints to HUD Alleging AFFH Violations

In addition to litigation under the False Claims Act, private parties may initiate complaints with HUD or in federal court under other sections of the FHA.[93] However, HUD has never accepted complaints based solely on Section 3608.[94] Nevertheless, under the Obama administration HUD has begun accepting and investigating complaints based on Section 3608 when such claims accompany other discrimination claims.[95] As of February 2013, at least 16 privately initi-

[90] "The statutory and [HUD] regulatory framework [] imposes no duty on the County to undertake any *particular* course of action to overcome an impediment to fair housing." *Westchester*, 668 F. Supp. 2d at 565. "HUD Guide [] demonstrates that it was not HUD's role to review or approve AIs." *Id.* t 568.

[91] In essence, the existing rule allowed Westchester County, and presumably other program participants to put forth *de minimis* or even no efforts to assess policies and other factors that constrict fair housing choice for protected classes. *See supra* notes 86-87 and accompanying text. Westchester County illustrates how easy it was for program participants, under the existing AFFH regulatory framework to get away with this without effective challenge by HUD; HUD sent memoranda and letters to *Westchester* but kept the funds flowing.

[92] *See* HUD Report Card Part II *supra* note 52, at 3 ("Because the successful implementation of the decree can serve as a model for how communities should meet their AFFH obligations, fair housing advocates believe it is essential that HUD and the Justice Department move forward to enforce that decree fully and vigorously"). The PRRAC article also states that the monitor made additional findings of non-compliance in a February 25, 2013 report, but notwithstanding this HUD has yet to seek contempt sanctions against the County. *Id.* More information on the ongoing status of the Westchester settlement and documents are available at the Anti-Discrimination Center's website: http://www.antibiaslaw.com/westchester-false-claims-case; *See also* Schwemm *supra* note 2, at 126 (Part III).

[93] HUD Report Card Part II *supra* note 52, at 11.

[94] *Id.*

[95] *See Id.* (HUD allowing § 3608 claims when they are coupled with claims under the FHA, Title VI of the 1964 Civil Rights Act, and Section 109 of the 1974 Housing and Community Development Act).

ated complaints that included Section 3608-based claims were pending before HUD[96] and some of these complaints resulted in significant settlements.[97]

In 2010 a private affordable housing developer brought an administrative complaint against Sussex County, Delaware alleging that the County violated the FHA, among other laws,[98] by (1) blocking a proposed housing development for low- and moderate-income households on the basis of race and national origin and (2) disregarding its AFFH obligation.[99] HUD conducted an administrative review and investigation, and ultimately determined that the County was in noncompliance with Title VI of the Civil Rights Act and its AFFH obligation.[100] Ultimately, the County and HUD entered into a Voluntary Compliance Agreement (VCA).[101]

Under the VCA, the County has had to take several corrective actions.[102] The County's evaluation of future land use proposals is constrained to reviewing for compliance with the County Code and State law.[103] In an effort to AFFH, the County had to review past AIs and determine whether previously identified impediments to fair housing still existed.[104] Upon finding impediments, the County had to develop a priority fair housing plan to address those impediments to fair housing choice.[105] The plan had to be submitted to HUD for approval and had to incorporate strategies to: (i) increase housing opportunities throughout the County, taking into ac-

[96] *See also* Schwemm *supra* note 2, at 166, fn. 252 (2011-2012).
[97] HUD Report Card Part II *supra* note 52, at 8.
[98] Title VI of the Civil Rights Act of 1964 and its implementing regulations, and Housing and Community Development Act of 1974.
[99] HUD Report Card Part II *supra* note 52, at 9; Voluntary Compliance Agreement between Dept. Hous. & Urban Dev. And Diamond State Community Land Trust and Sussex County Council & Sussex County Planning and Zoning Commission *2 (Nov. 28, 2012)[hereinafter HUD and Sussex County VCA]; Consent Decree, United States v. Sussex County, Del. & Sussex County Planning and Zoning Commission, 12-cv-01591 *2 (Dec. 19, 2012).
[100] HUD and Sussex County VCA *supra* note 99, at 2.
[101] *See generally id.* HUD also referred the matter to the Justice Department (DOJ) because DOJ has primary jurisdiction on matters involving zoning or other land use laws. HUD Report Card Part II *supra* note 52, at 9. DOJ and HUD worked together to reach a resolution under the VCA and a Consent Decree. *Id.*
[102] *See Id.* (listing corrective actions required under the VCA).
[103] *Id.* at 6. The County must "limit the evaluation of future land use proposals to compliance with the County Code and State law." *Id.*
[104] *Id.* at 6. The County had to review and evaluate AIs from 1998, 2003, and 2011 and submit the plan to HUD within 120 days of the VCA effective date (November 28, 2012).
[105] *Id.*

count the housing needs of African-American and Hispanic residents;[106] (ii) integrate affordable housing into all communities in the county;[107](iii) and hire a Fair Housing Compliance Officer to oversee compliance with the VCA and Consent Decree.[108] The VCA also requires the County to evaluate certain predominantly minority communities ("Impacted Communities") to determine investment strategies and give priority designation of infrastructure and community development efforts.[109] To the "greatest extent feasible" the County must comply with guidance and instructions from the State of Delaware in order to affirmatively further fair housing.[110]

Notably, the Sussex VCA containing this omnibus of corrective actions was spurred by a single complaint that alleged a solitary discriminatory denial of a proposed land use.[111] Thus, the importance of private individuals and organizations bringing administrative complaints, even for isolated acts of discrimination, cannot be understated, because HUD can use such complaints as justification for launching a larger investigation and enforcement action.[112]

C. HUD AFFH Compliance Reviews

HUD also initiates AFFH enforcement measures on its own by conducting fair housing

[106] *Id.* To this same end, the plan must also develop mechanisms in which the County will use its HUD funds to affirmatively further fair housing. *Id.*

[107] *Id.* This requires cooperation with the Delaware Office of State Planning and Coordination. *Id.* Moreover, "[t]o the extent that the County approves development sites outside designated growth areas, the provision of affordable housing shall be a consideration." *Id.*

[108] *Id* at 5-6. The VCA required a Fair Housing Compliance Officer to be hired within thirty days of the VCA effective date. *Id.* The Officer had to be designated in writing, which then had to be provided to HUD so that the officer could serve as HUD's primary contact person with respect to the VCA. *Id.*

[109] *Id.* at 7; DOJ-Sussex County Press Release *supra* note **Error! Bookmark not defined.**. The VCA also requires the County to evaluate the extent of secondary elements of infrastructure it has provided in the past to the Impacted Communities. HUD and Sussex County VCA *supra* note 99, at 7. Secondary elements of infrastructure include: funding for trash disposal, afterschool and community programs, street-lighting, and construction for accessibility purposes. *Id.* The goal set out in the VCA is for the County to prioritize funding for such infrastructure improvements and to formalize an approval process for continued County participation in such infrastructure projects. *Id.*

[110] *Id.* at 6.

[111] *Id.* at 2.

[112] *Id.* Under the current AFFH regulatory framework, HUD cannot launch a large-scale investigation challenging an AFFH certification without being subject to review for arbitrary and capricious action. *See* Sara Pratt, Deput. Assist. Sec. for Enforcement Prog. Dept. of Hous. & Urban Dev., John Marshall Law School Fair Housing Conference: Implementing the Duty to Affirmatively Further Fair Housing (Sept. 20, 2013) (noting that when HUD challenges certifications of program participants, its action can itself be challenged for an abuse of discretion).

compliance reviews.[113] During the Obama Administration HUD has stepped-up AFFH enforcement efforts to unprecedented levels, having initiated forty compliance reviews between 2009 and 2013.[114] These reviews have tremendous potential to enforce the AFFH mandate when they result in Voluntary Compliance Agreements (VCA) that include significant measures designed to AFFH.[115]

After a program review, and upon finding grounds to challenge AFFH certifications, HUD has offered VCAs to bring jurisdictions into compliance with the AFFH mandate without litigation.[116] In a letter dated June 17, 2013 HUD determined that Dubuque, Iowa was not in compliance with Title VI of the Civil Rights Act, which in turn was sufficient evidence to question whether the City's discriminatory actions were consistent with the City's AFFH certifications.[117] Two years earlier, HUD had completed a civil rights related review of Dubuque's Section 8 Housing Choice Voucher and Community Development Block Grant Programs and found that Dubuque discriminated against African Americans based on race, by implementing admission polies that effectively hindered African Americans from obtaining vouchers and relocating to Dubuque.[118] Moreover, because of these findings, HUD found "sufficient evidence to question whether the City's Section 8 policies and practices [were] consistent with its AFFH certifications.[119]

In order to resolve Dubuque's violation and actions inconsistent with its AFFH certifica-

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[113] Letter of Findings of Noncompliance from U.S. Dep't of Hous. & Urban Dev., to Mayor Roy Buol, City of Dubuque, Iowa (June 17, 2013) (on file with author)[Hereinafter Dubuque Letter of Findings of Noncompliance]; *See* HUD Report Card II *supra* note 52, at 11 n.33 ("Compliance Reviews" are periodic internal assessments by HUD Fair Housing staff of local agency compliance with civil rights statutes that they enforce including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Section 109 of the Housing and Community Development Act of 1974").

[114] *Id.* at 11.

[115] *See infra* notes 120-123 and accompanying text (discussing VCA between HUD and Dubuque, IA that did not require litigation).

[116] Dubuque Letter of Findings of Noncompliance *supra* note 113, at 1.

[117] *Id.* at 5 & 24.

[118] *Id.* at 1–5. Additionally, the City intentionally excluded persons from participation in its Section 8 program, denied them benefits, and otherwise discriminated against them on the grounds of race. *Id.*

[119] *Id.* at 18

tion, HUD sought to enter into a VCA with Dubuque.[120] Under the terms of the agreement, HUD proposed fifteen necessary affirmative corrective efforts for the city to take and left open the possibility of additional corrective actions that HUD could propose or deem necessary throughout the Voluntary Compliance process.[121] Some of the corrective actions HUD proposed would require Dubuque to: develop a strategy to increase housing opportunities throughout the city which take into account the needs of minority populations; develop a strategy to take affirmative steps to provide opportunities for desegregation of areas of racial and ethnic concentration and poverty; have city staff[122] attend three hours of mandatory AFFH and civil rights training conducted by an agency or organization approved by HUD each year for a minimum of five years; Amend the City's AI to include an analysis of the history of race relations in Dubuque, current race relations, and how these perceptions affect fair housing choice within the City and identify actions to address these perceptions; submit full annual plans to HUD for no less than five years; and provide additional assurances and certifications that the City will operate its programs in compliance with civil rights obligations and take actions to AFFH.[123]

D. The AFFH Framework under HUD's 2013 Proposed Rule

HUD's 2013 proposed AFFH rule would drastically change the fair housing planning framework for HUD program participants.[124] Through the six changes discussed below, HUD attempts to affirmatively further fair housing more effectively.[125]

1. Housing Assessment and Planning Tool – AFH

HUD's 2013 proposed rule also replaces the AI – the current housing assessment and

[120] *Id.* at 19
[121] *Id.*
[122] Including the City manager, HCDD Director, and all HCDD staff, Human Rights staff, City Council, Housing Commissioners and Long Range Planning Commissioners.
[123] Dubuque Letter of Findings of Noncompliance *supra* note 113, at 19 - 20.
[124] *See* HUD Proposed Rule, *supra* note 3, at 43714 (stating HUD's proposed rule will make a number of key changes to the current fair housing planning process for HUD program participants.
[125] *Infra* notes 152-**Error! Bookmark not defined.**; *See* HUD Proposed Rule *supra* note 3, at 43710 (stating purpose of HUD's proposed rule is to better fulfill HUD's AFFH duty).

planning tool that program participants are required to complete – with a more promising and standardized assessment of Fair Housing (AFH).[126] As discussed *supra*, under the current rule the AI requires HUD grantees to conduct a review of impediments to fair housing choice, but HUD offered little guidance as to what limits fair housing choice.[127] After the 2010 Government Accountability Office report[128] HUD has determined that "the current process for affirmatively furthering fair housing [the AI] is insufficient to ensure that program participants are meeting their obligation in a purposeful manner as contemplated by the law."[129] Therefore, HUD has included under its 2013 proposed rule a new tool to replace the AI—the AFH.[130]

Under HUD's 2013 proposed rule, the AFH allows program participants to evaluate fair housing challenges and goals using regional and national benchmarks and data tools to facilitate the measurements of trends and changes over time.[131] An AFH that a program participant submits to HUD must include analysis of: segregation (based on protected class), concentration of poverty, disparities in access to community assets, and disproportionate housing needs based on race, color, religion, sex, familial status, national origin, and disability.[132] Additionally the AFH must include a summary of fair housing issues in the jurisdiction, including any findings or judgments related to fair housing or other civil rights laws and assessments of compliance with existing fair housing laws, regulations, and guidance.[133] HUD program participants that must submit an AFH under the 2013 proposed rule include: (1) States, insular areas, and local governments participating in HUD programs that are covered by the Consolidated plan submission

[126] HUD Proposed Rule *supra* note 3, at 43711.
[127] *See supra* notes 61 - 65.
[128] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, REPORT TO CONGRESSIONAL REQUESTERS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010).
[129] HUD Proposed Rule *supra* note 3, at 43717.
[130] *Id.* at 43714.
[131] *Id.* at 43711.
[132] *Id.* at 43718.
[133] HUD Proposed Rule *supra* note 3, at 43718.

requirements;[134] (2) PHAs receiving assistance under Sections 8 and 9 of the U.S. Housing Act of 1937;[135] and (3) program participants that receive formula grants under the Community Development Block Grant (CDBG), the Emergency Solutions Grant (ESG), the HOME Investment Partners (HOME), and the Housing Opportunities for Persons With AIDS Program (HOPWA).[136]

Using a fair housing tool provided by HUD, program participants must: (1) Identify determinants that influence segregation; concentrations of poverty; disparities in access to community assets; and disproportionate housing needs based on protected class; (2) identify fair housing priorities and goals and articulate a justification for the chosen prioritization; and (3) set at least one goal for addressing the determinants.[137]

2. HUD Review of AFHs

Under a completely new section, HUD must review each AFH submitted by program participants.[138] "HUD's review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting as set forth in § 5.154(d) of the 2013 rule.[139] Under the 1995 rule, HUD has not reviewed or approved AIs, and this marks perhaps the most significant change under the 2013 proposed rule.[140] In HUD's review of a pro-

[134] *Id.* at 43717; HUD programs that are covered by the Consolidated plan submission requirements include: jurisdictions and insular areas participating in the following HUD programs: (i) Community Development Block Grant (CDBG) (24 CFR part 570, subparts D and I); (ii) Emergency Solutions Grants (ESG) (24 CFR part 576); (iii) HOME Investment Partnerships (HOME) (24 CFR part 92); and (iv) Housing Opportunities for Persons With AIDS (HOPWA) (24 CFR part 574); (2) Public housing agencies (PHAs) receiving assistance under sections 8 and 9 of the United States Housing Act of 1937 (42 U.S.C. 1437f and 42 U.S.C. 1437g); (3) Such other participants in HUD programs that may be subject to the AFFH regulations after [effective date of final rule] and announced by HUD through Federal Register notice. *See Id.* at 43730-31.

[135] HUD Proposed Rule *supra* note 3, at 43717.

[136] HUD Proposed Rule *supra* note 3, at 43730 – 43731.

[137] *Id.* at 43718.

[138] *See Id.* at 43712 (discussing new § 5.162).

[139] *Id.* at 43719.

[140] *Id.* at 43720. Section 5.162 goes on to provide that "the AFH will be deemed accepted 60 calendar days after the date that HUD receives the AFH for review, unless before that date HUD has notified the program participant that the AFH is not accepted." *Id.* HUD will notify program participants in writing that the AFH has not been accepted, and the written notification will specify the reasons that the AFH was not accepted and the actions that program participants may take to meet the criteria for acceptance. *Id.* Program participants will be allowed to revise and resubmit AFHs within 45 days after the date of the first notification of non-acceptance. *Id.*

gram participant's AFH submission, HUD may choose not to accept an AFH, or a portion of an AFH, if "it is inconsistent with fair housing or civil rights laws or if the assessment is substantially incomplete."[141] Examples of AFHs that are substantially incomplete include: (1) An assessment that was developed without the community participation or consultation required under the HUD regulations or (2) an assessment that fails to satisfy required elements for an AFH, which includes an assessment whose priorities or goals are materially inconsistent with the data and other evidence available to the jurisdiction.[142] HUD's scrutiny of AFHs is particularly important because HUD will provide program participants with data that must be used in fair housing planning; and hence logical inconsistencies between HUD provided data and program participants' AFHs and fair housing plans will be grounds for HUD to challenge participants' AFFH certifications.[143]

3. Regional Assessments

HUD's 2013 proposed rule creates an entirely new section of regulation that addresses and encourages regional fair housing assessments and planning.[144] It allows two or more program participants to join together to submit a single AFH that evaluates fair housing challenges, issues, and determinants from a regional perspective (called a Regional AFH).[145] Regional AFHs encourage program participants to cooperate in order to share resources and create regional strate-

Furthermore "HUD's acceptance of an AFH means only that, for purposes of administering HUD program funding, HUD has determined that the program participant has provided the required elements of an AFH as set forth in § 5.154(d). *Id.* It does not mean that HUD has determined that a jurisdiction has complied with its obligation to AFFH. *Id.* Circumstances when a program participant must revise an AFH include: the jurisdiction is subject to significant civil rights findings, determinations, Voluntary Compliance Agreements, or other settlements. *Id.*

[141] HUD Proposed Rule *supra* note 3, at 43733 (§ 5.162(b) (Standard of Review)).

[142] *Id.* at 43733.

[143] *Id.* at 43711; *id.* at 43715.

[144] *See id.* at 43718, 43732 (discussing proposed 24 C.F.R. § 5.156).

[145] *Id.* The proposed rule further delineates that:

> Regionally collaborating program participants need not be contiguous and may cross state boundaries, and a Regional AFH, like a local AFH, will examine regional data and account for regional dynamics. Regionally collaborating program participants must designate one member as the lead entity to oversee the development and submission of the assessment.

HUD Proposed Rule, *supra* note 3, at 43732.

gies, goals, and outcomes to improve fair housing choice for individuals within regional areas.[146] A program participant that submits a regional AFH is not relieved of its "obligation to analyze and address local fair housing issues and determinates that affect housing choice within its respective jurisdiction."[147] HUD's 2013 proposed rule purports to encourage and facilitate regional AFHs by including incentives for collaboration across jurisdictions and PHAs, and incorporating fair housing planning into regionally significant undertakings, such as major public infrastructure investments.[148]

4. Data Provided by HUD to Program Participants

Under the 2013 proposed rule, HUD will provide data from nationally uniform sources that program participants must consider in conducting their AFH.[149] The data will include information regarding: education, poverty, transit access, employment, exposure to environmental health hazards, and critical community assets, as well as local and regional data regarding: patterns on integration and segregation, racial and ethnic concentrations of poverty, disproportionate housing needs based on protected class, and outstanding discrimination findings.[150] Local and regional resources may supplement this data and HUD intends for it to improve fair housing assessment, planning, and decision-making. By informing the planning and decision-making processes, HUD expects the data will aid program participants to establish fair housing goals that address the issues and concerns related to the current rule, expressed by the Government Accountability Office ("GAO") and others.[151]

5. Definitions

[146] *Id.* at 43718
[147] *Id.* at 43719.
[148] *Id.* at 43711 and 43732. However, the proposed rule does not clearly state what incentives will be provided to regionally collaborating program participants. *Id.*
[149] *Id.* at 43711; *id.* at 43715.
[150] *Id.* at 43715. The proposed rule provides greater detail about this data on page 43717, explaining that in Paragraph(c).
[151] *Id.* at 43711; 43715.

HUD's 2013 proposed rule defines the AFFH obligation, along with other terms, in order to provide better guidance on what it means to affirmatively further fair housing.[152] Under the 2013 proposed rule, affirmatively furthering fair housing means, "taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act."[153] HUD also defines other fair housing terms for the first time ever, so that program participants know what to consider in the fair housing planning process and what concepts are contained within and central to the principle of fair housing.[154]

Another significant change under HUD's 2013 proposed rule is that it redefines the AFFH certification that program participants must make in order to receive HUD funds.[155] Under the current rule, AFFH certification means the program participant will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of impediments identified through that analysis, and maintain records reflecting the analysis and actions.[156] Whereas, under the 2013 proposed rule AFFH certification means the program participant will take meaningful actions to further the goals identified in the

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[152] *Id.* at 43716 (discussing terms defined under the proposed rule; *Id.* at 43729 (setting out proposed definitions for affirmatively furthering fair housing and other terms used under the proposed regulation).

[153] *See* HUD Proposed Rule *supra* note 3, at 43729 (going on to state that "More specifically, it means taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws. For participants subject to this subpart, these ends will be accomplished primarily by making investments with federal and other resources, instituting strategies, or taking other actions that address or mitigate fair housing issues identified in an assessment of fair housing (AFH) and promoting fair housing choice for all consistent with the policies of the Fair Housing Act").

[154] *See* HUD Proposed Rule *supra* note 3, at 43716 (listing new terms that will be defined in 24 CFR § 5.152, including: affirmatively furthering fair housing, assessment of fair housing, community participation, disproportionate housing needs, fair housing choice, fair housing determinant, fair housing issue, fair housing enforcement and fair housing outreach capacity, integration, racially or ethnically concentrated area of poverty, segregation, and significant disparities in access to community assets).

[155] *See infra* notes 156–157 and accompanying text (explaining the changed definition of AFFH certification).

[156] 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1) (2013) (respectively stating that each jurisdiction and state is required to submit to HUD a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of impediments identified through that analysis, and maintain records reflecting the analysis and actions).

AFH and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.[157]

6. Better Incorporating Fair Housing Analysis and Planning into Decision Making

The 2013 proposed rule explicitly requires program participants to incorporate fair housing planning into existing planning processes, including the consolidated, PHA, and annual plans.[158] HUD intends for this to result in the incorporation of fair housing priorities and concerns more effectively into housing, community development, land-use, and other decision-making that influences how communities and regions grow and develop.[159]

IV. ANALYSIS

Part IV will highlight the parts of HUD's 2013 proposed AFFH rule which promise to influence state and local planning and thereby to further fair housing; however, the section will primarily focus upon critiquing the 2013proposed rule. This analysis will start by discussing two reports that have correctly identified the need to refine the current AFFH planning framework laid out in the 1995 HUD regulation. Then this section will discuss significant changes under the 2013 proposed rule that hold promise for fulfilling the AFFH mandate. This section will conclude by discussing the limited reach and possible shortfalls of HUD's 2013 proposed AFFH regulation.

A. Why HUD Should Change its 1995 AFFH Regulation

1. Segregation Persists After Forty-five Years of the AFFH Mandate

[157] HUD Proposed Rule *supra* note 3, at 43738 – 43739, 43743 (§§ 91.225, 91.325, 91.425, 903.15 respectively stating that local governments, states, consortia, and PHAs will be required to submit a certification that the respective entity will take no action that is materially inconsistent with its obligation to affirmatively further fair housing, in addition to taking meaningful actions to further the goals identified in the AFH).

[158] *Id.* at 43730 ("For HUD program participants already required to develop plans for effective uses of HUD funds consistent with the statutory requirements and goals governing such funds, an AFH will be integrated into such planning.").

[159] *Id.* at 43711. This may affect other federal programs, such as LIHTC, but this will be discussed more at length *infra*. *See also Id.* at 43716 (stating that "The new AFFH regulations are intended to… to the extent appropriate, inform other housing and urban development programs that are subject to AFFH requirements.") This includes the LIHTC program administered the Treasury Department. *See Infra* note 232 and accompanying text.

Perhaps the greatest reason to refine the current AFFH framework is that it simply is not creating diverse communities free of the harmful effects of residential racial segregation that were envisioned by the FHA drafters.[160] After forty-five years of the AFFH mandate and FHA prohibitions against discrimination based on race and other characteristics in housing-related transactions, residential racial segregation remains the prevalent legacy of governmental and private discriminatory housing policies and practices.[161] The 2010 census confirms that "the United States is still a residentially segregated society."[162] Moreover, persistent racial discrimination in housing real estate transactions and an ongoing slow-rate of integrating neighborhoods promises little for creating diverse communities of opportunity.[163]

Several factors have contributed to the failure to integrate communities and to the renewal of residential racial segregation, including economic, attitudinal, on-going unlawful discrimination, and local government policies and practices.[164] Local Governments, including many subject to the AFFH mandate through receipt of HUD funds, continue to contribute to the causes of residential racial segregation despite certifying to HUD that they will do the opposite.[165] Moreover,

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[160] *See infra* notes 162-**Error! Bookmark not defined.** and accompanying text (discussing the slow rate of integration); *see infra* notes 173-175; *See supra* note 2 (stating that one of the goals of the FHA was to broadly remedy the effects of residential racial segregation).

[161] *See* Schwemm *supra* note 2, at 131 ("Despite the FHA's integration goal and over four decades of housing markets operating under the FHA's ban on discrimination, race-based residential segregation remains high, with only modest declines shown in each decanal census from 1970 through 2010").

[162] Craig Gurian, New Maps Show Segregation Alive and Well, Remapping Debate, Apr. 20, 2011, http://www.remappingdebate.org/map-data-tool/new-maps-show-segregation-alive-and-well (quoting William H. Frey, Senior Fellow with the Metropolitan Policy Program at Brookings Institution); Schwemm *supra* note 2, at 132-33.

[163] *See infra* notes 168-170 and accompanying text (discussing results of 2012 HUD study finding present-day discrimination in housing transactions); *See also*, John R. Logan & Brian J. Stults, The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census 4 (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf ("If we take the current rate of change and extend it over 50 years, blacks then would be as segregated as Hispanics are today. [] Hispanics are not exactly fully integrated into the society. Now that's . . . my grandchildren's lifetime that we're talking about, and that seems very, very slow"); *See also* Schwemm *supra* note 2 at 132-133 (2012) (putting forth statements of commentators on the 2010 and 2000 Decanal Censuses).

[164] *See* Schwemm *supra* note 2, at 133-36 (stating causes for Americas continued segregation).

[165] *See* Schwemm *supra* note 2, at 136 (stating that "Throughout the FHA's history, a large portion of its cases has involved local governments, which have been accused of various discriminatory practices whose purpose or effect restricted minority housing opportunities). Professor Schwemm reports that local governments have en-

experts have noted that segregation begets discrimination which further begets segregation in a continuing, circular cycle that reduces the efficacy of integration efforts.[166]

Furthermore, ongoing racial discrimination and steering in private real estate transactions continues to frustrate efforts to AFFH.[167] Paired-testing studies conducted by HUD in 2012 reveal that discrimination, against minorities seeking housing, persists across the U.S., without limit to specific regions.[168] Additionally, racial steering—where white homebuyers are recommended and shown homes in whiter neighborhoods than black and Asian homebuyers—persists, although to a lesser degree than when the FHA was enacted.[169] Perhaps even worse for AFFH efforts is that whites hear more positive comments about white neighborhoods and more negative comments about minority neighborhoods than blacks do, potentially steering whites away from mixed or

forced building codes more aggressively against minority-occupied housing; provided inferior municipal services to minority neighborhoods; given preferences to local residents in predominantly white areas for housing; and quite commonly employed zoning and other land-use techniques to block or limit affordable housing developments. *Id.* Professor Schwemm notes that this latter technique has been particularly effective in maintaining segregation, because it is reasonable to infer racial minorities, particularly African-Americans, are disproportionately affected by municipal action that limits the overall amount of affordable housing. *Id.*

[166] *See* Schwemm *supra* note 2, at 135 ("[t]he economic/attitudinal causes of segregation and on-going discrimination reinforce one another"); John Yinger, Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination 214 (1995) ("segregation is not simply an incidental outcome of the discriminatory system but is, in fact, a key reason why discrimination is so hard to eliminate - an outcome that becomes a cause");

[167] *See infra* notes 168-170 and accompanying text (reporting HUD's recent report detailing racial discrimination in real estate trasnactions).

[168] *See* Margery A. Turner et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, DEP'T. OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RESEARCH xviii, 1 (2013) (finding that when differences in treatment occur, whites are more likely to receive favorable treatment in private real estate transactions, and that there is no substantial difference in the incidence or severity of discrimination from region to region throughout the U.S.). Each paired-test during the study compared the treatment of whites and minorities at three "critical steps in the search for housing." *Id.* at xiii. "Taking all three steps into account (ability to make an appointment, availability of units, and agents' willingness to show units), minority renters are told about and shown fewer homes and apartments than equally qualified whites." *Id.* at xv. The report also finds, in relevant part, that, "minority homeseekers learn about and inspect fewer homes and apartments than whites, raising the costs of housing search and constraining their choices." *Id.*

[169] *See Id.* at 55 (explaining racial steering and reporting its prevalence). HUD reports:

> The census tracts of recommended and inspected homes are, on average, about two-thirds white, with high homeownership rates and low poverty rates. In more than half the tests, the tracts where one tester is recommended and shown homes are whiter on average than where the other tester is recommended and shown homes ... In these cases, whites are 8.0 percentage points more likely than their black partners to be recommended homes in whiter neighborhoods and 5.0 percentage points more likely to be shown homes in whiter neighborhoods. Overall, whites are recommended and shown homes in slightly whiter neighborhoods than blacks…

Id. (citations omitted).

minority neighborhoods.[170] The result of the discrimination found by the study is that minorities face increased time and money costs through prolonged housing search time-periods, which in turn constrains housing choices.[171]Furthermore, discriminatory lending practices that were part of the events leading up to the mortgage foreclosure crisis also constrained housing choice, perpetuating and creating new residential racial segregation.[172]

Regardless of its cause, existing residential racial segregation continues to have a deleterious effect on minorities, whites, national unity and the economy.[173] A vast majority of people affected by HUD programs desire to live in integrated communities.[174] There is broad consensus among social scientists, policy-makers, and advocates, that segregation has significant social costs for communities, families, and especially children.[175] Thus, residential racial segregation poses significant problems to the US which further impels strong policies to promote integrating communities at a swifter pace than under the current rule.

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[170] *Id.* at 1& 55 ("When the federal Fair Housing Act was passed in 1968, black families were routinely—and explicitly—denied homes and apartments in white neighborhoods").

[171] *See id.* at xviii (stating that black or Asian homebuyers would have to search longer or choose from a narrower set of options and as for renters, little is known about their search patterns, but "spending time inquiring about more advertisements and visiting more properties could be burdensome, especially for those with low incomes or inflexible work schedules").

[172] *See* Nelson D. Schwartz, Countrywide Will Settle a Bias Suit, NEW YORK TIMES (December 21, 2011), *available at* http://www.nytimes.com/2011/12/22/business/us-settlement-reported-oncountrywide-lending.html. Additionally, as early as 1998, subprime lenders dominated the refinance market in Black neighborhoods across the U.S. Dan Immergluck, *The Foreclosure Crisis, Foreclosed Properties, and Federal Policy*, JOURNAL OF THE AMERICAN PLANNING ASSOC., Vol. 75, No. 4, (2009). Subprime lenders made 51% of refinance loans in predominantly black census tracts, compared to only 9% in predominantly white tracts. Refinance borrowers in upper-income black tracts were six times more likely than borrowers in upper-income white tracts to receive subprime loans. *Id.* The effect of these discriminatory lending practices is to strip minority communities of their wealth and deprive them of housing choice opportunities, counteracting efforts to AFFH. *Id.*

[173] Schwemm *supra* note 2, at 135 (same).

[174] Turner *supra* note 168, at xxiv (reporting that many Americans—minority and white—say they want to live in more diverse neighborhoods) (citing Ingrid Ellen, et al., *Continuing Isolation: Segregation in America Today*, in SEGREGATION: THE RISING COSTS FOR AMERICA, at 261-77 (James H. Carr & Nandinee K. Kutty eds., 2008); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES, 937-80 (2002)). Turner also reports that information gaps, stereotypes and fears, local regulatory policies, and disparities in purchasing power all work together to perpetuate segregation, even though many Americans—minority and white—say they want to live in more diverse neighborhoods. *Id.* Meaningful reductions in neighborhood segregation and inequality can only be achieved if we tackle all these causal forces at the same time. *Id.*

[175] *See* HUD Proposed Rule *supra* note 3, at 43713 – 43714 (discussing the costs to individuals who live without access to vital community assets such as good schools, jobs, public transportation, and others); NAACP LDF Comments *supra* note 17, at 5.

2. HUD's 1995 AFFH Regulation Has Not Been an Effective Instrument for Integration.

In 2010 the U.S. Government Accountability Office ("GAO") published a highly influential report which demonstrated the ineffectiveness of the framework under HUD's current rule where program participants analyze impediments to fair housing and certify that the participant will affirmatively further fair housing.[176] Upon request from the GAO, many program participants had outdated information in their AIs, and a significant number were altogether unable to produce AIs.[177] The GAO report opined that insufficient guidance and clarity under the current rule led to uneven attention paid to the AI by local communities.[178] GAO concluded that the fair housing elements of current housing and community development planning are not as effective as they could be, do not incorporate leading innovations in sound planning practice, and do not sufficiently promote the effective use of limited public resources to affirmatively further fair housing.[179]

In the GAOs recommendations, it emphasized that HUD could better assist program participants by providing the data necessary to prepare fair housing plans and more guidance and technical assistance.[180] Additionally, as a result of its findings, the GAO ultimately recommended that HUD establish rigorous standards for AIs, regular submissions of AIs to HUD, checking and

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[176] *See* GAO Report, *supra* note 128, at 22 ("HUD's AI requirements and oversight and enforcement approaches have significant limitations that likely contribute to our findings that many such documents are outdated or contain other weaknesses."); *See also* The Proposed Rule, *supra* note 3, at 43710 (acknowledging that the current rule was rightly subject to the comments offered by the GAO and others).

[177] GAO Report, *supra* note 128, at 22; HUD Proposed Rule, *supra* note 3, at 43713, n.7.

[178] GAO Report, *supra* note 128, at 1 ("In particular, HUD's regulations have not established standards for updating AIs or the format that they must follow, and grantees are not required to submit their AIs to the department for review."); *see* HUD Proposed Rule, *supra* note 3, at 43713 ("GAO found that there has been uneven attention paid to the AI by local communities in part because sufficient guidance and clarity was viewed as lacking.").

[179] *Id.* at 22; *See* HUD Proposed rule at 43710 (discussing GAO report).

[180] GAO Report, *supra* note 128, at 22. Among its recommendations for AIs, the GAO suggested that HUD require program participants to (1) include time frames for implementing HUD recommendations, (2) have authorized officials sign AIs, and (3) routinely submit AIs to HUD for review. GAO Report *supra* note 128, at 33. Additionally, the GAO recommended that HUD, in its AI review, verify the timeliness of AIs, determine whether they adhere to established format requirements, assess the progress that grantees are achieving in addressing identified impediments, and help ensure consistency between AIs and other reports required or program participants, such as the CAPERs. *Id.*

verifying AIs by HUD, and measuring grantee's progress in addressing identified impediments to fair housing.[181] Some of the GAO's recommendations have been explicitly adopted in HUD's 2013 proposed AFFH rule.[182]

Additionally, the Poverty and Race Research Action Council critiqued HUD's 1995 rule by proposing to HUD regulatory changes in 2009, 2010, and 2013 that would improve existing practices, focus on achieving residential integration, and implement new practices.[183] An effective AFFH rule, Poverty and Race Research Action Council (PRRAC) claimed, would provide for audits and site visits, frequent evaluations of fair housing plans and progress, a specified process for receiving and investigating complaints, and increased enforcement.[184] "Additionally, [a new rule] should incentivize and assess concrete progress in increasing racial and economic integration within and across jurisdictions in metropolitan regions."[185] PRRAC also stated that AFFH

[181] GAO Report, *supra* note 128, at 32-33; *see* HUD Proposed Rule, supra note 3, at 43725.

[182] *See* HUD Proposed Rule *supra* note 3, at 43710 ("This rule accordingly proposes to refine existing requirements with a fair housing assessment and planning process that will better aid HUD program participants fulfill this statutory obligation and address specific comments the GAO raised.").

[183] *See* Program Review, *Affirmatively Furthering Fair Housing at HUD: A First Term Report Card*, Poverty & Race Research Action Council, Part I at 4-5 (2013) (discussing HUD's planning and preparation for the proposed rule and opining on necessary elements of a strong AFFH rule) [hereinafter HUD Report Card I]; *see* Letter to Sec. Donovan, re: Final thoughts on a new Affirmatively Furthering Fair Housing rule (Oct. 29, 2010), *available at* http://www.prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf (recommending that a new AFFH rule should focus on promoting racial integration, not merely access to opportunity; prevent disparate treatment and impact against protected classes; and provide better resourced accountability and enforcement measures); Letter to HUD Asst. Sec. John Trasviña and HUD staff, re: Further comments on HUD's July 22nd "listening session" on Affirmatively Furthering Fair Housing (July 29, 2009), *available at* http://www.prrac.org/pdf/AffirmativelyFurtheringFairHousing7-29-09comments.pdf (recommending changes for HUD's AFFH regulation in 2009, four years before the proposed rule was released).

[184] HUD Report Card I *supra* note 183, at 5. PRRAC recommends that HUD review and investigation of grantee compliance should be triggered by a complaints or letters requesting investigations and not based upon any routine HUD review or approval process of local fair housing plans. Additionally, HUD should also institute targeted investigations of AFFH compliance by grantees, including investigations in the most segregated metropolitan areas in the U.S. *Id.* Moreover, in regions segregated by race and regions containing concentrations of government subsidized housing, jurisdictions should be required to work with HUD in order to develop a strategy for desegregating housing across the region, and "opening up opportunities for low income families in higher-opportunity areas." *Id.* PRRAC offers an example of this approach by pointing to Dr. Jill Khadduri's expert report in Thompson v. Dep't. Hous. & Urban Dev., No. MJG-95-309 (2006) *available at* www.prrac.org/projects/fair_housing_commission/atlanta/khadduri.pdf.

[185] HUD Report Card I *supra* note 183, at 5. PRRAC contends that HUD should implement strong race conscious approaches that encourage racial integration. Letter to Sec. Donovan, re: Final thoughts on a new Affirmatively Furthering Fair Housing rule (Oct. 29, 2010), *available at* http://www.prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf. "[R]ace conscious approaches are fully permissible under U.S. Supreme

efforts of HUD program participants should be "judged on results, not merely filing the correct paperwork."[186] For HUD programs that involve a competitive application process,[187] or that require HUD review and approval,[188] HUD program offices should adopt review and approval procedures that ensure HUD resources are not used to further segregation and instead promote residential integration and deconcentration of poverty.[189] PRRAC also opined that the 1995 rule could be improved by implementing clearer and stronger procedures that enumerate sanctions for noncompliance and incentives for jurisdictions that do an excellent job.[190] AIs and Action Plans submitted by program participants, along with required documentation, should be posted to a public website within 30 days of submission to HUD.[191] PRRAC also recommended that HUD take certain actions under its AFFH obligation, in addition to promulgating a stronger regulation.[192]

B. Significant Changes in the 2013 Proposed Rule and Promises for AFFH

HUD's 2013 proposed AFFH rule includes many significant changes from the 1995 rule, and some of these hold promise for a more effective approach to fair housing planning. Housing and civil rights advocates have opined, "[t]he regulations now proposed by HUD present a tre-

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Court precedent and in light of HUD's past record, so long as tenants are not individually targeted for special treatment based on their race." Furthermore, PRRAC states that the central purpose of the AFFH mandate is to promote residential integration based on race and to prevent perpetuation of residential racial segregation. Letter to Sec. Donovan, re: Final thoughts on a new Affirmatively Furthering Fair Housing rule (Oct. 29, 2010), *available at* http://www.prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf. "Research and experience make clear, moreover, that the vast majority of people affected by HUD programs desire integrated communities, and that residential integration confers a range of benefits to individuals, communities, schools, and our nation." *Id.* Although expanding equitable access to "the infrastructure of opportunity" (quality schools, employment, health care services, transportation, and environmental protections) is necessary to AFFH, this is not the same thing as affirmatively furthering fair housing. *Id.*

[186] *See* Letter to Sec. Donovan, re: Final thoughts on a new Affirmatively Furthering Fair Housing rule (Oct. 29, 2010), *available at* http://www.prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf.

[187] Such as those subject to the Super Notice of Funding Availability (SuperNOFA), and a host of others.

[188] Such as multifamily and public housing development programs.

[189] Letter to HUD Asst. Sec. John Trasviña and HUD staff, re: Further comments on HUD's July 22nd "listening session" on Affirmatively Furthering Fair Housing (July 29, 2009), *available at* http://www.prrac.org/pdf/AffirmativelyFurtheringFairHousing7-29-09comments.pdf.

[190] *Id.*

[191] *Id.*

[192] *See id.* (proposing that HUD undertake an internal review of all HUD grantee programs to assess the extent to which their actions are perpetuating, creating, or permitting residential racial segregation, and that HUD adopt a desegregation metric that assesses the degree to which each HUD funded housing program is becoming more or less spatially segregated over time).

mendous first step toward ensuring more rigorous compliance by HUD program participants with their obligations under the Fair Housing Act."[193]

First, HUD's 2013 proposed rule sets out a clearer definition of AFFH by stating its purpose, rather than a process for program participants to follow.[194] The AFFH definition provided in the 1996 HUD Planning Guide told jurisdictions what to do – analyze, take steps, record – but it did not set out what it means to affirmatively furthering fair housing, the goal behind the analysis and taking those steps.[195] Under the 2013 proposed rule HUD has clearly laid out what it means to affirmatively further fair housing – taking proactive steps to create inclusive communities for all persons protected by the Fair Housing Act.[196] This refined AFFH definition in HUD's 2013 proposed rule has more substance behind it, which tells jurisdictions more about what their obligation entails.

Second, the difference between the 1995 and the 2013 certification definition cannot be understated, since the 1995 definition iterates a process that must be followed, while the proposed definition requires program participants to refrain from actions inconsistent with their AFFH obligation.[197] Under the current rule, if the program participant has followed the process correctly, i.e. analyzed impediments, taken steps, and recorded both analysis and the steps, it is likely that the certification cannot be challenged.[198] In contrast, under the proposed certification definition program participants must not only take steps in accordance with their AFH, but also

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[193] NAACP LDF Comments *supra* note 17, at 5.

[194] *See* HUD Proposed Rule, *supra* note 3, at 43729 ("Affirmatively furthering fair housing means … taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.").

[195] 1996 HUD Planning Guide, *supra* note 58, at 1-3. *See* GAO Report *supra* note 176, at 32 (recognizing that under the current rule, program participants have considerable flexibility in determining when to update their AIs and what information to include in them, which caused weaknesses in AIs as fair housing planning documents).

[196] HUD Proposed Rule, *supra* note 3, at 43729.

[197] *Id.*

[198] This point is well illustrated by the *Westchester* case, where Westchester County incorrectly analyzed impediments to fair housing by not considering impediments based on race and only those impediments to affordable housing. *See Westchester*, 668 F. Supp. 2d at 565.

consider their AFH in all other actions taken so as to take no actions inconsistent with their AFFH obligation.[199] This provides a broad basis for HUD to challenge certifications based upon program participant inaction or inconsistent actions.[200] For that reason, the proposed amendment to the definition of certification is a much better enforcement tool than that contained in the current rule.[201]

Third, HUD's review of AFH's promises better oversight and uniformity of fair housing standards across jurisdictions, depending on how HUD conducts these reviews.[202] Under the current rule, the 1996 HUD Planning Guide informed grantees that "AIs are not to be submitted to, or be approved by, HUD.[203] Thus, HUD reviewed the consolidated plan submitted by a jurisdiction, but the details of the AI were in large part left out of the yearly submissions. Further, the 1996 HUD Planning Guide made it clear that local communities set the pace for furthering fair housing.[204] As seen in the years since the 1995 AFFH rule was implemented, local communities have not brought a commitment to the "task."[205] The 2013 proposed rule takes a step away from the devolution approach, where local communities have almost complete autonomy in fair hous-

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[199] As will be discussed *infra* at notes 259 and accompanying text, inconsistent actions proscribed by the certification may include local decisions to locate developments using the low-income housing tax credit in neighborhoods that are predominantly low-income or populated by FHA protected classes, including minorities.

[200] *Cf.* Letter from Anti-Discrimination Center, Inc., to Dep't of Hous. & Urban Dev. 8-9 (Sept. 16, 2013) (available at http://www.antibiaslaw.com/sites/default/files/ADC_comments_2013_09_16.pdf) (regarding HUD's 2013 proposed AFFH regulation and expressing concern with the certification language under HUD's proposed rule but recognizing HUD's attempt to create an action requirement). Most notably Anti-Discrimination Center was the original plaintiff in the *Westchester* case where the Center brought a successful complaint under the False Claims Act against Westchester County for false AFFH certifications. *See supra* pt. III.A (*Westchester* case).

[201] *Id.*

[202] HUD Proposed Rule, *supra* note 3, at 43733 (§ 5,162).

[203] "However, HUD could request submission of the AI in the event of a complaint or as part of routine monitoring." 1996 HUD Planning Guide *supra* note 58, at 2-7. "Rather, the HUD Guide explained that jurisdictions should provide a summary of the AI, along with the jurisdiction's accomplishments for the past year, as part of the CAPER submission." From Westchester case; *see also*, 1996 HUD Planning Guide *supra* note 58, at 2-7 ("Instead of submitting its AI to HUD, a jurisdiction would provide HUD with a summary of the AI plus the jurisdiction's accomplishments for the past program year as part of the performance report required by the Consolidated Plan regulation (24 CFR 91.520(a)"). See §§ 2.13 and 2.15 for further discussion on this matter.

[204] *See* 1996 HUD Planning Guide, *supra* note 58, at ii (announcing that devolution will be used to allow communities to address their own fair housing issues with HUD's support).

[205] *See infra* part IV.A.1 (residential racial segregation persists despite a statutory obligation to affirmatively further fair housing).

ing planning, recognizing its ineffectiveness and need for more aggressive efforts in order to comply with the AFFH statutory mandate.[206]

The importance of HUD reviewing the AFH for inadequate assessment, before it is included in the consolidated plan reviewed by HUD is compounded when understood in light of the process that HUD must go through under the current rule in order to correct inadequate fair housing assessment, planning, and action of jurisdictions. Under HUD's 1995 and 2013 proposed regulations, when HUD brings a challenge to a jurisdiction's actions, after a consolidated plan is submitted and a certification is made, HUD's challenge is subject to judicial review for abuse of discretion.[207] Under the current rule, HUD will review the consolidated plan and may require the jurisdiction to resubmit it when the plan was developed without citizen participation, it fails to satisfy the elements under the rule, the certification is rejected by HUD for some reason, or the plan fails to state how it will provide assistance to a public housing agency designated as "troubled" by HUD.[208] However, upon HUD's acceptance of the consolidated plan and the jurisdiction's certification, the certification is deemed accurate unless HUD reviews sufficient amounts of evidence, provides notice and opportunity for comment from the jurisdiction and then HUD may determine the certification is inaccurate.[209] This higher threshold after certifica-

[206] *See* HUD Proposed Rule *supra* note 3, at 43716 (changing the planning tool to AFH which involves more HUD oversight, but "neither the proposed rule nor the improved process that it will establish defines the strategies or actions program participants will take"). The proposed rule emphasizes that jurisdictions may take "diverse approaches" and that "strategies and actions may include … enhancing neighborhood assets (e.g., targeted investment in neighborhood revitalization or stabilization) or promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals. *Id.*

[207] *See supra* note 112.

[208] *See* HUD Proposed Rule *supra* note 3, at 43732-33 (laying out the review process for proposed 24 C.F.R. § 5.160). The proposed rule goes on to allow HUD to disapprove of a plan, or portion of a plan, if it is "substantially incomplete." *Id.* at 43733. Examples of consolidated plans that are substantially incomplete include: (1) A plan that was developed without the required citizen participation or the required consultation; (2) A plan that fails to satisfy all the elements required of consolidated plans; and a plan for which a certification is rejected by HUD as inaccurate.

[209] See 24 C.F.R. § 91.5 (2013) (stating the definition of certification is a "written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public. The assertion shall be deemed to be accurate *unless* HUD determines otherwise, after inspecting the evidence

tion presents a barrier for HUD to challenge jurisdictions whose facially neutral actions or policies are determinants of fair housing.[210] Because a HUD challenge to a jurisdiction's certification is subject to review for an abuse of discretion, under the current rule HUD will only bring a challenge to a certification when there is substantial evidence of failing to AFFH, often also requiring evidence of intentional discrimination.[211]

Under the 2013 proposed rule HUD would get an earlier shot at reviewing the jurisdiction's fair housing assessment process and can correct inadequate assessment which would likely lead to ineffective fair housing planning.[212] Under the current rule, generally HUD does not review AIs, and therefore HUD mostly reviews consolidated plans without the context provided by an AI.[213] Moreover, AFH review before certification amounts to HUD's review of fair housing plans before there is a problem requiring a challenge to the program participant's past actions.[214] A critical development in the 2013 proposed rule is that HUD may choose not to accept an AFH,

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and providing due notice and opportunity for comment."); *see also* 1996 HUD Planning Guide *supra* note 58, at 2-24 – 2-25 (stating the process for HUD to challenge a consolidated plan submission). Under the current rule, each year jurisdictions provide HUD with a summary of the AI and the jurisdiction's accomplishments during the past program year. *Id.* If HUD's year-end review "suggests" that the AI or actions taken by the jurisdiction were inadequate, HUD could require submission of other documentation, including the AI. *Id.* If, after reviewing all documents, HUD concludes that the AI was "substantially incomplete" or that the actions taken were "plainly inappropriate" to address the identified impediments, HUD would then provide notice to the jurisdiction that HUD believes the AFFH to be inaccurate and an opportunity to comment for the jurisdiction to comment. *Id.* If, after the notice and opportunity to comment, HUD determines that the AFFH certification is inaccurate, HUD will then reject the jurisdiction's AFFH certification. *Id.* Rejecting the certification renders the jurisdiction's Consolidated Plan "substantially incomplete" and "constitutes grounds for HUD to disapprove the Consolidated Plan." *Id.* at 2-24 - 2-25. HUD will then work with the jurisdiction to determine actions necessary to make the certification accurate and the Consolidated Plan complete. *Id.* Necessary actions may include a "special assurance" describing actions the jurisdiction will make in order to make the AI complete, or describing actions the jurisdiction will take to overcome the effects of identified impediments. *Id.* Both of these assurances require a timetable for accomplishing these actions. *Id.* The point of HUD's rejection of the jurisdiction's AFFH certification, is that a jurisdiction cannot receive its CDBG, HOME, ESG, or HOPWA program grants until the Consolidated Plan is approved. *Id.* Thus, rejection of the certification for a substantially incomplete AI or plainly inappropriate actions will result in HUD's withholding grant funds from HUD. *Id.*

[210] *Id.*

[211] *See supra* note 112 (HUD's reluctance to challenge AFFH certifications stems from the reviewable nature of its decisions); HUD Report Card Part II *supra* note 52, at (discussing challenges brought by HUD).

[212] *See* HUD Proposed Rule *supra* note 3, at 43714 (under the proposed AFFH framework, HUD will review program participants' AFHs, which replace AIs as the planning tool).

[213] *Supra* note 64 and accompanying text.

[214] *See Id.* (intending the framework under the proposed rule to provide a "more direct link between the AFH and subsequent program participant planning products—the consolidated plan and the PHA Plan—that ties fair housing planning into the priority setting, commitment of resources, and specification of activities to be undertaken").

or a portion of an AFH, if the assessment's "priorities or goals are materially inconsistent with the data [provided in part by HUD] and other evidence available to the jurisdiction." [215] Therefore, under the 2013 rule HUD will provide fair housing data to jurisdictions and jurisdictions cannot choose to ignore that data. Jurisdictions must make plans and take actions consistent with the data that HUD provides to jurisdictions, otherwise the jurisdiction risks losing funding for HUD entitlement grants and losing competitiveness for other HUD grants.[216] However, as discussed *infra*, the 2013 proposed rule still leaves municipalities with the primary burden of determining the appropriate actions in response to solving fair housing issues.[217]

Fourth, HUD's 2013 proposed rule also responds to a longstanding impediment to furthering fair housing, which is the inability of homogenously populated areas–i.e. majority white suburbs or predominantly minority inner cities–to effectuate diversification.[218] Fair housing issues often transcend the boundaries of municipalities; and therefore solutions to such issues require coordinated actions across multiple jurisdictions and disconnected policy domains.[219] The 2013 proposed rule responds to this impediment by facilitating and encouraging regional plan-

[215] HUD Proposed Rule *supra* note 3, at 43733.

[216] *See* the proposed rule *supra* 3, at 43715 (stating that The AFH is completed by HUD program participants with HUD data and guidance and that once accepted, the AFH will then inform the consolidated plan or PHA plan) The program participant's respective fair housing plans are part of the participant's AFFH certification which is necessary to receive funds from HUD. *See Id.* at 43716 (noting that the AFFH certification is a statutory condition of HUD funding); Cite also to relevant provision of FHA?

[217] *See* HUD Proposed Rule, *supra* note 3, at 43716 (stating that "neither the proposed rule nor the improved process that it will establish defines the strategies or actions program participants will take… [t]he proposed rule emphasizes that there are diverse approaches that can be taken. A program participant's strategies and actions may include strategically enhancing neighborhood assets (for example, through targeted investment in neighborhood revitalization or stabilization) or promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals. Consistent with longstanding judicial guidance regarding AFFH, the proposed rule is designed so that program participants undertake a process that informs and engages the public and allows program participants to make educated judgments regarding the appropriate strategies and actions that are consistent with their obligations to affirmatively further fair housing. In doing so, it directs them to examine relevant factors, such as zoning and other land-use practices that are likely contributors to fair housing concerns, and take appropriate actions in response.").

[218] HUD Proposed Rule *supra* note 3, at 43716; NAACP LDF Comments *supra* note 17, at 5 (praising the proposed rule for encouraging regional fair housing planning).

[219] *Id.* at 43716.

ning.[220] Regional planning is encouraged under the 2013 proposed rule through introducing incentives for collaboration across jurisdictions and PHAs, and incorporating fair housing into regionally significant undertakings, such as major infrastructure investments.[221] Moreover, because the 2013 proposed rule provides program participants with regional and national data, as opposed to purely local data procured by program participants themselves, the rule demands that jurisdictions consider segregation across a region as opposed to smaller, homogenous municipalities.[222]

C. Possible Shortfalls and Limited Reach of HUD's 2013 Proposed AFFH Rule

1. HUD's 2013 Proposed Rule May Fall Short of Holding Cities Accountable for the Efficacy of their Integration Efforts

HUD's final rule should explicitly require program participants to set benchmarks for integration, based on their Analysis of Fair Housing (AFH), which HUD should then use to hold program participants accountable.[223] HUD's 2013 proposed rule does much to provide national and regional data to decision-makers, however, it does little to change the way those decision-

[220] *See Id.* at 43711. Also, that housing needs are regional in nature has been a well-established principle. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 218 (N.J. 1983) stating that: "The lower income regional housing need is comprised of both low and moderate income housing. A municipality's fair share should include both in such proportion as reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need." *Id.*

[221] HUD Proposed Rule *supra* note 3, at 43711; *Id. at* 43718 (stating that New § 5.156 addresses and encourages regional assessments and fair housing planning by allowing two or more program participants to join together to submit a single, Regional AFH that evaluates fair housing challenges, issues, and determinants from a regional perspective). The proposed rule further facilitates regional fair housing planning by providing that regionally collaborating program participants need not be contiguous and may even cross state borders. *Id.* However, program participants remain responsible for their own local AFFH obligation and must continue to take steps locally to AFFH under their consolidated plan. *Id.* at 43719.

[222] *See* HUD Proposed Rule *supra* note 3, at 43711-12 (stating that under the new AFFH framework program participants will evaluate fair housing challenges and goals using regional and national benchmarks established by data on "patterns of integration, racially and ethnically concentrated areas of poverty, access to key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act"); *Id.* at 43718 (AFH to include analysis of data concerning disparities in the jurisdiction's area, based upon HUD provided fair housing data, including local or regional data, and using this information, the program participant must identify, within the jurisdiction and region, integration and segregation patterns and trends across protected classes; racially or ethnically concentrated areas of poverty; whether significant disparities in access to community assets exist across protected classes within the jurisdiction and region; and whether disproportionate housing needs exist across protected classes).

[223] *See* NAACP LDF Comments *supra* note 17, at 5 – 6 (HUD must require actual integration to satisfy the AFFH mandate, and communities cannot fulfill their AFFH duty merely by taking steps to promote fair housing choice).

makers are held accountable for effectuating integration in segregated areas.[224] Under the 2013 rule, local decision-makers will be held accountable through HUD's review of AFHs, consolidated and annual plans, and certifications, but HUD will continue to allow program participants to choose strategies and actions to fulfill their AFFH certification.[225] But allowing jurisdictions to choose strategies to eliminate impediments to fair housing choice, without requiring local decision-makers to create a numbers-based integration benchmark, leaves HUD with the same problem for determining when an AFH, consolidated or annual plan, or AFFH certifications is materially inconsistent with the AFFH obligation.[226] The 2013 rule's failure to require jurisdictions to set a bright-line, numbers-based bench-mark for integration may result in the continued slow or altogether non-existent rate of integration in many segregated communities as seen under HUD's 1995 rule.[227]

How will HUD's 2013 rule prevent fraud like that seen in *Westchester*, where a county certified over the course of six years that it had been assessing impediments to fair housing for protected classes when in fact it was not?[228] In *Westchester* HUD sent several letters informing the county of its deficient AIs, but HUD did not bring an enforcement action under section 3608.[229] Will HUD, under the 2013 rule, more aggressively penalize program participants whose AFHs or consolidated plans are deficient or inconsistent with their AFFH certification? Will HUD review for consistency between a program participant's fair housing planning tools submit-

[224] *See* HUD Proposed Rule *supra* note 3, at 43715 (discussing the data HUD will provide to program participants and the data provision process).

[225] *See* HUD Proposed Rule, *supra* note 3, at 43716.

[226] *See supra* note 207 and accompanying text (the barrier that prevents HUD from challenging jurisdictions to meet their AFFH obligation). In the past this vagueness has prevented HUD from challenging consolidated plans and certifications, which led to limited AFFH enforcement that allowed state and local governments to proceed with exclusionary zoning practices, unless challenged in private law suits, where HUD would only intervene after the complaint is brought.

[227] *See* NAACP LDF Comments *supra* note 17, at 10 (expressing disappointment at the proposed rule's failure to provide benchmarks or timeframes for assessing program participants' performance in meeting the goals identified in their AFH).

[228] *See supra* notes 76-89 and accompanying text (discussing the Westchester case and its settlement).

[229] *See* Part III. A. (discussing *Westchester* case).

ted to HUD and the participant's actions? Whether HUD plans to review program participant certifications *sua sponte* remains to be seen, but will in large part determine the effectiveness of the new rule in HUD's attempt to hold program participants to their AFFH duty.[230]

2. HUD's 2013 Proposed Rule May Not Prevent America's Largest Low-Income Housing Development Program from Perpetuating and Creating Residential Racial Segregation

A substantial limitation for HUD's 2013 Proposed AFFH Rule is that the Treasury Department has failed to promulgate regulations that directly reference and meaningfully implement its AFFH obligation.[231] This is significant because the Treasury administers the Low-Income Housing Tax Credit (LIHTC), which is responsible for a majority of the development of affordable housing across the nation, and HUD cannot promulgate regulations specifically for LIHTC.[232]

The Low Income Housing Tax Credit (LIHTC) is currently the largest federal program that funds the development and rehabilitation of housing for low-income households.[233] Between

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[230] *See supra* note 115 and accompanying text (HUD compliance reviews bring to light program participant non-compliance with civil rights laws that would otherwise go undetected).

[231] 42 U.S.C. § 3608(d) (applying the AFFH to all executive agencies that oversee housing programs); *See* 26 C.F.R. § 1.42-9(a) (merely stating that to be eligible for tax credits, a residential unit in a building must be rented to the general public in a manner consistent with housing policy governing nondiscrimination, as evidenced by H.U.D. rules or regulations, without mentioning the housing policy governing affirmatively furthering fair housing); *See also* Kawitzky *supra* note 35, at 11 (stating that The Treasury Department regulations regarding LIHTC only reference the agency's duty to affirmatively further the goals of the FHA without stating how). The Proposed Rule states, "It is HUD's expectation that the AFH will also serve as a valuable tool to inform other planning documents or processes in addition to the consolidated plan and PHA Plan, such as PHA Capital Fund Plans, and transportation or education plans, in this way facilitating and supporting civil rights planning across policy domains." *Id.* at 43718. This is the most direct language in the Proposed Rule about HUD's intention that the proposed rule will promote fair housing planning in other planning processes, such as State and regional decisions surrounding the LIHTC.

[232] *See infra* notes 233-236 and accompanying text.

[233] Roisman *supra* note **Error! Bookmark not defined.**, at 1011-12; *See* Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments*, Poverty and Race Research Action Council 1 (2013), *available at* http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf ("since the early 1990s, LIHTC has been the only program that has added substantial numbers of subsidized projects to the U.S. rental housing stock"); HUD Report Card II *supra* note 51, at 26 (reporting that LIHTC "is the largest federal low income housing development program, with 1,539,619 units placed in service between 1995 and 2009"). Moreover, with the withdrawal of federal support for a substantial number of other subsidized housing development programs, LIHTC "stands as essentially the only game in town." Roisman *supra* note **Error! Bookmark not defined.**, at 1011.

1986 (when LIHTC was created)[234] and 2013, LIHTC developed over 2.4 million units of housing.[235] Odd as it may sound, the largest federal subsidized housing program is not administered by HUD, but rather the Treasury Department administers LIHTC through state and local housing credit agencies.[236] Treasury has carefully crafted and promulgated regulations requiring housing credit agencies and LIHTC developers to go through a detailed processes in administering the program, with one significant exception – compliance with civil rights laws, specifically the FHA and its AFFH mandate.[237]

As discussed *supra*, since 1968 all federal agencies have had an obligation to AFFH.[238] However, since 1986 Treasury has failed to direct LIHTC program participants to take steps to comply with the AFFH obligation.[239] Because LIHTC is the nation's largest development tool for affordable housing, efficacy of efforts to affirmatively further fair housing, including reducing and preventing further residential racial segregation, will depend on LIHTC's compliance with the AFFH mandate.[240] Without AFFH compliance, LIHTC may perpetuate and enhance residential racial segregation caused by past federal policy errors.[241]

Housing credit agencies have significant discretion in administering LIHTC under Treasury's regulatory framework, although Treasury does require each agency to develop a qualified allocation plan (QAP).[242] QAPs must: (1) use pre-identified selection criteria, "appropriate to local conditions," in order to choose among projects; (2) use standards set-out by Congress for

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[234] Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189 (1986) (codified as amended at I.R.C § 42 (2011)); Roisman *supra* note **Error! Bookmark not defined.**, at 1013.

[235] Khadduri *supra* note 233, at 1.

[236] *Id*; Roisman *supra* note **Error! Bookmark not defined.**, at 1012.

[237] *Id.*

[238] *Supra* notes 37-38.

[239] Specifically, Treasury, unlike HUD, has not promulgated an AFFH framework. Roisman *supra* note **Error! Bookmark not defined.**, at 1012.

[240] *Id.* at 1012-13 (postulating that the LIHTC program seems to be repeating errors of federal housing programs that imposed and enhanced racial segregation).

[241] *Id.* at 1012.

[242] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2319 (1989) (codified at 26 U.S.C. § 42(o)(1)(B) (1994)); *see* Roisman *supra* note **Error! Bookmark not defined.**, at 1017.

some of the agency's selection criteria; (3) give preference to projects serving the lowest income tenants for the longest amount of time; and (4) specify a procedure for monitoring LIHTC developer compliance and for notifying the IRS of noncompliance.[243] However, while the Code specifically directs the agencies to include seven selection criteria in their allocation plans, the Code does not define these criteria or provide any guidance for their use.[244]

Yet, despite mandatory agency reports to the Treasury, the Treasury lacks a full set of data necessary for fair housing planning, i.e. total numbers of LIHTC units completed, development locations, and resident characteristics, other than income and family size.[245] Ten years after LIHTC began, the Government Accountability Office (GAO) estimated that more than half of LIHTC units were located in census tracts that had concentrations of poverty and minorities.[246] "This suggests that America's major contemporary housing subsidy program is producing separate and unequal housing."[247] The vast majority of LIHTC units and units developed under older affordable housing programs are in low-income neighborhoods.[248] Thus, what little data Treasury does collect and report seems to indicate that Treasury is failing to meet its AFFH obligation in

[243] *Id.* at 1018.

[244] *Id.* "For example, the Code requires that each QAP's selection criteria include "project location" and "tenant populations with special housing needs," but does not tell an allocating agency what to do about these subjects. Moreover, the Treasury's regulations provide no further guidance on these standards." *Id.*

[245] *See* Roisman *supra* note **Error! Bookmark not defined.**, at 1017-19 (discussing credit agency reporting requirements)

[246] *Id.* at 1019-20 (1998) (citing General Accounting Office, Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program Sec. 2 (March 1997); *see also* ABT Assoc. Inc., Development and Analysis of the National Low-Income Housing Tax Credit Database: Final Report 1-2 (July 1, 1996)).

[247] Roisman *supra* note 89, at 1019-20. Moreover, since Professor Roisman's article in 1998 LIHTC has continued to place developments in predominantly minority neighborhoods. *See* Simon Kawitzky, et al., *Choice Constrained, Segregation Maintained: Using Federal Tax Credits to Provide Affordable Housing*, Fair Housing Justice Center, Inc. (2013) (noting that although the LIHTC program has produced a relatively large number of rental housing units, concerns have been raised that the geographic distribution of LIHTC housing has exacerbated poverty concentration and racial segregation). A 2009 study showed that of all rental units produced nationally between 1995 and 2006, 13% were located in areas with at least a 30% poverty rate, while more than 20% of LIHTC units were located in these areas. Abt Associates Inc., *Updating the Low Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service through 2006*, HUD Office of Policy Development and Research, 59 (2009). Similarly, 41% of all rental units were in low-poverty census tracts (those with less than 10% poverty), while only 33% of LIHTC units were in low-poverty areas. *Id.* at 56.

[248] Khadduri *supra* note 233, at 14.

the administration of the LIHTC program.[249] Necessary data collection from housing credit agencies and LIHTC applicants and developments is discussed *infra*; but simply put – Treasury, in order to AFFH, should be collecting the same data as HUD under HUD's 2013 proposed rule and distributing that data to housing credit agencies, LIHTC applicants and developers using LIHTCs.[250]

As mentioned *supra*, the Treasury, as a federal executive agency, has a duty under § 3608 to affirmatively further fair housing in the administration of its housing programs, which includes LIHTC.[251] In order to AFFH, the Treasury must "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[252] Moreover, the Treasury's affirmative duty under § 3608 is to consider the effect of its actions and proposed actions on the racial and socio-economic composition of neighborhoods

[249] *See Supra* notes **Error! Bookmark not defined.**-248 and accompanying text (discussing the predominance of LIHTC developments sited in low income and minority neighborhoods). Siting affordable housing, which is often home to members of FHA protected classes, directly affects fair housing choice (as defined under HUD's proposed rule) for protected classes and thus works against fair housing for protected classes.

[250] *See* HUD Proposed Rule *supra* note 3, at 43717 (listing the data HUD will collect and provide to program participants under new §5.154(C)). Under the proposed rule, HUD will provide to program participants, a set of nationally uniform local and regional data about: patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to neighborhood assets such as education, employment, low poverty, transportation, and environmental health, among others; disproportionate housing needs; data on individuals with disabilities and families with children; and discrimination. *Id.* HUD will also provide PHA site locational data, the distribution of housing choice vouchers, and occupancy data. Moreover, HUD proposes that program participants use the data and thresholds specified in the data methodology appendix, among other HUD provided resources, to help program participants understand whether relatively low, moderate, or high levels of segregation exist. *Id.* HUD will also provide to program participants data on: disproportionate housing needs for protected classes and the existence of racially concentrated areas of poverty (RCAP) within their jurisdictions. *Id.* These data will include a designation that identifies whether a given census tract is an RCAP, based on HUD established joint thresholds for minority and poverty concentrations. *Id.*

[251] *Supra* notes 37-38 and accompanying text; Roisman, *supra* note **Error! Bookmark not defined.**, at 1031; Khadduri *supra* note 233, at 1; Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1790 (2005) ("The In Re 2003 court reiterated what is clear from legislative history, case law, and administrative materials: the duty to affirmatively further integrated housing applies to all federal housing programs, including the LIHTC") (citations omitted).

[252] *See Boston NAACP*, 817 F.2d at 155 (discussed *supra* note 47, interpreting HUD's AFFH obligation); Roisman *supra* note **Error! Bookmark not defined.**, at 1031.

and to take no action that would limit the supply of genuinely open housing for FHA protected classes but only actions to increase that supply.[253]

Treasury has so far declined to adopt AFFH regulations that acknowledge its AFFH obligation and promote integration in LIHTC site selection.[254] Without federal- and state-level AFFH rules applied directly to LIHTC siting decisions, LIHTC is likely to continue its current practice of placing low-income developments into low-income neighborhoods, and thus to maintain or expand prior residential racial and economic segregation."[255] Thus, while HUD's 2013 proposed AFFH rule may make headway into promoting integration using HUD programs, this headway stands to be reversed by developers and crediting agencies making LIHTC siting decisions that operate without obligatory AFFH planning.[256]

Developers using LIHTC must work with local governments and PHAs in order to find suitable housing development sites, and often LIHTC developers apply for special use permits from municipalities.[257] HUD's 2013 proposed rule attempts to influence these local and state planning processes, including the allocation of tax credits and siting for LIHTC developments, but the rule does not apply directly to developers and owners of LIHTC developments, because the credit allocation process is regulated by Treasury.[258] Therefore LIHTC applicants, recipients,

[253] *Id.* at 156; Roisman, *supra* note **Error! Bookmark not defined.**, at 1031.

[254] Olatunde C.A. Johnson, Stimulus and Civil Rights, 111 COLUM. L. REV. 154, 182-83 (2011); *See* Khadduri *supra* note 233, at 1 (contending that "effort is needed to create a better balance between locating LIHTC projects in "high-opportunity" communities and locating them in neighborhoods where" substantial numbers of poor people and minorities currently live).

[255] Johnson *supra* note 254 and accompanying text.

[256] *See* Johnson *supra* note 254 and accompanying text.

[257] *See* Roisman *supra* note **Error! Bookmark not defined.**, at 1014 (discussing the LIHTC planning process); J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. Cal. Rev. L. & Soc. Just. 213, 230, & 246-250 (2010) (Explaining the LIHTC program leaves state agencies with wide discretion to implement broad federal policy goals and discussing LIHTC placements).

[258] HUD Proposed Rule, *supra* note3, at 43711 (stating that one of the expected outcomes of the proposed rule is incorporating fair housing priorities into housing, community development, land-use, and other decision-making that influences how communities and regions grow and develop); Florence Wagman Roisman, *The Role of the State, The Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study*, 27 SETON HALL L. REV. 1386, 1406 (1997) (stating that "[t]he LIHTC program is almost unique among subsidized housing

and regulators are not required to go through the AFH drafting and review process, nor does Treasury require these entities to discuss AFFH in the planning process.

The 2013 rule may reach the siting decisions for LIHTC developments – decisions that are made by state and local jurisdictions – because such decisions must be consistent with the jurisdiction's AFFH certification to HUD.[259] Therefore, without meaningful Treasury regulations, the only way the 2013 rule may influence local and state LIHTC siting decisions is either through (1) the AFH review process,[260] (2) HUD's review of the consolidated plan[261] or (3) through review of the jurisdiction's AFFH certification and subsequent actions.[262]

Moreover, Treasury's existing regulation may also transpose HUD's new AFFH rule onto the LIHTC credit and site selection process.[263] The existing Treasury regulation provides that eligibility for the LIHTC requires that "the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development . . . ."[264] However, this regulation omits any reference to the FHA,

programs in not requiring housing owners to collect and report data [race, ethnicity and other protected categories])."

[259] *See* HUD Proposed Rule, *supra* note 3, at 43738 – 43739, 43743 (§§ 91.225, 91.325, 91.425, 903.15 respectively stating that local governments, states, consortia, and PHAs will be required to submit a certification that the respective entity will take no action that is materially inconsistent with its obligation to affirmatively further fair housing, in addition to taking meaningful actions to further the goals identified in the AFH).

[260] See *supra* notes 202 - 209 (discussing the AFH review process).

[261] As illustrated in cases such as *Westchester*, under the current rule the consolidated plan review process has proven inadequate to influence local government planning. *See supra* note 83 (HUD's several memoranda informing the County that its consolidated plan could be improved by including analysis of restrictions on fair housing choice based on race). Arguably, with better HUD guidance under the proposed rule, consolidated plan review may support more aggressive HUD action, i.e. withholding HUD funds when consolidated plans do not match the newly defined AFFH, fair housing determinants, and other new definitions under the proposed rule. *Id.* at 43729 (amending § 5.152 Definitions).

[262] *See supra* notes 217 (AFH review) & 259 (certification review).

[263] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1029 (1998) (explicating the Treasury regulation that implicates HUD rules and regulations into the LIHTC program).

[264] 26 C.F.R. § 1.42-9(a) (2013) (Specifically, the regulation provides, in relevant part: "A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX)."); Roisman, *supra* note **Error! Bookmark not defined.**, at 1030.

and it refers only to "non-discrimination," without explicitly mentioning the AFFH Mandate.[265] Furthermore, a significant problem for transposing HUD's new AFFH rule onto the LIHTC crediting and developing process is that the existing Treasury regulation does not specifically tailor the HUD requirements to the tax credit program.[266] It is uncertain how a rule designed for HUD program participants, which provide or develop housing, should apply to a housing financing program.[267]

Another route for transposing the 2013 rule onto LIHTC is through the AFFH certifications made by local governments and states. Through the jurisdiction's AFFH certification, in order for HUD's 2013 proposed rule to apply to LIHTC siting decisions, HUD must review the certification, plans, and actions taken by the jurisdiction and determine whether specific LIHTC siting decisions of the jurisdiction are materially consistent with the jurisdiction's AFFH obligation.[268] This may prevent the siting of future LIHTC developments from undermining the 2013 proposed rule and may allow for the rule to reach LIHTC developments without Treasury Department AFFH regulations. However, a much more effective way to ensure that the AFFH obligation is not undermined by LIHTC credit, siting and other decisions that bear upon fair housing choice, is for Treasury to promulgate regulations under its AFFH obligation in § 3608(d).[269]

V. PROPOSAL

This last section suggests policy changes which should be adopted by HUD in its final AFFH rule and by other federal executive agencies, in order to achieve the integration promised by the designers and adopters of the AFFH mandate in Section 3608. First, this section will sug-

[265] *See generally Id.* at 1029 (noting that the existing treasury regulation does not reference "the FHA's other purpose, to create 'truly integrated and balanced living patterns'").
[266] *Id.* at 1030.
[267] *Id.*
[268] *See supra* notes 156-197 (discussing the process for submitting certifications to HUD and HUD's review).
[269] Callison *supra* note **Error! Bookmark not defined.**, at 250 ("Congress Should Make the LIHTC Program Expressly Subject to Civil Rights Laws, and Treasury Regulations Should Specify What State Credit Agencies and Developers Must Do to Satisfy Such Laws.").

gest changes HUD should implement to its 2013 proposed rule that might improve the final AFFH rule's ability to create diverse communities of opportunity for members of FHA protected classes.[270] Second, this section will recommend actions that should be taken at the Federal level, outside of HUD's discretion, in order to end residential racial segregation and prevent its re-creation.[271] Foremost among these recommendations is that federal agencies other than HUD, chiefly the U.S. Treasury Department, promulgate regulations to fulfill the AFFH mandate.[272]

A. Recommended Changes to HUD's 2013 Proposed AFFH Rule

HUD should consider several changes to its 2013 proposed rule, many iterated by fair housing advocates during the regulatory comment period, which would make the 2013 rule more effective at ending residential racial segregation and building inclusive communities of opportunity.[273] For forty-five years the AFFH mandate has failed, in large part, to end residential racial segregation.[274] Taking this into consideration, in its final rule HUD should take aggressive steps to enforce the AFFH obligation and in so doing create a concrete plan for eliminating the effects of forced residential racial segregation created by past housing policy and private acts of discrimination.[275]

HUD's 2013 proposed rule should establish a complaint process that would give private parties the authority to directly participate in AFFH enforcement.[276] The absence of a clear com-

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[270] *See Infra* pt. V.B (Recommending changes it should make to the proposed AFFH rule before implementing it).

[271] *See Infra* pt. V.A. (recommending that Congress and Treasury take actions to AFFH).

[272] *See Infra* pt. V.A.2 (making specific recommendations for regulations that Treasury should adopt in order to comply with the AFFH mandate of § 3608(d)).

[273] *See Responses to HUD's "Affirmatively Furthering Fair Housing" Proposed Rule*, Poverty and Race Research Action Council, *http://www.prrac.org/full_text.php?item_id=14252&newsletter_id=0&header=Current%20Projects* (last visited November 3, 2013) (a repository for fair housing advocates' comments to the proposed rule

[274] *infra* notes 161-162 and accompanying text. Furthermore, individuals in FHA protected classes have had to stand by, without the ability to bring private AFFH enforcement actions, and wait for housing policy shifts promised since the FHA was adopted. *Id.*

[275] *infra* note 163 and accompanying text.

[276] HUD Report Card II *supra* note 52, at 12-13. HUD should include in its AFFH rule a process whereby private parties can lodge administrative complaints against HUD program participants that fail to AFFH. This is especially important since, as discussed *supra* there is no private right of action under § 3608. Hence private indi-

plaint process under the current rule has been a major obstacle to AFFH enforcement, preventing private individuals from bringing administrative complaints based solely on Section 3608 or requiring them to file actions under the Administrative Procedure Act or False Claims Act.[277] This shortfall should be addressed in any new AFFH regulation, but the 2013 rule fails to do so.[278] With a private administrative enforcement mechanism, the 2013 rule would enjoy greater efficacy and HUD program participants would be more accountable to the AFFH mandate.[279]

Additionally, HUD should incorporate into the its final rule a strong compliance review mechanism where HUD would randomly and regularly investigate the certifications of states, local governments, insular areas, and public housing agencies, searching for the kinds of false certifications seen in the *Westchester* settlement.[280] One important development under the 2013 rule is that HUD will review each program participant's AFH.[281] However, in light of cases like Dubuque, Iowa, this is simply not enough to prevent abuse by program participants after planning, when making decisions that implicate fair housing.[282]

HUD should require jurisdictions to work with HUD to set a numbers-based integration

viduals are completely excluded from HUD's AFFH enforcement process, unless the individual complains to HUD of other FHA or civil rights violations in addition to tacking on a failure to AFFH allegation.

[277] *See supra* note 77 and accompanying text (explaining that plaintiff in *Westchester* brought suit to enforce AFFH under FCA, not § 3608); HUD Report Card II *supra* note 52, at 12-13.

[278] *Id*.

[279] *Id* ("The lack of a clear complaint process has been a major hindrance to AFFH enforcement and it needs to be addressed in any new regulation").

[280] HUD Report Card I *supra* note 183, at 5 (opining that "[a]n effective AFFH rule would provide for audits and site visits…"); *See* GAO Report *supra* note 128, at 23-24 (discussing HUD's monitoring process that includes onsite compliance reviews).

[281] HUD Proposed Rule *supra* note 3, at 43715 ("The proposed rule requires program participants to submit their AFH to HUD in advance of the consolidated plan and PHA Plan submission so that the AFH may then inform strategies and actions in those plans.").

[282] *See infra* note **Error! Bookmark not defined.** and accompanying text (discussing the actions taken by Joliet, Illinois after it conducted its fair housing planning process); *see also infra* note 112 and accompanying text (discussing the judicial review hurdle that HUD must overcome when it suspects a jurisdiction is noncompliant with its AFH obligation). What will prevent program participants from conducting an AFH, crafting a plan (consolidated, PHA, or annual) and then not taking the action steps laid out in that plan? Or, said differently, what part of HUD's proposed ruled will ensure that program participants actively and meaningfully take the steps they certify that they will take? And when program participants fail to take those steps, when will HUD challenge the program participant on the participant's failure to carry out its action plan? Answers to these questions will determine in large part the efficacy that HUD's proposed rule will enjoy, if implemented in its current form.

bench-mark similar in principle to that expressed in *NAACP v. Mount Laurel II*.[283] HUD's 2013 proposed rule sets out something closer to a good faith effort obligation.[284] In *Mount Laurel II* the NJ Supreme Court imposed upon municipalities an obligation to provide the "substantial equivalent of [their] fair share" of affordable housing, which is based on regional numbers, not just needs within the municipality.[285] A benchmark for de-segregation,[286] set by the jurisdiction coordinating with HUD, would most clearly tell program participants what it means for that jurisdiction to actually affirmatively further fair housing. Under statute and Executive Order, HUD is in the position to determine and expound in detail what it means to affirmatively further fair housing.[287] However, under the 2013 rule, HUD continues to defer much of this to local governments.[288] An AFFH integration bench-mark is not only capable of being set-out, but such a clear rule is the only method which promises to build inclusive communities out of the segregated cit-

[283] Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 216 (N.J. 1983) (stating that "The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a *good faith attempt*) (emphasis added). Under New Jersey's Fair Share Obligation the housing opportunity provided must, in fact, be the substantial equivalent of the fair share. *Id.* There is an affirmative requirement under the fair share obligation to provide a realistic opportunity for low income individuals, as opposed to a mere theoretical opportunity for the development of low-income housing in a municipality. 'Affirmative,' as used under the Mount Laurel rule suggests that the municipality is going to take action. *Id.* at 260. Additionally, the term 'realistic opportunity' suggests that what local governments will do will make it realistically possible for lower income housing to be built. *Id.* at 260-262. Satisfaction of the Mount Laurel doctrine cannot depend on the inclination of developers to help the poor. *Id.* It has to depend on affirmative inducements to make the opportunity real. *Id.* "Therefore, unless removal of restrictive barriers will, without more, afford a realistic opportunity for the construction of the municipality's fair share of the region's lower income housing need, affirmative measures will be required." *Id.* at 262.

[284] *See* HUD Proposed Rule *supra* note 3, at 43714-716 (setting out a planning process for jurisdictions but not explicitly requiring jurisdictions to consider regional fair housing issues, nor requiring jurisdictions to establish benchmarks based on regional fair housing issues).

[285] *Mt. Laurel*, 92 N.J. at 216.

[286] Under the 2013 proposed rule, HUD will require jurisdictions to use the dissimilarity index and the isolation index, which describe segregation dynamics. HUD Proposed Rule *supra* note 3, at 43717. These common social science measures of segregation will be accompanied by data provided from HUD, making it easy to see whether a community has relatively low, moderate, or high levels of segregation. *Id.*

[287] *See* 42 U.S.C. § 3608(e)(5) (2011), discussed *supra* note 4; *see also supra* note 38 and accompanying text (Executive Order 12898 requiring executive agencies to cooperate with HUD in AFFH efforts).

[288] *See* HUD Proposed Rule *supra* note 3, at 43716 ("It is important to note, however, that neither the proposed rule nor the improved process that it will establish defines the strategies or actions program participants will take."). While HUD rightly assumes that determining how to AFFH is something that must be decided on a local level, this is not the same for deciding what AFFH looks like in a community.

ies that exist across America today.[289]

Such a hard-line rule would be similar to ADA physical barrier accessibility standards, and the Fair Housing Accessibility Guide – both of which provide a bright-line rule for entities to follow. Under such a rule, a covered entity is either in compliance or it is not in compliance. Moreover, there is no question that compliance with ADA standards and Fair Housing Accessibility is high. This is a stark contrast to the compliance with the AFFH mandate which requires but fails to get program participants to work toward creating inclusive communities of opportunity for FHA protected classes.

What would a hard-line rule look like in the AFFH arena? Short of mandating arbitrary integration percentages (i.e. no more than 50% of one race in 75% of a city's neighborhoods), HUD could set a standard for the pace of integration for FHA protected classes.[290] Under such a standard, communities that are predominantly composed of FHA protected classes or communities that have almost no FHA protected classes would be required to begin integrating at a set pace by a date certain. Then, for jurisdictions that meet the goal, HUD could offer them the carrot of increased funding. This hard-line standard is a radical departure from the devolution model that put most of the discretion in the hands of local governments, which has failed to produce inclusive communities of opportunity.[291] Moreover, this hard-line obligation is necessitated by forty-five years of failing to end the effects of federal, state, and local policies that created, perpetuated and sustained residential segregation based on race.[292]

The final AFFH rule should also provide HUD the opportunity to condition AFH ap-

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289 *Id.*

290 *See* NAACP LDF Comments *supra* note 17, at 11 (contending that HUD's AFFH rule should measure program participants' performance in promoting integration is a net increase in the number of desegreative housing opportunities in the regional housing market).

291 *See supra* notes **Error! Bookmark not defined.**-206 (discussing the devolution ideals behind the current rules and HUD's step toward less discretion at the local level by implementing an AFH review process).

292 *See infra* part IV.A.1 (residential racial segregation persists despite a statutory obligation to affirmatively further fair housing).

proval upon the jurisdiction (state or local government) including one or more affirmative governmental devices recommended by HUD in the jurisdiction's Consolidated Plan.[293] Such devices may be necessary in jurisdictions with significant impediments to fair housing choice, and especially where there has been a long history of residential segregation within the municipality or region. HUD could even build into AFH approval process a step where HUD would propose specific affirmative governmental devices and make future funding contingent upon municipalities or states implementing the recommended device.[294] Such devices are as simple as a requirement for the state or local government to consult with a special "master" who would assist in developing fair housing-centered zoning and land use regulations,[295] or the device could be stronger, such as requiring that local and state governments implement inclusionary zoning measures such as incentive zoning or mandatory set-asides.[296]

Lastly, and most importantly, HUD's final AFFH rule must be designed so that it will assuredly influence local planning and decision-making. HUD should include in the AFFH framework a more aggressive tool to ensure this will happen. One of the outcomes that HUD hopes the 2013 rule will achieve is "[i]ncorporating, explicitly, fair housing into existing planning processes, the consolidated plan and PHA Annual Plan, which in turn incorporates fair housing pri-

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[293] The process for oversight laid out in Mount Laurel is particularly instructive for HUD: "The municipal obligation to provide a realistic opportunity for the construction of its fair share of low and moderate income housing may require more than the elimination of unnecessary cost-producing requirements and restrictions. *Affirmative governmental devices* should be used to make that opportunity realistic, including lower-income density bonuses and mandatory set-asides [required of developers to create mixed-income housing]." *Mount Laurel*, 92 N.J. at 217 (emphasis added).

[294] Here, the process where HUD finds a state or local government AFH insufficient might be comparable to the process where a trial court finds a municipality has not met its fair share obligation. *Id.* These judicial remedies crafted by the NJ Supreme Court could be modified and used by HUD to promote fair housing. *Id.* at 285-86. HUD could require the municipality to: (1) adopt resolutions and ordinances that will enable it to meet its AFFH obligation, such as amendments to zoning ordinances and other land use regulations; (2) delay certain types of construction within the municipality until its ordinance is satisfactorily revised, or until its fair share of lower income housing is constructed or in process of construction; (3) relax or eliminate building and land-use restrictions in all or portions of the municipality; and (4) approve particular applications for housing developments that will include low-income units.

[295] *Id.* at 284 (setting out the process where municipalities consult with a "master" about land-use rules).

Id.

[296] *See infra* Part III and notes (discussing cases and agreements that resulted in affirmative governmental devices).

orities and concerns more effectively into housing community development, land-use, and other decision-making that influences how communities and regions grow and develop."[297] Hence, by incorporating the AFH into local fair housing plans mandated and reviewed by HUD, HUD intends for local governments to consult these plans when making decisions that will affect fair housing.

However, there is a gap between including the AFH in fair housing plans and incorporating those fair housing plans into a municipality's comprehensive or general plan.[298] Zoning and other city created policies are adopted into the comprehensive plan at the city's discretion.[299] Parts of a municipality's comprehensive plan may include facially neutral rules, plans, or policies that have a segregative effect on the municipality and which also spills over into a segregative effect on the region where protected class members, to a large part, are excluded from portions of the municipality or from it entirely and relegated to others.[300] Thus, municipalities engage in complex decision-making where there are some priorities at odds with others and the challenge HUD faces is getting municipalities to give greater weight to fair housing plans than to those plans or proposed actions that cause or perpetuate fair housing determinants.[301]

How can HUD, in its final rule, respond to this dilemma and how can HUD ensure that the fruits of local fair housing planning processes are incorporated into local comprehensive planning and actions? The only mechanism that the 2013 AFFH rule currently uses to ensure that

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[297] HUD Proposed Rule, *supra* note 3, at 43711.

[298] A comprehensive plan (also known as a general plan) guides all of a local government's implementation and action. *See* Daniel R. Mandelker, The Affordable Housing Element in Comprehensive Plans, 30 B.C. Envtl. Aff. L. Rev. 555, 557 (2003).

[299] *See* Chris Brancart, Partner, Brancart & Brancart, John Marshall Law School Fair Housing Conference: Implementing the Duty to Affirmatively Further Fair Housing (Sept. 20, 2013) (stating that the primary downfall of HUD's 1995 AFFH rule was that fair housing planning has not been incorporated into municipal comprehensive plans).

[300] *See* S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 336 A.2d 713, 718-724 (1975) (discussing the city's exclusionary polices that impacted fair housing for the region); Tim Iglesias, Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists, 82 Or. L. Rev. 433, 477 (2003).

[301] *See* HUD Proposed Rule, *supra* note 3, at 43730 (discussing the elements of fair housing that should be considered during the planning process and subsequent action). "Fair housing determinant means a factor that creates, contributes to, or perpetuates one or more fair housing issues." *Id.*

municipalities incorporate plans about fair housing into their comprehensive plan is a certification for program participants that requirement that is substantially similar in its function to the prior certification which has been in place since well before cases like *Westchester*.[302] The certification requirement, based on its track record, has proven necessary but not sufficient to instigate municipal action in accordance with the former fair housing tool, the AI.[303] Perhaps the simplest way for HUD to ensure that fair housing plans are incorporated into municipal comprehensive plans is for HUD to make this a condition of funding.[304] Under the AFFH regulation, HUD could explicitly require jurisdictions to incorporate fair housing planning documents into any comprehensive or general plan that jurisdictions maintain.

B. Recommended Federal Actions to AFFH that are External to HUD

1. Congress Must Amend the FHA

Congress should amend the FHA to allow for a private right of action under § 3608.[305] This would allow private citizens who are injured by their municipality's failure to take steps to create diverse, inclusive communities of opportunity to bring suit against their municipality and

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[302] HUD Proposed Rule *supra* note 3, at 43716. After discussing the process of including the AFH in a HUD approved fair housing plan (either consolidated plan or PHA plan) the proposed rule provides the certification as the framework to ensure that the fair housing plan is followed by municipalities. *Id.*

[303] *See Westchester*, 668 F. Supp. 2d at 550. (showing an example of a county government that falsely certified that it is affirmatively furthering fair housing consistent with HUD's AFFH rule, while in fact it was not). Moreover, under the current rule, many municipalities hire private consultants to draft an AI but then fail to incorporate the AI into the municipalities' comprehensive plans. *See* PLANNING/COMMUNICATIONS, http://planningcommunications.com/ (last visited Nov. 1, 2013). Thus, the municipality continues to take actions inconsistent with the AI although it has certified to HUD that it will affirmatively further fair housing. *See* Chris Brancart, Partner, Brancart & Brancart, John Marshall Law School Fair Housing Conference: Implementing the Duty to Affirmatively Further Fair Housing (Sept. 20, 2013) (pointing out that municipalities often fail to incorporate fair housing planning documents into their comprehensive plans and actions).

[304] *See* HUD Proposed Rule *supra* note 3, at 43715 (stating that a critical innovation in the proposed rule is the AFH which will help program participants more effectively integrate fair housing concerns into the fair housing planning process, but failing to discuss how this will generally impact municipal planning and actions). HUD could require municipalities to submit publicly available comprehensive planning documents as an appendix for the AFH, consolidated or annual plans.

[305] *See supra* notes 49-**Error! Bookmark not defined.**, 77 and accompanying text (private citizens must bring suit through the APA or FCA if they are to enforce the AFFH mandate, but the standard for review of agency actions creates a burden to APA enforcement actions and the FCA process can only challenge HUD program participant certifications).

recover damages in addition to seeking equitable relief.[306] This added accountability for municipalities will ensure better compliance with the AFFH obligation because in addition to HUD withholding funds, municipalities could be liable for money damages in the event that they fail to meet their AFFH obligation.[307]

2. Executive Agencies Other than HUD Must Promulgate AFFH Regulations

In order to fulfill the FHA's goal of fair and integrated housing, Federal agencies other than HUD (notably the Treasury) must promulgate regulations under the FHA's AFFH mandate in § 3608(d).[308] Without such regulations, HUD's 2013 AFFH rule is likely to influence only HUD program participants; it may not effectuate substantial change to residential segregation sustained and enhanced through the nation's largest program responsible for low-income housing development, the Low Income Housing Tax Credit (LIHTC).[309]

Although, existing Treasury regulations arguably make the LIHTC program subject to HUD's regulations,[310] there has been no compliance by housing credit agencies or LIHTC developers with HUD's 1995 AFFH rule.[311] Hence there is unlikely to be a significant change in LIHTC program compliance with new HUD AFFH regulations. However, parts of the 2013 AFFH rule may reach programs administered by other federal agencies (i.e. LIHTC) through the

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306 *See* 42 U.S.C. § 3602 (2011) (allowing recovery for specific section of the FHA but omitting § 3608).

307 *See* 42 U.S.C. § 3613(c) (2011) (Relief which may be granted to aggrieved persons under the FHA). Relief, in addition to attorney's fees, which may be granted under the FHA includes:

> (1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

Id.

308 *See supra* notes 254-259 (discussing the need for the Treasury to promulgate an AFFH regulation that adopts the fair housing planning framework in HUD's proposed AFFH rule).

309 *See* Roisman *supra* note 258, at 1406 (explaining that "the Low Income Housing Tax Credit (LIHTC) program is 'the only major Federal assistance program. . . that is currently active' in producing new or rehabilitated subsidized housing").

310 Roisman, *supra* note **Error! Bookmark not defined.**, at 1045-46 (1998) ("Furthermore, since the Treasury regulation makes the LIHTC program subject to HUD regulations…. ").

311 *Id.*

guarantee of a planning process that incorporates an AFH approved by HUD.[312] However, HUD cannot promulgate AFFH regulations for other executive agencies and regulations are necessary to explain how rules apply to specific entities. Specifically, regulations should explain how the AFFH obligation must be carried out by housing credit agencies and developers under the LIHTC.[313]

The Treasury Department should promulgate regulations under § 3608(d) (the AFFH mandate for executive agencies other than HUD) in order to meet its AFFH obligation.[314] This would include regulations acknowledging that the Treasury and the housing programs it administers are under a statutory obligation to AFFH.[315] Moreover, the regulations should require specific actions of housing credit agencies and developers using the LIHTC, including annual certifications that they are in compliance with federal fair housing laws, including the AFFH obligation.[316] The Treasury should amend its regulations in three ways: (i) acknowledge the Treasury's AFFH obligation under the FHA, specify what the AFFH requires of LIHTC, and clearly place LIHTC subject to HUD's AFFH regulations; (ii) specify the AFFH obligation for housing credit agencies; and (iii) specify the AFFH obligation for developers applying for and using LIHTC.[317]

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[312] Under the proposed rule HUD must review and approve AFH's submitted by program participants, and therefore, any plans that program participants make based upon the AFH are expected to incorporate measures to further fair housing based upon HUD approved analysis on fair housing in that jurisdiction.

[313] *See generally* HUD proposed Rule *supra* note 3, at 43710 – 43743 (setting out framework for fair housing planning and implementing policies specific to the needs and practices of HUD programs that may not be suitable to housing credit agencies and LIHTC developers).

[314] *See supra* notes 310 – 311 and accompanying text (reporting that although existing Treasury regulations may adopt standards of HUD regulations, there is no compliance among housing credit agencies with the HUD fair housing planning process set out under the current AFFH rule).

[315] *See supra* notes 318-322 and accompanying text (discussing how the Treasury should acknowledge, through regulation, its AFFH obligation).

[316] Owners of tax credit developments now are required to make a series of certifications, including a certification "that each building in the project was suitable for occupancy, taking into account local health, safety and building codes. . . ." The U.S. Department of the Treasury requires owners to certify "that all units in the project were for use by the general public. . .," a requirement that Treasury defines as a non-discrimination requirement: A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX).

[317] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1031 (arguing for similar but broader Treasury regulations).

i. Treasury's LIHTC Regulations Should Specifically Acknowledge the AFFH Obligation, Specify What This Requires of LIHTC, and Place LIHTC Subject to HUD's AFFH Regulations

At a minimum, the Treasury's AFFH obligation requires the Treasury to state that the FHA and AFFH mandate apply to the LIHTC program.[318] The Treasury should amend its existing LIHTC regulations to specify that all housing developed under the LIHTC is subject to the provisions of the FHA and HUD's FHA regulations, with specific references to HUD's AFFH regulations.[319] Additionally, the Treasury should clarify the AFFH obligation by reference to HUD's new definition of affirmatively furthering fair housing under HUD's 2013 AFFH rule.[320] LIHTC regulations should further specify that every housing credit agency and developer using LIHTC must comply not only with HUD regulations implementing the FHA, but specifically HUD's AFFH regulations under § 3608.[321] The Treasury should specify that developers and housing credit agencies that fail to AFFH may forfeit their tax credit and credits for allocation, respectively.[322]

Treasury, in order to AFFH, should be collecting the same kinds of data as HUD (under the 2013 AFFH rule) about LIHTC developments, their neighborhoods and jurisdictions, and distributing that data to housing credit agencies and LIHTC applicants and developments.[323] This

[318] Roisman, *supra* note **Error! Bookmark not defined.**, at 1032 (1998). Moreover, Treasury regulations should also acknowledge and restate the Treasury's own obligations under the FHA. *Id.*

[319] Roisman, *supra* note **Error! Bookmark not defined.**, at 1032.

[320] *Id* at 1033.

[321] *Id.*

[322] *Id.*

[323] *See* HUD Proposed Rule *supra* note 3, at 43717 (listing the data HUD will collect and provide to program participants under new §5.154(C)). Under the proposed rule, HUD will provide to program participants, a set of nationally uniform local and regional data about: patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to neighborhood assets such as education, employment, low poverty, transportation, and environmental health, among others; disproportionate housing needs; data on individuals with disabilities and families with children; and discrimination. *Id.* HUD will also provide PHA site locational data, the distribution of housing choice vouchers, and occupancy data. Moreover, HUD proposes that program participants use the data and thresholds specified in the data methodology appendix, among other HUD provided resources, to help program participants understand whether relatively low, moderate, or high levels of segregation exist. *Id.* HUD will also provide to program participants data on: disproportionate housing needs for protected classes and the existence of racially concentrated areas of poverty (RCAP) within their jurisdictions. *Id.* These data will include a designation that identifies whether a given census tract is an RCAP, based on HUD established joint thresholds for minority and poverty concentrations. *Id.*

may be difficult with existing department resources, and may require Congressional support to expand Treasury's institutional capacities or greater collaboration with HUD.[324] However, such data is necessary in order for housing credit agencies to consider fair housing implications in their credit allocating decisions.[325] LIHTC Developers also need this information when they create Fair Housing Market Plans, apply for additional LIHTCs, and take other actions that implicate fair housing for protected classes.[326]

Treasury should also change the LIHTC regulations to encourage Qualified Allocation Plans (QAPs) that utilize standards and preferences that affirmatively further fair housing:[327] QAPs have been recognized as a powerful tool for affecting the location of low income housing and through their influence over LIHTC development placement, QAPS are the key instrument for creating diverse communities of opportunity.[328] Therefore, Treasury should encourage QAP standards that limit allocation of credits in predominantly minority, low-income neighborhoods to only a few LIHTC development proposals that include neighborhood revitalization efforts with a reliable chance of success.[329] Treasury should encourage QAPs that create incentives for locating projects in high-opportunity, predominantly non-minority or diverse neighborhoods.[330]

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[324] *See* Kevin Plexico, *President's budget would cut Transportation, boost HHS and Treasury*, WASH. POST (May 05, 2013) *http://articles.washingtonpost.com/2013-05-05/business/39048310_1_energy-department-sequestration-budget* (reporting that the Treasury has already received an extra $766 million (6.1%) budget increase to expand its administrative capacity to deal with extra taxes under the Affordable Care Act).

[325] *See* HUD Proposed Rule *supra* 3, at 43715 (stating that HUD provided data will be essential to fair housing planning for HUD program participants); *Alschuler*, 686 F.2d at 482 – 86 (holding that HUD must "adopt institutional measures" for carrying out its AFFH duty in an informed manner).

[326] *Id.*

[327] *See* Khadduri *supra* note 233, at 10-17 (stating that LIHTC has developed 2.5 million units).

[328] *See Id* at 18-19 ("Qualified Allocation Plans are a powerful tool for affecting the location of low income housing in a state" and "Qualified Allocation Plans are the key instrument of state policies for creating balance in the locations of LIHTC developments.").

[329] *See Id.* at 10-13 (contending that well-defined community revitalization plans are more likely to create balance between LIHTC developments located in high-poverty communities and those located in low-poverty communities). A reliable chance of success may be evidenced by developers, plans or techniques that have a high rate of past success with revitalization efforts.

[330] *See Id.* at 15 (discussing QAPs that have utilized incentives for applicants proposing developments in high opportunity neighborhoods). Among the 36 states with QAPs reviewed by Khadduri, twelve had QAP provisions with incentives for locating LIHTC developments in high-opportunity neighborhoods. *Id.* Incentives for applicants

Treasury should encourage housing credit agencies to change their QAP provisions that block the creation of LIHTC developments in high-opportunity, predominantly non-minority or diverse neighborhoods.[331]

ii. Treasury Regulations Should Specify the AFFH Obligation for Housing Credit Agencies

The Treasury's regulations, in addition to requiring housing credit agencies to comply with HUD's proposed AFFH rule, should specify, in terms as strong as HUD's 2013 AFFH rule, what the AFFH obligation is for housing credit agencies and what those agencies must do in order to AFFH when allocating the LIHTC.

Principally, Treasury regulations should state that non-discrimination and residential racial integration are priority goals for housing credit agencies and that these goals should be a central part of QAPs.[332] "The LIHTC program will not solve the problems of discrimination and segregation unless [housing credit agencies] identif[y] them as issues requiring attention and solution."[333] In the past, most agencies have adopted the non-discrimination and nominal AFFH ideals of their jurisdiction's consolidated plan.[334] However, LIHTC siting decisions have not been effectively influenced by such passive adoptions of consolidated plans; that LIHTC has not made

take the form of points basis boosts, set-asides, threshold requirements, policy statements, or any combination of two or more of these. *Id.*

[331] *Id.* at 17. Simply providing extra points to LIHTC applicants intending to build in high opportunity, predominantly white or diverse neighborhoods may not be sufficient. *Id.* Sometimes threshold requirements for QAPs prevent developers from event applying to high opportunity neighborhoods because the development might exceed the per unit or land cost limits. *Id.* Housing credit agencies can address these limitations by considering exceptions to cost limits, excluding sit acquisition costs, or providing a basis boost for properties in high opportunity, predominantly non-minority or diverse communities.

[332] *See infra* notes 333-335 and accompanying text.

[333] Roisman, *supra* note **Error! Bookmark not defined.**, at 1033-34. Roisman goes on to state that "each state may define discrimination and segregation issues differently, but the Treasury should require at a minimum that each state credit agency address the problems." *Id.* Better yet, would be for the Treasury to explicitly adopt HUD's definitions of fair housing issues, integration, segregation, racially or ethnically concentrated areas of poverty, and significant disparities in access to community assets under HUD's 2013 AFFH rule. HUD Proposed Rule *Supra* note 3, at 43717.

[334] Roisman, *supra* note **Error! Bookmark not defined.**, at 1033.

[334] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1033 n.123 (1998) ("Most states now define their housing priorities for the LIHTC program by reference to the consolidated plans that HUD requires for several of its programs, including CDBG and the HOME Investment Partnership programs.").

significant gains at integrating segregated cities is evidence of such.[335] Rather, jurisdictions should bring housing credit agencies into the jurisdiction's consolidated and annual planning process so that both the consolidated plan and housing credit agency are informed.[336] Such collaboration would be likely if both the jurisdiction, as a HUD program participant, and housing credit agency had the same non-discrimination and integration goals.

Most significantly, Treasury regulations should require housing credit agencies to consider the duty to AFFH in their QAPs and in their site selection process.[337] The tax credit statute, as amended to incentivize siting in Difficult Development Areas (DDAs)[338] and Qualified Census Tracts (QCTs)[339] may operate in contravention to the FHA's goal to integrate America's cities.[340] However, the Treasury's statutory duty is to use its grant programs to assist in ending segregation, to the point where the supply of genuinely open housing increase.[341] Therefore, Treasury

[335] *See supra* note 247 and accompanying text (stating that LIHTC may be inadvertently continuing past policy of building segregated communities).

[336] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1033 n.124 (1998) ("Integration of the tax credit program into a coordinated state housing strategy would be very salutary.") (citing Peter W. Salsich, Jr., Urban Housing: A Strategic Role for the States, 12 Yale L. & Pol'y Rev. 93, 117 (1994) urging that coordinated state housing strategy incorporating LIHTC and mortgage revenue bond financing.).

[337] Roisman, *supra* note **Error! Bookmark not defined.**, at 1043 (stating that housing credit agencies have failed to consider the segregating effects of their siting decisions).

[338] DDAs are places where the maximum LITHC rent based on area median income is low relative to construction costs in the area. (In implementing the DDA designations, HUD uses Fair Market Rents as a proxy for construction costs). Khadduri *supra* note 233, at 10.

[339] QCTs are census tracts within which the majority of residents have income between 60 percent of area median income or with a poverty rate of 25 percent or more, hence generally household incomes within these areas are low enough that the property may not be able to charge rent at the LIHTC maximum. *Id.*

[340] The LIHTC statute was amended so that both DDAs and QCTs are eligible for a higher basis on which the tax credit may be taken—up to 30 percent higher—at the discretion of the state. *Id.* The statute also requires states to include in their QAPs a preference for projects in a QCT "with a concerted community revitalization plan." *Id.* *See also* Roisman, *supra* note **Error! Bookmark not defined.**, at 1043 ([T]he tax credit statute itself encourages developers to apply for allocations for qualified census tracts and difficult development areas, which are likely to be areas of minority concentration"); Khadduri *supra* note 233, at 10-17 ("State officials sometimes say that one of the reasons for the current imbalance in the location of LIHTC units is that Section 42 requires states to prefer properties in qualified census tracts (QCTs).").

[341] Roisman, *supra* note **Error! Bookmark not defined.**, at 1046 (citing NAACP, Boston Chapter, 817 F.2d at 155. HUD must "affirmatively ... promote racial integration" and it has an "affirmative duty to avoid segregation." Glendale Neighborhood Ass'n v. Greensboro Housing Auth., 956 F. Supp 1270, 1276 (M.D.N.C. 1996); "HUD [has a] statutory duty to integrate," King v. Harris, 464 F. Supp. 827, 839 (E.D.N.Y.), aff'd sub nom. King v. Faymor Dev. Co., 614 F.2d 1288 (2d Cir. 1979), vacated on other grounds, 446 U.S. 905 (1980)).

and housing credit agencies should seek to reconcile the two statutory provisions.[342] Thus, in selecting from various LIHTC applications, housing credit agencies should be required to desegregate cities and integrate neighborhoods through carefully considering where LIHTC developments are to be sited and what sincere marketing efforts are to be used.[343]

Treasury regulations should expressly require all housing credit agencies to collect Affirmative Fair Housing Marketing Plans (AFHMPs) from developers applying for the LIHTC.[344] Under such plans, similar to the planning tools under HUD's 2013 AFFH rule program participants, developers would affirmatively market LIHTC developments in order to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of race, color, religion, sex, disability, familial status or origin.[345] Furthermore, because the tax credit statute creates an incentive for developers to site projects in minority neighborhoods, the AFFH obligation would require that developers placing developments into DDAs and QCTS make an affirmative effort to market such developments in order to integrate non-minorties into predominantly minority neighborhoods.[346]

However, AFHMPs on their own are not likely to effectively integrate predominantly minority neighborhoods, so Treasury should apply HUD's 2013 AFFH planning framework un-

[342] One way to reconcile the AFFH mandate and the statutory incentive to site LIHTC developments in DD and QCTs is for LIHTC developers and crediting agencies to use AFHMPs, discussed *infra*. AFHMPS may be used to market to whites LIHTC developments in predominantly minority communities and *vice versa*.

[343] Siting in a neighborhood that is predominantly occupied by one group (i.e. a protected class under the FHA or high poverty) will require affirmative marketing of LIHTC units to non-group members in order to promote integration and prevent further segregation. Thus, choosing to site in areas that are predominantly minority would require affirmative efforts to market the units to eligible, non-minority household. On the other hand, choosing to site in predominantly non-minority neighborhoods would require more efforts to market LIHTC units to eligible minority households. These efforts will be necessary to promote inclusive, diverse communities, regardless of neighborhoods where developments are sited. That said, developments sited in areas that are already predominated by classes of people protected under the FHA (e.g. minority or ethnic concentrations) have time and again proven harder to market to non-minorities and others.

[344] Roisman, *supra* note **Error! Bookmark not defined.**, at 1035-36.

[345] *See Id.* 1035 (contending that Fair Housing Market Plans should be required of all tax credit agencies).

[346] *Id.* at 1037.

der HUD's proposed AFFH rule to housing credit agencies.[347] For informed Fair Housing Planning, Treasury regulations should explicitly require housing credit agencies to collect, assess, and report (to Treasury and the public) information about the racial, ethnic, and other protected statuses of residents of LIHTC developments.[348] Housing credit agencies should then engage in an Analysis of Fair Housing (AFH) substantially the same as that required under HUD's 2013 AFFH rule, using self-collected data and data from HUD.[349] In its AFH, each housing credit agency should be required to map all of its existing LIHTC projects, noting the racial, ethnic, and economic characteristics of each location and of the residents at each location.[350] Using that information, housing credit agencies would then assess each LIHTC application to determine the extent to which the new proposal "affirmatively furthers" fair housing.[351] Additionally, Treasury regulations should require housing credit agencies to certify that they are in compliance with the FHA, HUD regulations, and that they will AFFH.[352] Specifically, housing credit agencies would have to make the same annual AFFH certifications that HUD program participants must make under the 2013 proposed rule.[353]

iii. Treasury Regulations Should Specify the AFFH Obligation for Developers Applying for and Using LIHTC.

[347] HUD Proposed Rule *supra* note 3; *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1037 (arguing the same limitations for AFHMPs).

[348] *Id.* at 1038. LIHTC developers are already obligated to collect and maintain such data, because the Treasury has made compliance with the HUD regulations a condition of eligibility for the tax credit. *See Id.* at 1029-30 & 1038-39 (pointing to the Treasury regulation that adopts HUD's regulations and that this requires the collection of such data).

[349] *Id.* at 1042.

[350] *Id.*

[351] *Id.*

[352] *See supra* note 157 (Certifications for HUD program participants under the proposed rule).

[353] HUD Proposed Rule *supra* note 3, at 43716 ("It is a statutory condition of HUD funding that program participants certify that they will affirmatively further fair housing, which, under the proposed rule, means that that they will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of this rule, and that the program participant will take no action that is materially inconsistent with its obligation to affirmatively further fair housing"); *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1047-49 (1998) (contending that LIHTC developers should have to make civil rights certifications).

The Treasury's regulations, in addition to requiring LIHTC developers to comply with HUD's 2013 proposed AFFH rule, should specify, in terms as strong as HUD's, what the AFFH obligation is for LIHTC developers and what developers must do in order to AFFH.

LIHTC Developers, similar to HUD program participants, have a direct impact on fair housing choice for protected classes, and so developers should engage in an AFFH Framework similar to HUD program participants.[354] For that reason, the Treasury regulations should require each developer to go through the same fair housing planning steps as HUD program participants, including conducting an Analysis of Fair Housing (AFH) using self-collected data and data provided by HUD to the relevant jurisdiction.[355] LIHTC developers should also be required to keep track of their fair housing data and planning records, in the same way that HUD program participants must under the 2013 rule.[356] Furthermore, LIHTC developers should have to make the same annual AFFH certifications that HUD program participants must make under the 2013 rule.[357] The Treasury regulations should also require LIHTC developers to train the developer's staff, who are likely to be unfamiliar with the FHA and HUD rules, on the AFFH obligation and to certify that this training has occurred.[358] Lastly, the developer should be required to certify that it

[354] *See infra* notes **Error! Bookmark not defined.-Error! Bookmark not defined.** (discussing the siting process used by LIHTC developers). Developers are responsible for making the siting proposals that will determine whether LIHTC developments are erected in low-poverty areas that will promote diversity. *Id.* Owners of properties developed using the LIHTC, through many of their decisions, also effect whether the AFFH is successfully carried out. *Id.* This includes AFFH regulations that apply to state and local housing credit agencies that administer tax credits to LIHTC developers. *Id.*

[355] *See* supra part III. D. (discussing fair housing planning process for HUD program participants under the proposed rule). Additionally, developers should assist with drafting and abiding by the jurisdiction's consolidated and annual plans. *Id.*

[356] This includes data collection, AFH, consolidated and annual plans.

[357] HUD Proposed Rule *supra* note 3, at 43716 ("It is a statutory condition of HUD funding that program participants certify that they will affirmatively further fair housing, which, under the proposed rule, means that that they will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of this rule, and that the program participant will take no action that is materially inconsistent with its obligation to affirmatively further fair housing"); *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1047-49 (contending that LIHTC developers should have to make civil rights certifications).

[358] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1047 n.168 (citing to Jones v. Office of the Comptroller of the Currency, 983 F. Supp. 197, 204 n.10 (D.D.C 1997) and pointing to the Office of the Comptroller of the Currency as an exemplar for providing AFFH obligation trainings, which include lending seminars, confer-

advises housing applicants and development residents about their rights under the FHA and avenues for redress for perceived FHA violations.[359]

Treasury regulations should require all developers applying for the LIHTC to describe the racial, ethnic, income and other protected characteristics of the neighborhood where the development would be located.[360] Furthermore, Treasury regulations should explicitly require LIHTC developments to report on the racial, ethnic, income, and other protected characteristics of the development's occupants, so that the housing credit agency can ascertain to what extent segregation exists based on protected class status.[361] Collecting and using this information for planning is the only way that LIHTC developers and housing credit agencies can make an informed decision on the effects of site selection on racial concentration.[362] Moreover, several U.S. Circuit Courts of Appeals have determined that the AFFH obligation requires HUD to be informed about racial concentration information when making siting decisions; therefore each agency subject to the AFFH mandate is also under the same obligation to make housing siting decisions informed by

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ences on the banking industry, and other events as well as publication of papers and issuances to examiners and banks about fair housing).

[359] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1047. The Treasury's LIHTC regulations should specifically state the ways in which the applicants' and tenants' rights should be explained, including videos and print publications (for those who cannot read due to disability and for other reasons). *Id.* at n.170. The Treasury's LIHTC regulation should also require developers to advice housing applicants and development residents of the right to file administrative complaints, to elect to have the Department of Justice pursue their claims, or to bring their own suits. *Id.* Moreover, the advice given to applicants and residents should make clear that the developer may be faced with the loss of the tax credit for FHA violations. *Id.*

[360] *See* Kawitzky *supra* note 35, at 14 (contending that housing credit agencies, who are charged with deciding how to allocate tax credits to support the development of affordable housing opportunities, should be mindful of their legal duty to affirmatively further fair housing when administering the tax credit to applicants).

[361] *See* Roisman, *supra* note **Error! Bookmark not defined.**, at 1040 (contending that LIHTC developers are already obligated to collect and maintain such data, whether or not they receive funding from HUD or Department of Agriculture, because the Treasury has made compliance with the HUD regulations a condition of eligibility for the tax credit.) This reporting should occur at the initial rent-up and annually each year, included in the developer's annual plan submitted to the housing credit agency.[361] HUD regulations already require some LIHTC developers to collect and report this data. *Id.*

[362] *See* HUD Proposed Rule *supra* note 3, at 43715 (setting forth HUD's commitment to providing relevant data to program participants in order for them to prepare more effective fair housing plans).

racial concentration information.[363] "Indeed, the LIHTC program is almost unique among subsidized housing programs in not requiring housing owners to collect and report such data."[364]

VI. CONCLUSION

HUD's 2013 proposed rule implementing the Fair Housing Act's AFFH mandate which, in part, modifies the state and local measures for carrying out the AFFH, if strongly implemented, may further fair housing.[365] However, advocates, lawyers, and courts will have to look elsewhere to comprehensively carry-out the AFFH mandate as envisioned at the time of its adoption as part of the FHA. This will include advocating for stronger HUD regulations as well as regulations implementing the AFFH by federal agencies other than HUD, including regulations by the Treasury for the LIHTC program.

[363] *See supra* note **Error! Bookmark not defined.** and accompanying text (discussing Court decisions finding that HUD has an obligation to make informed siting decisions); Roisman, *supra* note **Error! Bookmark not defined.**, at 1047-49 (arguing that LIHTC developers have the duty to collect, report, and use such data).

[364] *Id.* at 1049. Additionally, requiring this data collection and reporting "would not significantly add to the burdens on LIHTC developers" because developers already must acquire income certification and documentation annually. *Id*. (citing 26 C.F.R. § 1.42-5(c)(1)(iv) (1998).

[365] *See Strong Outpouring Of Support For HUD's New Fair Housing Rule*, PR News Wire, http://www.prnewswire.com/news-releases/strong-outpouring-of-support-for-huds-new-fair-housing-rule-224556571.html (last visited November 3, 2013) (opining "the new rule, if strongly implemented, could clarify state and local obligations and improve the regional planning process").