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The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant  
Recipients and Sub-Recipients

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## I. Introduction

Recipients of federal funds from the U.S. Department of Housing and Urban Development (HUD) are required to administer those funds in a manner that affirmatively furthers fair housing (AFFH). The duty to AFFH requires three things: (i) a careful analysis of the impediments to fair housing within one's jurisdiction; (ii) actions to eliminate identified impediments; and (iii) maintenance of documentation and records concerning steps (i) and (ii). Put simply: analysis, action, and documentation. Although the statutory obligation to AFFH is as old as the Fair Housing Act (FHA) itself, recent high-profile enforcement actions by HUD, by the Department of Justice, and by private parties have put all grant recipients and public housing authorities (PHAs) on notice that the failure to AFFH may result in significant legal exposure and the loss or delayed receipt of federal funds. These obligations and concomitant liability grow out of the text of the FHA, as well as the FHA's interpretation by Executive Order, federal regulation, the federal courts, and HUD's own guidance.

This article offers information necessary to understand the duty to AFFH, and to comply with it. It also synthesizes practical advice and from HUD to assist grant recipients in fulfilling their three-fold duties. Finally, the article discusses the evolving regulatory environment concerning these obligations. Specifically, HUD is expected to publish a new federal regulation governing the duty to AFFH by fall 2014. That regulation is likely to shift and clarify the AFFH obligations of all grantees, and should be of the utmost concern to those committed to compliance with the law.

## II. Background

### A. *The Statute*

The FHA was enacted in 1968<sup>1</sup> to remedy the adverse effects of past and present housing discrimination and in immediate response to the assassination of Dr. Martin Luther King, Jr.<sup>2</sup> The FHA's legislative history makes clear that Congress intended the law to increase housing choices for minority individuals and to foster meaningful integration throughout society.<sup>3</sup> The principal sponsor of

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<sup>1</sup>As originally written in 1968, the statute banned discrimination on the basis of race, color, religion, and national origin, Fair Housing Act, Pub. L. No. 90-294, 82 Stat. 73, 81-89 (1968); sex was added in 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974); disability and familial status were added by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

<sup>2</sup> See generally Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2183 (2013).

<sup>3</sup> *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977) (citing 114 Cong. Rec. 228, 3421 (1968) (remarks of Senator Brooke and remarks of Senator Mondale)); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § § 2:3; 5:2 (2014).

the FHA, Senator Mondale, explained the purpose of the FHA was to replace the ghettos with “truly integrated and balanced living patterns.”<sup>4</sup> Eliminating segregation and achieving meaningful integration was meant to benefit not just minority groups, but “the whole community.”<sup>5</sup>

In its current form, the FHA prohibits discriminatory housing practices, enforced through administrative proceedings, and private and government lawsuits.<sup>6</sup> The Supreme Court has made clear that the language of the FHA and its legislative history endorse the idea that the FHA’s purpose was residential integration.<sup>7</sup> The Court has determined that the statute carries out a “policy that Congress considered to be of the highest priority,” and so achieving its goals must not be hampered by a narrow interpretation of the statute.<sup>8</sup>

Importantly, the authors of the FHA recognized that achieving the goals of the statute and eliminating the effects of widespread discrimination would require more than simply a mandate that individuals refrain from engaging in discriminatory conduct. Congress included Section 3608 in the FHA, which sets forth the “affirmative” obligation that HUD and other federal agencies administer their housing programs in a manner to actively promote fair housing and integration. Specifically, the FHA provides, in relevant part: “[t]he 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.”<sup>9</sup> The FHA also provides that federal departments and agencies other than HUD must administer all programs and activities relating to housing and urban development “in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”<sup>10</sup>

Appellate courts, particularly in the years immediately following the passage of the FHA, have taken care to set forth the linear connection between racial segregation in the 1960s, passage of the FHA, and Congress’ inclusion of the duty to AFFH.<sup>11</sup> The first of these federal appellate decisions, *Shannon v.*

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<sup>4</sup> 114 Cong. Rec. at 3422.

<sup>5</sup> 114 Cong. Rec. at 2706 (statement of Senator Javits); *see also Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“The purpose of racial integration is to benefit the community as a whole, not just certain of its members.”).

<sup>6</sup> 42 U.S.C. §§ 3604-3606, 3617, 3610-3614 (2012).

<sup>7</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 209, 208-09 (1972) (relying on Sen. Mondale’s remarks concerning the “truly integrated and balanced living patterns”); *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (same).

<sup>8</sup> *Trafficante*, 409 U.S. at 211-12.

<sup>9</sup> 42 U.S.C. § 3608(e)(5).

<sup>10</sup> 42 U.S.C. § 3608(d).

<sup>11</sup> For the most comprehensive discussion of these early cases, *see* 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, 137-44 (2011-2012) [hereinafter Schwemm, *Overcoming Structural Barriers*].

*HUD*, articulates the duty to AFFH more explicitly and, in the authors' estimation, more honestly, than any decision since:

Congress has since 1949 refined its view of the factors relevant to achieving national housing objectives. At least under the 1968 Civil Rights Act, and probably under the 1964 Civil Rights Act as well, more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. Even though previously located rent supplement projects were located in non-ghetto areas the choice of location of a given project could have the 'effect of subjecting persons to discrimination because of their race \* \* \* or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race. \* \* \*' 24 C.F.R. § 1.4(b)(2)(i). That effect could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood. That effect could be felt not only by occupants of rent supplement housing and low cost housing, but by occupants of owner occupied dwellings, merchants, and institutions in the neighborhood. Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.<sup>12</sup>

A few years after *Shannon*, the Second Circuit Court of Appeals reached similar conclusions on different facts.<sup>13</sup> While *Shannon* and *Otero* interpreted the AFFH provision to require affirmative steps to avoid discrimination or segregation on the basis of protected class in the context of specific developments, they did not provide a precise roadmap by which municipalities could guide their community-wide efforts to expand fair housing choice. When the First Circuit considered this broader context, then-Judge Stephen Breyer (now Justice Breyer of the Supreme Court) observed that Section 3608 requires HUD to "do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."<sup>14</sup> That is, communities are required, as a condition of receiving federal funds, to take affirmative steps, each year, to

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<sup>12</sup> *Shannon v. U.S. Dep't of Hous. & Urban Dev.* 436 F.2d 809, 820-21 (3d Cir. 1970).

<sup>13</sup> See generally *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1124 (2d Cir. 1973) (applying the duty to affirmatively further to a HUD grantee, "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.").

<sup>14</sup> *N.A.A.C.P. v. Sec'y of Housing & Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).

expand the supply of housing that is available on a non-discriminatory basis. These decisions are important guideposts but they do not answer definitively what steps a municipality or PHA must take to comply with its AFFH obligation.

### ***B. The Executive Order***

In 1994, President Clinton issued Executive Order No. 12982 to clarify how the Secretary should effectuate the mandate to AFFH.<sup>15</sup> The Order makes clear that the duty to AFFH encompasses all of HUD's programs and activities, including its grants, loans, contracts, insurance, guarantees, and federal supervision.<sup>16</sup> Specifically, state and local governments that receive Community Development Block Grants (CDBG) and HOME Investment Partnership Program grants (HOME) are required to AFFH and, in fact, must certify compliance with this requirement as a condition of receiving grant funds.<sup>17</sup> PHAs that receive assistance under sections 8 and 9 of the United States Housing Act of 1937 (42 U.S.C. § 1437(f)) are also obligated to AFFH. Put simply, the obligation to AFFH travels with federal housing funds; the obligation is indivisible from the money.

The Executive Order also required that the Secretary of HUD promulgate regulations to clarify the grantee obligations. Specifically, the Executive Order states, in relevant part, that the Secretary of HUD shall:

- (3) describe the responsibilities and obligations of executive agencies in ensuring that programs and activities are administered and executed in a manner that furthers fair housing;
- (4) describe the responsibilities and obligations of applicants, participants, and other persons and entities involved in housing and urban development programs and activities affirmatively to further the goal of fair housing; and
- (5) describe a method to identify impediments in programs or activities that restrict fair housing choice....<sup>18</sup>

Thus, the Order both clarifies the reach of Section 3608 and then calls upon HUD to implement further regulations aimed at clarifying how those obligations are to be fulfilled.

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<sup>15</sup> Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

<sup>16</sup> *Id.* at 2939; 42 U.S.C. § 3608(d). The obligation to AFFH also extends to all other executive departments and agencies with programs relating to housing and urban development. These obligations, however, are not discussed in this article.

<sup>17</sup> See generally *HUD Memorandum re: Affirmatively Furthering Fair Housing in the Community Development Block Grant Program*, dated Feb 9, 2007, at 2 (available at <http://portal.hud.gov/hudportal/documents/huddoc?id=fairhousing-cdbg.pdf>) (setting forth the regulations requiring certification and discussing the underlying activities necessary to AFFH).

<sup>18</sup> Exec. Order No. 12,892, 59 Fed. Reg. 2939, 2940-41 (Jan. 17, 1994).

### ***C. Current Regulations***

Following Executive Order No. 12892, HUD promulgated new regulations in 1995 (that remain in place today with minor amendments) governing all of the major block grant programs of HUD's Office of Community Planning and Development. Specifically, HUD published a rule consolidating the requirements for the Community Housing Affordability Strategy (CHAS), the community development plan (required for the CDBG program), and the submission and reporting requirements for the four formula-based block grant programs (CDBG, HOME, ESG, and HOPWA) into a single plan – the Consolidated Plan.<sup>19</sup> Similarly, HUD has promulgated regulations to govern the AFFH obligations of PHAs.<sup>20</sup>

As part of the Consolidated Plan (ConPlan), grantees must certify that they will AFFH. As set forth above, this duty consists of three discrete obligations: (i) a careful analysis of all of the impediments to fair housing within one's jurisdiction, which is commonly referred to as an Analysis of Impediments to Fair Housing (AI); (ii) actions to overcome identified impediments; and (iii) maintenance of documentation and records concerning steps (i) and (ii).<sup>21</sup>

Under current regulations, a grantee is required to submit an annual certification that it has an AI and will AFFH, but is not required to submit the actual AI to HUD.<sup>22</sup>

### ***D. Planning Guide***

Following the publication of HUD's regulations in 1995, in 1996 HUD published a "Fair Housing Planning Guide," providing HUD grantees with comprehensive guidance on how to fulfill their duty to AFFH.<sup>23</sup> HUD makes clear that it "expects jurisdictions to take this Guide seriously and use it to meet their AFFH certification requirements."<sup>24</sup> For those jurisdictions that receive federal funds, the obligation to AFFH applies not just to HUD-funded programs, but "extends to all housing and housing-related activities in the grantee's

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<sup>19</sup> Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1878-1918 (Jan. 5, 1995); 24 C.F.R. § 91 (2012); *see also* HUD, FAIR HOUSING PLANNING GUIDE 1-4 (1996) [hereinafter HUD, FAIR HOUSING PLANNING GUIDE], *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

<sup>20</sup> *See e.g.*, 24 C.F.R. § 903.7(o).

<sup>21</sup> 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1); 24 C.F.R. §§ 570.487(b), 570.601(a)(2). Similarly, 24 C.F.R. § 903.7(o) requires PHAs to incorporate AFFH obligations in the PHA Administrative Plan, which includes, among other things, (i) identifying impediments to fair housing within its programs; (ii) addressing those impediments in a reasonable fashion in view of available resources; and (iii) maintenance of records reflecting steps (i) and (ii).

<sup>22</sup> *Id.*; The Opportunity Agenda, *Public Policy Brief: Reforming HUD's Regulations to Affirmatively Further Fair Housing* 5 (2010).

<sup>23</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19.

<sup>24</sup> *Id.* at 1-5.

jurisdictional area whether publicly or privately funded.”<sup>25</sup> That is, all of a recipient’s programs are required to conform to the AFFH obligation, and all of the housing and community development resources available to a recipient must be deployed to overcome fair housing impediments.

The purpose of the Guide is to supply grantees with information and resources to assist in performance of the three elements of the AFFH duty.<sup>26</sup> The Planning Guide provides that fulfillment of that duty requires a recipient to:

- analyze and eliminate housing discrimination in the jurisdiction;
- promote fair housing choice for all persons;
- provide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin;
- promote housing that is structurally accessible to, and usable by, all persons, particularly persons with disabilities; and
- foster compliance with the nondiscrimination provisions of the Fair Housing Act.<sup>27</sup>

To assist grantees in accomplishing these general goals, the Guide is an invaluable resource. In Chapter 2, the Guide provides sample analyses, sample solutions, examples of data, proposed preliminary steps to conducting an AI, models for successful completion of the AI, suggested tools for identifying impediments to fair housing, steps to develop and implement an effective action plan, suggested forms of documentation, and ultimately, a suggested format for the AI itself.<sup>28</sup> In Chapter 3, the Guide provides specific guidelines for State and State-Funded Jurisdictions<sup>29</sup> and in Chapter 4, for Entitlement Jurisdictions.<sup>30</sup> In

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<sup>25</sup> *Id.*

<sup>26</sup> 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1); 24 C.F.R. §§ 570.487(b), 570.601(a)(2); *see also* HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 1-4, 1-5.

<sup>27</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 1-3.

<sup>28</sup> *Id.* at 2-5 to 2-30.

<sup>29</sup> *Id.* ch. 3, at 3-1 to 3-50. Each State has the opportunity to participate in the State CDBG Program, which involves administering CDBG funds for non-entitlement areas, including cities with populations of less than 50,000 (except cities that are designated principal cities of Metropolitan Statistical Areas), and counties with populations of less than 200,000. Each non-entitlement area that receives funds through the State is a “State-Funded Jurisdiction.” Participating States do not administer funds directly to citizens or private organizations; all funds are distributed by the States to the State-Funded Jurisdictions which are responsible for carrying out the funded activities. However, the State is still responsible for ensuring that the State-Funded Jurisdictions comply with the AFFH mandate. Currently every State except Hawaii participates in the State CDBG Program. *See State Administered CDBG*, U.S. DEP’T OF HOUS. & URBAN DEV. (July 21, 2014), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs/stateadmin](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/stateadmin).

<sup>30</sup> *Id.* ch. 4, at 4-1 to 4-14. Grantees eligible as “entitlement jurisdictions” include 1) principal cities of Metropolitan Statistical Areas; 2) other metropolitan cities with populations of at least 50,000; and 3) qualified urban counties with populations of at least 200,000 (excluding the population of entitled cities). *See Community Development Block Grant Entitlement Communities*

Chapter 5, the Guide provides a detailed discussion of potential analyses concerning impediments to fair housing in the public sector, the private sector, and impediments that may concern both public and private actors.<sup>31</sup>

The Guide is a critical resource to ensure that a recipient is asking the right questions when it attempts to analyze impediments to fair housing. Rather than promoting a “one size fits all” approach to studying impediments, the Guide emphasizes that impediments to fair housing choice—and effective strategies to overcome them—will differ widely from one recipient to the next.<sup>32</sup> The Guide counsels recipients, especially those with limited staffing to commit to the project, to consider contracting with an outside group to conduct the analysis, provided the group has a demonstrated expertise in analyzing impediments to fair housing.<sup>33</sup>

In recent years, recipients that have failed to heed the advice and guidance set forth in the Planning Guide have exposed themselves to significant liability in the form of both HUD initiated complaints for failing to AFFH and, in some instances, in the form of federal prosecution for violation of the False Claims Act.<sup>34</sup>

### *E. Case Law*

Some recipients—either through ignorance or lack of political will—have failed and continue to fail in their obligation to AFFH. These failures manifest in all three parts of the duty: analysis, action, and documentation. Some recipients have failed to carefully analyze the impediments to fair housing, either by not drafting an AI at all, or drafting a self-serving analysis that, on its face, does not seriously address fair housing issues.<sup>35</sup> Other jurisdictions may have created an AI but have failed to take concrete steps to address or eliminate identified impediments. Finally, under either scenario, recipients have also failed to

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*Grants*, U.S. DEP’T OF HOUS. & URBAN DEV. (July 21, 2014), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs/entitlement](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement).

<sup>31</sup> *Id.* ch. 5, at 5-1 to 5-32.

<sup>32</sup> *Id.* at *i-ii* (“In the past, the Department has too often tried to prescribe national remedies for local situations. And too often, this has not worked because the communities were not involved in the decisionmaking process, and what started out as instruments of principle became rules of process that were to be minimized or even ignored.... The goal of devolution of responsibility in the area of fair housing means that communities will have the authority and the responsibility to decide the nature and extent of impediments to fair housing and decide what they believe can and should be done to address those impediments.”).

<sup>33</sup> *Id.* at 2-15 to 2-16.

<sup>34</sup> 31 U.S.C. §§ 3729-3733 (2012).

<sup>35</sup> *See e.g.*, U.S. Gov’t Accountability Office, GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans 14-15* (2010) [hereinafter GAO Report], *available at* <http://www.gao.gov/new> (commenting that some AIs submitted by grantees were only a few pages long, and noting specifically that one AI “contained only two sentences describing a fair housing impediment” and another did not identify any fair housing impediments).



maintain adequate documentation and records to demonstrate fulfillment of their obligations. For many years, these failures went unchecked. In the last five years, however, recipients are increasingly being held accountable.

In a ground-breaking case, *U.S. ex rel. Anti-Discrimination Center v. Westchester County*,<sup>36</sup> the Anti-Discrimination Center of Metro New York (ADC) filed suit against Westchester County under the False Claims Act to enforce the Westchester's obligation to AFFH. The ADC alleged that the County, which is one of the most segregated metropolitan areas in the country,<sup>37</sup> had falsely certified AFFH compliance over a six year period in order to receive \$52 million in CDBG, HOME, and other federal funds. The falsity arose out of the County's failure to comply with the obligations to identify and analyze race-based impediments, and to take appropriate actions to overcome them.<sup>38</sup>

In its ruling on Westchester's motion to dismiss (*Westchester I*), the district court rejected Westchester's argument that the Fair Housing Act does not require grantees to identify racial discrimination and segregation as impediments to fair housing, and that income can serve as "a better proxy for determining need than race when distributing housing funds."<sup>39</sup> The court held that "an interpretation of 'AFFH' that excludes consideration of race would be an absurd result" in light of the legislative purpose of the Fair Housing Act and the guidance provided by HUD in the Planning Guide.<sup>40</sup>

In a later decision on cross motions for summary judgment, (*Westchester II*), the court granted partial summary judgment for the ADC, finding that Westchester had made false certifications on seven annual AFFH certifications and on over a thousand implied certifications of compliance.<sup>41</sup> The court emphasized that "[t]he AFFH certification was not a mere boilerplate formality,

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<sup>36</sup> 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (denying motion to dismiss); 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (deciding cross motions for summary judgment).

<sup>37</sup> Schwemm, *Overcoming Structural Barriers*, *supra* note 11, at 154.

<sup>38</sup> *United States ex rel. Anti-Discrimination Center v. Westchester County*, RELMAN, DANE & COLFAX PLLC, <http://www.relmanlaw.com/civil-rights-litigation/cases/westchester.php> (last visited July 10, 2014); Complaint at 7-13, *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 CV 2860).

<sup>39</sup> *Westchester I*, 495 F. Supp. 2d at 389.

<sup>40</sup> *Id.* at 386-88 (noting that the Fair Housing Act was "enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing;" and highlighting sections of the HUD Guide which explain: (1) that the AFFH duty includes providing opportunities for individuals regardless of race, (2) that an AI under this duty involves an "assessment of conditions...affecting fair housing choices for all protected classes" (including race), and (3) that the suggested AI format includes "a housing profile describing "the degree of segregation and restricted housing by race....").

<sup>41</sup> *Westchester II*, 668 F. Supp. 2d at 562-65. The court specifically found that the "County's AIs during the false claims period utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race. This failure is only compounded by the County's failure to follow the [Fair Housing Planning Guide]." *Id.* at 563.

but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations....”<sup>42</sup>

Perhaps of particular note going forward, the *Westchester* court determined that the county failed to fulfill the first of its three duties: Westchester County failed to *analyze* the impediments to fair housing in its jurisdiction. “As a matter of logic, providing more affordable housing for a low-income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate *an analysis* of where the additional housing is placed.”<sup>43</sup> In other words, as a matter of law, the County failed to fulfill its obligations by ignoring race and racial segregation in crafting its AI.

Shortly after the *Westchester II* decision, the Department of Justice moved to intervene in the litigation and eventually settled with Westchester County for a historic \$62.5 million, and the County was required to do the following:

- Ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods, and affirmatively market them to people of color:
  - 660 units must be built in municipalities with an African-American population of less than 3% and Latino population of less than 7%, and
  - Additional integrative criteria at the census block group level;
- Return \$30 million to HUD:
  - \$21.6 million to fund integrative units, and
  - \$7.5 million to pay “relator’s share” for ferreting out the false claims;
- Supply an additional \$30 million for integrative units;
- Pay \$2.5 million in attorneys’ fees and costs; and
- Conduct a new AI and consider all fair housing impediments.<sup>44</sup>

In response to the *Westchester* settlement HUD Deputy Secretary Ron Sims said, “[t]his is consistent with the president’s desire to see a fully integrated society.... Until now, we tended to lay dormant. This is historic, because we are going to hold people’s feet to the fire.”<sup>45</sup> Following *Westchester*, HUD has ramped up its enforcement efforts concerning recipients’ AFFH compliance, and private parties have had some significant success in filing HUD administrative

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<sup>42</sup> *Id.* at 569.

<sup>43</sup> *Id.* at 564 (emphasis added).

<sup>44</sup> Memorandum of Law of the U.S. of Am. in Support of Its Application to Intervene, *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06–2860), 2009 WL 2899691; Stipulation & Order of Settlement & Dismissal, *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06–2860).

<sup>45</sup> *As reported by* Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. TIMES, Aug. 23, 2009, at WK3.

complaints and additional litigation under the False Claims Act, which provides for treble damages, civil penalties, and other substantial relief.

Over the past five years, HUD has dramatically increased its review of AIs. In the fiscal year 2010, HUD reviewed the AIs of “*more than 300 recipient jurisdictions.*”<sup>46</sup> A recent law review article by Robert Schwemm, the nation’s preeminent fair housing scholar, provides the most comprehensive discussion of post-*Westchester* enforcement by HUD, the Department of Justice, and private litigants.<sup>47</sup> Schwemm discusses recent enforcement actions in Texas, Louisiana, Illinois, Delaware, Wisconsin, and California,<sup>48</sup> noting that, as of April 2011, HUD had 14 privately initiated complaints concerning the duty to AFFH currently pending.<sup>49</sup>

In particular, the resolution of a recent HUD Complaint that was filed by the Texas Low Income Housing Information Service and Texas Appleseed against the state of Texas, underscores the enormous amounts of money potentially at stake when recipients fail to AFFH. In 2009, Texas Low Income Housing Information Service and Texas Appleseed expressed concerns about the State of Texas’s compliance with its planning and civil rights obligations under the Community Development Block Grant Program. As a result, HUD investigated and, ultimately withheld more than one billion dollars in federal funds, pending satisfactory compliance by the State of its civil rights obligation. The settlement required, among other things, that the State of Texas:

- conduct a new AI and document how it and its sub-grantees comply with the obligation to AFFH;
- shift an additional \$152 million toward housing needs of low- and moderate-income households;
- provide funding for the replacement of all public housing units in the City of Galveston and in other municipalities where units were destroyed by recent hurricanes;
- set aside \$100 million to rebuild subsidized housing in the Counties of Harris, Galveston and Orange;
- fund an \$18 million “Impacted Area Buyout” program to permit low- and moderate-income victims of the hurricanes to move out of areas of high minority and high poverty concentration, a “Title Clearance and Legal Assistance” program to resolve problems with “heir property” and to make those properties eligible for disaster assistance;

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<sup>46</sup> GAO Report, *supra* note 35, at 45-47 (publishing letter from John Trasnvina, Assistant Sec’y for Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. & Urban Dev., to Orice Williams, Fin. Mkts. & Cmty. Invs. Dir., Gov’t Accounting Office (Sept. 3, 2010) (emphasis in original)); *see also* Schwemm, *Overcoming Structural Barriers*, *supra* note 11 (discussing the same).

<sup>47</sup> *See generally* Schwemm, *Overcoming Structural Barriers*, *supra* note 11, at 166-69, nn.252-67.

<sup>48</sup> *Id.* at 167-68.

<sup>49</sup> *Id.* at 166 n.252.

- create an additional \$5 million fund for a program to assist tenants with portable rent subsidies who would like to move to higher opportunity neighborhoods.<sup>50</sup>

Another recent settlement between the Diamond State Land Trust and Sussex County, Delaware illustrates how the actions of a sub-grantee, with respect to a specific development, may also implicate the duty to AFFH. The complaint alleged that Sussex County violated the Fair Housing Act, Title VI of the Civil Rights Act, and the obligation to AFFH when it denied preliminary site plan review to a homeownership development designed for low- and moderate-income people employed in agricultural, retail and service industries. Under the terms of the consent decree, Sussex County is required to, among other things:

- reconsider the land use denial and pay Diamond State \$750,000 in damages and attorney's fees;
- appoint a fair housing compliance officer;
- take affirmative steps with respect to promotion of future affordable housing development; and
- provide periodic reports to the public and the Department of Justice.<sup>51</sup>

HUD retained jurisdiction over Diamond State's remaining claims (which were based on the County's receipt of federal funds) and on August 23, 2012, found that the County was in noncompliance with Title VI and its duty to AFFH. The County has agreed to enter into a Voluntary Compliance Agreement, under which it must also do the following:

- develop a new plan to address impediments to fair housing choice and adopt strategies to integrate affordable housing into all communities in the county.<sup>52</sup>

The groundswell of litigation over the duty to AFFH has placed all grantees on notice that HUD is watching AFFH certifications closely, and will not hesitate to reject AIs that do not comply with the regulations and the Guide.<sup>53</sup>

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<sup>50</sup> *Landmark Settlement of Texas' AFFH Obligations*, RELMAN, DANE & COLFAX PLLC, <http://www.relmanlaw.com/civil-rights-litigation/cases/westchester.ph> <http://www.relmanlaw.com/civil-rights-litigation/cases/Texas-AFFH-Conciliation-Agreement.php> (last visited July 14, 2014); Conciliation Agreement, *Texas Low Income Housing Information Service and Texas Appleseed v. Texas*, (Nos. 06-10-0410-8, 06-10-0410-9). The settlement was achieved through a Conciliation Agreement approved by HUD on May 25, 2010. The Agreement (and the State's submission of a new disaster recovery plan) paves the way for the release of \$1.7 billion in Community Development Block Grant funds specifically appropriated for hurricane recovery efforts.

<sup>51</sup> *Federal Court Consent Decree Clears Way for Delaware Affordable Housing Project*, RELMAN, DANE & COLFAX PLLC, <http://www.relmanlaw.com/civil-rights-litigation/cases/Diamond-State.php> (last visited July 21, 2014).

<sup>52</sup> *Id.*

<sup>53</sup> For example, HUD recently rejected the City of Houston's AI. See Letter from Christina Lewis, Houston FHEO Director, to James D. Noteware, Director of the City of Houston Housing and

Non-compliant grantees may incur, at any time, legal actions seeking damages, penalties, and attorneys' fees as a result of their noncompliance, jeopardizing millions of dollars of their federal funds.<sup>54</sup> HUD's current regulations speak in broad, general terms. Some have asserted that this regulatory regime and increased enforcement, warrant more detailed regulatory guidance, coupled with more hands-on review by HUD.

#### ***F. 2010 GAO Report***

In 2010, the U.S. Government Accountability Office (GAO) published a report on the abysmal state of grantee compliance with the duty to AFFH and HUD's general ineffectiveness at enforcing the mandate.<sup>55</sup> The results of the study published in the report were troubling and prompted HUD to redouble its efforts and propose a new regulatory regime. The GAO's report was prompted by a request from members of Congress, concerned about the effectiveness of HUD's current AFFH enforcement.<sup>56</sup> The recent wave of litigation, including the *Westchester* case, a 2009 HUD internal study, and other reports had called into question HUD's oversight and enforcement.<sup>57</sup> Furthermore, grantees committed to furthering fair housing testified to the challenges in doing so as a result of the limited guidance and clarity in HUD's regulations.<sup>58</sup> In response to this proliferation of litigation, studies, and testimony on the subject, the congressional requesters sought information on: (1) grantees' compliance with AFFH requirements; and (2) the primary factors explaining any findings of low-conformance.<sup>59</sup>

The GAO conducted a performance audit from October 2009 to September 2010 of a representative sampling of 473 CDBG and HOME grantees' AIs.<sup>60</sup> The GAO also reviewed HUD's policies, procedures, and guidance, the 2009 internal HUD study on AI compliance, annual reports submitted to HUD from grantees, public testimony and interviews with HUD officials, and documentation and data on enforcement activity.<sup>61</sup>

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Community Development Department (Nov. 30, 2011) (on file with author), *available at* <http://texashousers.net/2012/02/08/hud-rejects-city-of-houston-fair-housing-effort/>

<sup>54</sup> For example, Westchester County continues to face the threat of loss of funds because it remains non-compliant with its duty to AFFH. More than \$25 million of HUD funds have been withheld from the County since 2011, \$7 million of which has been lost permanently. See Elizabeth Ganga, *Westchester Loses 2014 Community Development Grants; Total Lost Tops \$25 Million*, THE JOURNAL NEWS (July 18, 2014), <http://www.lohud.com/story/news/local/westchester/2014/07/18/westchester-loses-2014-community-development-grants-total-lost-tops-25-million/12836177/>.

<sup>55</sup> GAO Report, *supra* note 35.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 3-4.

<sup>61</sup> *Id.* at 4.

The final GAO report concluded two things: (1) many grantees' AIs are outdated or otherwise out of conformance with HUD guidance and so serve a limited use as an effective fair housing planning tool; and (2) HUD's limited regulatory requirements, oversight, and enforcement approaches likely explain the problems with grantees' AIs.<sup>62</sup>

In arriving at the first conclusion, the GAO requested that certain grantees provide its most recent AI, with a 95% response rate, totaling 441 AIs.<sup>63</sup> The review concluded that an estimated 29% of all AIs were prepared in 2004 or earlier, including 11% dating from the 1990s.<sup>64</sup> Additionally, 25 grantees never submitted their AI, suggesting they may not have had one at all.<sup>65</sup> As for those AIs completed more recently, many "did not identify time frames for implementing the recommendations or contain the signatures of top elected officials as...suggested in HUD's guidance."<sup>66</sup> Timetables and top officials' signatures are necessary elements to establish accountability for implementation, and evaluate progress toward achieving the AI's stated goals.<sup>67</sup>

The GAO's second conclusion largely faulted HUD. First, HUD was faulted because its regulatory scheme lacked clear standards for updating or formatting AIs, and no requirement to submit AIs for review.<sup>68</sup> Second, HUD was faulted for what the GAO perceived to be a lack of enforcement and oversight, with limited staff and resources dedicated to the issue, and HUD officials rarely requesting grantees' AIs for review.<sup>69</sup>

To address the limitations identified by the report, the GAO recommended that HUD: (1) establish standards for grantees in updating and formatting their AIs; (2) require grantees to include time frames for implementation and signatures of responsible officials; and (3) require grantees to routinely submit their AIs to HUD for review.<sup>70</sup> To ensure that recipients are better able to identify impediments and fulfill the FHA's mandate to further fair housing, the GAO advised HUD to "expeditiously complete" its new AFFH regulations with these recommendations in mind.<sup>71</sup>

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<sup>62</sup> *Id.* at 9, 22.

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 9-13. This matched the findings of the 2009 HUD internal review which found "that many AIs were outdated or appeared to have been prepared in a cursory fashion and found that the department's oversight was limited." U.S. Dept. of Hous. & Urban Dev., Analysis of Impediments Study (2009).

<sup>65</sup> GAO Report, *supra* note 35, at 9, 14.

<sup>66</sup> *Id.* at 9, 19-21.

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.* at 22-24.

<sup>69</sup> *Id.* at 22, 25-26.

<sup>70</sup> *Id.* at 32-33.

<sup>71</sup> *Id.* at 32.

### III. The New Rule

On July 19, 2013, HUD published its new proposed regulations, entitled “Affirmatively Furthering Fair Housing,” referred to here as “the New Rule.”<sup>72</sup> The New Rule acknowledges criticism, by the GAO and others, that the current regulations have not been as effective as intended.<sup>73</sup> The New Rule proposes five key changes by: (i) replacing the AI with the Analysis of Fair Housing (AFH); (ii) providing nationally uniform data, rather than calling upon recipients to locate and obtain their own data; (iii) providing meaningful and focused direction regarding the purpose of the AFH; (iv) establishing a more direct link between the AFH and subsequent program planning products, either the ConPlan or the PHA plan; and (v) establishing a new HUD review procedure and requiring HUD approval of the AFH.<sup>74</sup>

As set forth more fully below, some critics have suggested that the New Rule does not go far enough, while others have suggested it reaches too far. This article concludes that a careful review of the salient case law interpreting Section 3608, recent enforcement actions, and HUD’s Fair Housing Planning Guide demonstrate that the rule grows directly out of those authorities. Program participants, which the New Rule defines as States and sub-grantees, Entitlement Jurisdictions, and PHAs, will not have any new obligations under the proposed regulation. In one sense, nothing has changed. The New Rule merely clarifies the legal obligations that already exist. Recipients have always had the duty to AFFH.

The New Rule addresses the dual-critique of the GAO by both: (i) clarifying expectations and (ii) establishing a comprehensive enforcement regime. As described by HUD, the New Rule serves only to “refine existing requirements” in an attempt to address the limitations identified by the GAO and ensure grantees understand how to fulfill their statutory obligation.<sup>75</sup> Again, much of the language and instruction of the New Rule originates from HUD’s 1996 Fair Housing Planning Guide, and so reflects pre-existing AFFH best practices.

#### A. Procedural Modifications

The New Rule attempts to refine and improve the current regulatory structure governing the AFFH mandate through a number of procedural changes. These changes are intended to clarify requirements, improve HUD oversight, and integrate fair housing with the consolidated planning processes.

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<sup>72</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

<sup>73</sup> *Id.* at 43,710, 43,713.

<sup>74</sup> *Id.* at 43,714.

<sup>75</sup> *Id.* at 43,710.

## 1. Program Participants

The New Rule remains the same as the current regulations regarding who is required to fulfill the AFFH mandate: it is clear that *only* entities that wish to receive federal funds are subject to the mandate. No recipient is required to take federal money through HUD's programs. But, if grantees choose to participate, their mandate to AFFH governs *all* of their funds and resources, not just those provided by HUD. In a sense, grantees are "in for a penny, in for a pound" and HUD, in analyzing the ability to AFFH, will not limit itself to the use of HUD funds, but will evaluate a recipient's entire bouquet of funds to determine what is (and what is not) required.

This understanding was first articulated in 1996 through HUD's Fair Housing Guide, which provided that "[a]lthough the grantee's AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee's jurisdictional area whether publicly or privately funded."<sup>76</sup> The New Rule embraces and implements this thinking: the strategies and actions "will be accomplished primarily by making investments with federal *and other resources*...."<sup>77</sup>

## 2. AFH Submission and Regional Collaboration

The most notable changes in the New Rule are that (1) it replaces the AI with an Assessment of Fair Housing ("AFH") and (2) participants are now required to submit their AFH for HUD approval; HUD will no longer rely solely on the grantees' certification that they have completed an AFH.<sup>78</sup> As described *supra* at pp. 8-12, review is currently the result of either individual or HUD initiated complaints. The New Rule intends to make this review an anticipated, non-adversarial part of regulatory compliance.

The AFH is subject to clearer content requirements than the AI in order to be a more effective planning tool. (See *infra* Graph 2). The New Rule requires grantees under the CDBG, ESG, HOME, or HOPWA grant programs to develop and submit an AFH to HUD.<sup>79</sup> It also requires PHAs receiving assistance under sections 8 or 9 of the U.S. Housing Act of 1937 to submit an AFH; however, PHAs may adopt the state's AFH rather than create their own.<sup>80</sup> Again, many of these requirements were foreshadowed by HUD's 1996 Planning Guide.<sup>81</sup>

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<sup>76</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 1-3.

<sup>77</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,729 (emphasis added).

<sup>78</sup> *Id.* at 43,729, 43,732-33.

<sup>79</sup> *Id.* at 43,730-31.

<sup>80</sup> *Id.* at 43,730-32.

<sup>81</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 2-7 (explaining that HUD does not require AIs to be submitted but "HUD could request submission of the AI in the event of a complaint or as part of routine monitoring.").



In developing these AFHs, the New Rule encourages regional collaboration because it acknowledges that fair housing issues often cross jurisdictional boundaries and effective solutions will require coordinated action.<sup>82</sup> The New Rule allows nearby program participants to collaborate to conduct and submit a single regional AFH.<sup>83</sup> The participants need not be contiguous and may cross state boundaries; however, regionally collaborating program participants are still obligated to analyze and address local fair housing issues and determinants within their own jurisdiction.<sup>84</sup> Once again, HUD's encouragement that recipients collaborate on these issues is nothing new.<sup>85</sup>

### 3. Data Collection and Analysis

The process of developing a quality AFH and establishing an effective fair housing plan requires reliable data and assessment. In order to facilitate this process for program participants, the New Rule establishes that HUD will provide all participants with nationally uniform local and regional data on the following key areas related to fair housing planning:

- 1) patterns of integration and segregation;
- 2) racially and ethnically concentrated areas of poverty;
- 3) disparities in access to community assets;
- 4) disproportionate housing needs;
- 5) numbers of individuals with disabilities and families with children; and
- 6) discrimination.<sup>86</sup>

HUD anticipates that provision of this data to program participants will reduce the cost and burden of complying with the AFFH mandate. Under the current regime, data collection practices vary widely from jurisdiction to jurisdiction, as participants are left to collect data themselves and HUD does not explicitly require the consideration of certain data sources. Participants will now only be required to supplement HUD's data with available local or regional data and information gained through community participation.<sup>87</sup>

To assist participants in analyzing their data, HUD has agreed to provide instructions and assessment tools explaining how to use the data to develop the AFH.<sup>88</sup> At this point, HUD has not identified the instruction or assessment tools,

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<sup>82</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,716.

<sup>83</sup> *Id.* at 43,732.

<sup>84</sup> *Id.* at 43,718-19, 43,732.

<sup>85</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 1-5, 2-11 to 2-12 (“the Department encourages multiple jurisdictions in metropolitan areas or regions to consult with one another and initiate metropolitan areawide or regionwide [fair housing planning].”).

<sup>86</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,731.

<sup>87</sup> *Id.* at 43,731.

<sup>88</sup> *Id.* at 43,730, 43,731.

although it has provided a prototype example on its website, in the form of an interactive mapping tool used to look for data on racially and ethnically-concentrated areas of poverty, among other things.<sup>89</sup>

#### 4. Community Participation

The New Rule deviates slightly from current regulations in its clarity on the requirement to include meaningful community participation throughout the development of the AFH. The New Rule states that community participation is an integral part of participants' AFHs, particularly participation by those historically excluded from housing decisions because of characteristics protected by the FHA.<sup>90</sup> Program participants must give the community meaningful opportunity to participate in the development of the AFH and its incorporation into subsequent planning programs.<sup>91</sup>

Specific requirements for ConPlan participants and PHAs are to match their respective program's statutory citizenship participation requirements, which may include consultations with other public and private agencies in various related areas.<sup>92</sup> The final AFH submitted must include a summary of the community participation that occurred.<sup>93</sup> Once again, this innovation draws heavily from HUD's 1996 Planning Guide, which encouraged recipients to think seriously about community participation, especially from disenfranchised communities.<sup>94</sup>

#### 5. Coordination between AFH and ConPlan or PHA Plan

The New Rule also makes more explicit the coordination that is required between the development of the AFH and the development of other planning processes. All program participants are already obligated to submit either a ConPlan or a PHA Plan as a condition of receiving their HUD grants, and the

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<sup>89</sup> The mapping tool and user instructions can be found at: [http://www.huduser.org/portal/affht\\_pt.html#dataTool-tab](http://www.huduser.org/portal/affht_pt.html#dataTool-tab).

<sup>90</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,711.

<sup>91</sup> *Id.* at 43,732.

<sup>92</sup> *Id.* at 43,732, 43,734.

<sup>93</sup> *Id.* at 43,731.

<sup>94</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at *i* ("...all affected people in the community must be at the table and participate in making those [fair housing] decisions. The community participation requirement will never be more important to the integrity, and ultimately the success, of the process."); *id.* at 2-12 ("The AI structure should provide for effective, ongoing relationships with *all* elements of the community with clear and continuous exchange of concerns, ideas, analysis, and evaluation of results."); *id.* at 2-13 (encouraging relationships with fair housing organizations, other governments, advocacy groups, housing providers, banks and other financial institutions, educational institutions, and the general public and grantees to encourage participation of diverse population groups and ensure accessibility to persons with disabilities).

HUD Planning Guide strongly encouraged the integration of the AI into the ConPlan.<sup>95</sup>

Under the New Rule, each participant must now submit and receive approval of an AFH as a precondition to approval of their ConPlan or PHA Plan.<sup>96</sup> Having already conducted and completed an AFH, participants are expected to incorporate the goals outlined in their AFH into their subsequent ConPlan or PHA Plan, and demonstrate how that plan will AFFH through strategies and actions consistent with the goals and elements identified in their AFH.<sup>97</sup>

## 6. Timeline for Submission and Review of AFH

Submission and review of a participant's AFH is subject to a very specific timeline so it is important that participants are aware of their deadlines and begin thinking about the development of their AFH early. Because the New Rule requires explicit coordination between a participant's AFH and their other required program plans (e.g., ConPlan or PHA Plan), the participant must be aware of the start of their program year and be prepared to submit their completed AFH at least 270 calendar days before that time.<sup>98</sup> If program participants would prefer to change their program year's start date in order to better coordinate the submission of their AFH and their program plan, they may request a change based on the procedures described in 24 C.F.R. § 91 (for ConPlans) and 24 C.F.R. § 903 (for PHA Plans).<sup>99</sup> Regionally coordinating participants may also make this request in order to coordinate the program start date for each participating region.<sup>100</sup>

After an AFH is submitted, HUD will review it for compliance with the requirements outlined in § 5.154(d) of the New Rule (see *infra* Graph 2). An AFH is considered accepted 60 days after HUD receives it if no notification is given to the contrary; however, "acceptance" means only that the required elements are in place and not that the participant has necessarily complied with its obligation to AFFH.<sup>101</sup> If an AFH is noncompliant, HUD will notify the participant and explain in writing the problems with the AFH and the actions to be taken to address those problems, which the participant then has 45 days to correct

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<sup>95</sup> See e.g., *id.* at 2-26 to 2-27 (noting that much of the information in the AI should also be in the Consolidated Plan so "[t]hose involved in FHP must be familiar with the Consolidated Plan to avoid duplicating research, data, problems, findings, and conclusions").

<sup>96</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,732.

<sup>97</sup> *Id.* at 43,738-39, 43,742.

<sup>98</sup> *Id.* at 43,732. Subsequent AFHs may be submitted at least 195 days before. *Id.*

<sup>99</sup> *Id.* at 43,733.

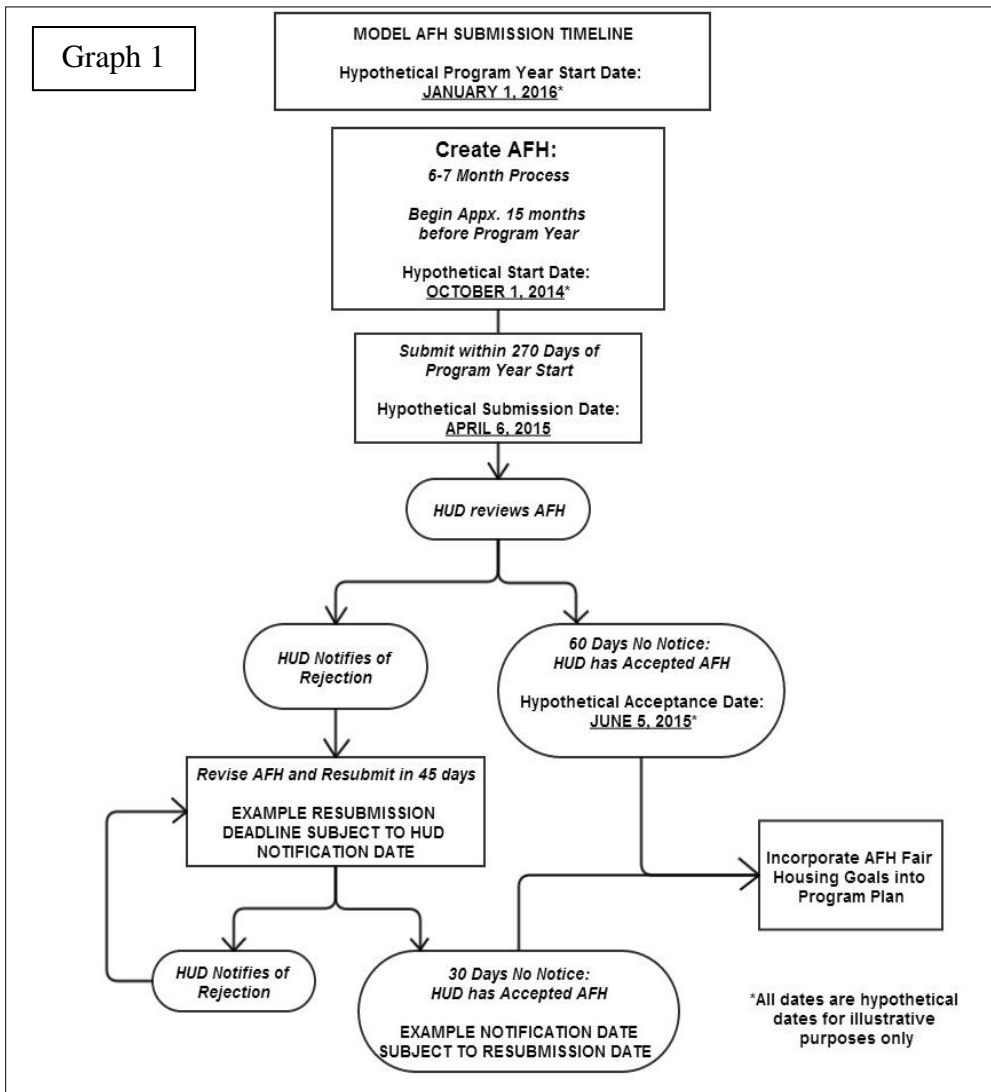
<sup>100</sup> *Id.* at 43,732.

<sup>101</sup> *Id.*

before resubmitting.<sup>102</sup> Failure to submit a timely AFH or a revised AFH may result in a loss of funds.<sup>103</sup>

After the first submission year, participants will be required to update and resubmit their AFH every five years, or whenever there is a material change in circumstances that affects the continued validity of the AFH (*e.g.*, a natural disaster, significant demographic changes, significant policy changes, or significant civil rights findings).<sup>104</sup>

The following graph demonstrates the timetables required by the New Rule for submission of a recipient’s first AFH, using a hypothetical January 1, 2016 program year start date. The authors emphasize that the dates are meant only for representative purposes.



<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 43,732-33.

<sup>104</sup> *Id.* at 43,733.

The graph suggests recipients will need approximately 6-7 months to complete the AFH, however this is only an estimate and recipients should consider their individual circumstances in determining how long they are likely to need. Furthermore, recipients who are collaborating regionally to submit one AFH will likely need additional time to complete the AFH and should plan accordingly. Additionally, the graph indicates that a recipient will have a continuous opportunity to revise its AFH upon notice from HUD of its rejection. However, the New Rule is not explicitly clear about how many times a recipient will have the opportunity to revise its AFH if HUD continually finds it to be incomplete or non-compliant. Recipients should thus be aware that there may be a limited number of opportunities to revise their AFH before HUD takes punitive action.

***B. Substantive Requirements of the AFH***

Along with the more clearly outlined procedural requirements, the New Rule is much more specific about the content of the AFH, as compared to the AI which had no formal content standards. The New Rule begins by providing a definition of “affirmatively furthering fair housing,” which it defines as:

[T]aking 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. 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.<sup>105</sup>

The New Rule then explains in § 5.154(d) the specific content that must be included in a participant’s AFH. Ultimately, the AFH will have four main parts, outlined in the graph below.<sup>106</sup>

<b>Graph 2</b>		<b>AFH Required Content</b>	
<b>Part 1: The Executive Summary</b>		<ul style="list-style-type: none"> <li>• Overview of fair housing issues</li> <li>• Assessment of compliance with existing fair housing laws, regulations, and guidance</li> <li>• Assessment of fair housing enforcement and outreach capacity</li> </ul>	
<b>Part 2:</b>		<ul style="list-style-type: none"> <li>• Concentrate analysis on the four main fair</li> </ul>	

<sup>105</sup> *Id.* at 43,729.

<sup>106</sup> *Id.* at 43,731.

<b>The Analysis</b>	housing goals: <ol style="list-style-type: none"> <li>1) Identify integration and segregation patterns</li> <li>2) Identify racially or ethnically concentrated areas of poverty</li> <li>3) Identify significant disparities in access to community assets for all protected classes</li> <li>4) Identify disparities in access to housing for all protected classes</li> </ol>
<b>Part 3: Fair Housing Priorities and Goals</b>	<ul style="list-style-type: none"> <li>• List fair housing issues identified through data analysis and assessment</li> <li>• Prioritize fair housing issues and justify the chosen prioritization</li> <li>• Identify most significant fair housing determinants related to priority issues</li> <li>• Set goals for mitigating or addressing those determinants</li> </ul>
<b>Part 4: Community Participation Summary</b>	<ul style="list-style-type: none"> <li>• Concise summary of community participation process, public comments, and efforts made to broaden community participation</li> <li>• A summary of any comments or views not accepted with explanation of why not accepted</li> </ul>

Once again, the New Rule implements in regulatory form what HUD has been strongly encouraging grant recipients to do for almost 20 years. The Planning Guide recommends similar components for the AI.<sup>107</sup>

#### IV. Comments on the New Rule

The New Rule elicited a number of comments from fair housing advocates, HUD grantees, and the general public alike. Over one thousand public comments were submitted to HUD addressing the New Rule, representing a diverse set of opinions.<sup>108</sup> The responses are too numerous and varied to summarize fully in this article. However, a number of suggestions were

<sup>107</sup> HUD, FAIR HOUSING PLANNING GUIDE, *supra* note 19, at 2-26 to 2-31 (recommending that jurisdictions include: (1) an introduction and executive summary of the analysis; (2) jurisdictional background data; (3) evaluation of jurisdiction’s current fair housing legal status; (4) identification of impediments to fair housing choice; (5) assessment of current public and private fair housing programs and activities in the jurisdiction; and (6) conclusions and recommendations). Although the HUD Guide does not explicitly suggest including community participation information in the AI itself, the HUD Guide does recommend that grantees keep “[s]ummaries or transcripts of all public meetings, hearings, and citizen comments/input” as part of their records. *Id.* at 3-4, 4-4.

<sup>108</sup> See [http://www.regulations.gov/#!documentDetail;D=HUD\\_FRDOC\\_0001-3408](http://www.regulations.gov/#!documentDetail;D=HUD_FRDOC_0001-3408).

repeatedly highlighted and are thus worth discussing as they are the most likely to be addressed in HUD’s final rule.

### ***A. Recipient Commentary***

Many HUD grantees and organizations involved in the disbursement of HUD funds submitted comments on the New Rule. Many of these commentaries incorporate similar praise and suggestions as those identified in the *Advocate Commentary* section *infra*. However, additional concerns were frequently noted by the HUD funding recipient community.

1. “One Size Fits All” Concerns. Many HUD grantees and associated individuals expressed concern that the New Rule wrongly suggests the same standards for all grantees and participants. They comment that the New Rule is best suited for urban municipalities but is inappropriate for other funding recipients, particularly those covering larger, diverse states or primarily rural areas. The commentaries that focus on state-wide issues express concerns over ability to comply with citizenship participation requirements, inapplicability of HUD’s data for statewide use, and the limitation of states to affect local decision-making.<sup>109</sup> Rural concerns similarly express doubt most commonly over the reliability of data for rural areas, and limited capacity and resources to meet all requirements.<sup>110</sup>
2. Costs. Many of those responsible for fulfilling the requirements of the New Rule express concern over the potential costs, particularly because HUD acknowledges in the rule that, due to the diversity of participants and their communities, “HUD cannot quantify the benefits and costs of policies influenced by the rule.”<sup>111</sup> Many recipients, particularly smaller grantees and PHAs, request flexibility in complying with the New Rule in light of available funds and resources.<sup>112</sup>
3. Clear Expectations and Deference to Participant. Many recipients express concerns over the lack of specificity in the New Rule delineating

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<sup>109</sup> See e.g., Comment Submitted by Minnesota Housing Finance Agency; Comment Submitted by Illinois Housing Development Authority; Comment Submitted by Texas Department of Housing and Community Affairs; Comment Submitted by Council of State Community Development Agencies; Comment Submitted by Pennsylvania Department of Community & Economic Development.

<sup>110</sup> See e.g., Comment Submitted by Minnesota Housing Partnership; Comment Submitted by National Rural Housing Coalition; Comment Submitted by Housing Assistance Council; Comment Submitted by Kentucky Housing Corporation; Comment Submitted by Council of State Community Development Agencies.

<sup>111</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43,712.

<sup>112</sup> See e.g., Comment Submitted by Illinois Housing Development Authority; Comment Submitted by Westchester County; Comment Submitted by Janis Hendrix of San Marcos, Texas (identical comment submitted by multiple other small jurisdictions); Comment Submitted by Pennsylvania Department of Community & Economic Development.

certain requirements, while also expressing the desire to retain flexibility and deference to their decisions. Specifically, recipients request clearer guidance on the criteria HUD will use for evaluating an AFH, clearer definitions on some key terms in the rule, guidance on the level and breadth of community participation and consultation required, additional detail on timelines and record keeping, and clarity on repercussions associated with failure to adequately construct on AFH. However, at the same time that these recipients request greater clarity on HUD's expectations, they also emphasize that HUD must be flexible in each participant's ability to meet different requirements and give deference to their individual decisions on goals and prioritization.<sup>113</sup>

4. Technical Assistance. Recipients request adequate technical assistance from HUD in the form of on-site training, virtual training and webinars, templates for all required components of the AFH, and jurisdiction-specific guidance for the different needs and processes of diverse recipients.<sup>114</sup>
5. Natural Disaster Clarity. Many recipients also address the AFFH requirements related to natural disasters and request more guidance on what is expected, as well as flexibility from HUD in its expectations that recipients can meet all requirements during emergency situations.<sup>115</sup>

These generalized comments represent some of the more common issues identified by recipients, but they are only a small sampling of the numerous and diverse comments submitted. Others include concerns over the AFH timeline as it relates to other planning programs; redundancy between the AFH and other plans such as the ConPlan; more clarity on the expectations of PHAs; concerns over the reliability of the intended data; and the measures and indices to be used, to name a few.

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<sup>113</sup> See e.g., Comment Submitted by Illinois Housing Development Authority; Comment Submitted by Minnesota Housing Finance Agency; Comment Submitted by Council of State Community Development Agencies; Comment Submitted by Pennsylvania Department of Community & Economic Development; Comment Submitted by High-Cost Cities Housing Forum; Comment Submitted by the National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA).

<sup>114</sup> See e.g., Comment Submitted by Illinois Housing Development Authority; Comment Submitted by Council of State Community Development Agencies; Comment Submitted by the National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA).

<sup>115</sup> See e.g., Comment Submitted by Illinois Housing Development Authority; Comment Submitted by Pennsylvania Department of Community & Economic Development; Comment Submitted by Westchester County, New York; Comment Submitted by the National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA).



## ***B. Advocate Commentary***

A number of fair housing and civil rights advocates and non-profit organizations submitted comments to HUD regarding the New Rule. Although the comments from this group are varied in substance and focus, they almost unanimously begin by affirming HUD for issuing this New Rule which acknowledges the goals of the Fair Housing Act and takes an “important step toward achieving Congress’ vision of the Fair Housing Act as a means to create equal opportunity in our country.”<sup>116</sup>

These groups generally commend HUD on a number of provisions in the New Rule, including: its clearer definition of AFFH; HUD’s provision of data; the requirements that participants submit their AFH for review and update it at specific times, consult with fair housing and other relevant organizations, and directly link their AFH to other planning processes; the requirement that participants explain how they will use all of their housing and community development resources – not just their HUD funding – in their AFH; and the call for increased public participation.<sup>117</sup>

Along with this praise, advocates also offer a number of suggestions for how to improve the New Rule both to create greater clarity for participants and to further foster the goals of AFFH. Some of the most frequent comments and suggestions include the following:

1. Regulatory Standard. Advocates assert that HUD should maintain a higher regulatory standard for AFFH compliance by requiring grantees to do more than just “mitigate or address” determinants of fair housing issues but rather take action to actually overcome them.<sup>118</sup> Furthermore, grantees should not be allowed to limit their AFH to concern only a few “priority issues” or set just “one or more” goals for addressing those issues,<sup>119</sup> but rather should be required to set goals addressing all of the fair housing impediments identified.
2. Performance Standard. Advocates insist HUD should require that recipients include in the AFH specific benchmarks, timetables, milestones, or other measurable methods of demonstrating progress toward their goals. HUD should also require annual reports from recipients detailing their progress in achieving these goals, and specify the standards it will use to determine whether recipients are making

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<sup>116</sup> See e.g., Comment Submitted by NFHA; Comment Submitted by Fair Housing Marin; Comment Submitted by NAACP; Comment Submitted by ERASE Racism, Inc.; Comment Submitted by Connecticut Fair Housing Center.

<sup>117</sup> *Id.*

<sup>118</sup> Compare Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710, § 5.154(d)(4), at 43,731 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903), with 24 C.F.R. § 91.225(a)(1).

<sup>119</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. §5.154(d)(4), at 43,731.

sufficient progress. Many advocates also suggest annual audits of randomly selected recipients to ensure compliance and monitor progress.

3. Meaningful Review. In light of HUD’s limited resources and staff, many advocates contend that the New Rule should allow a longer period for HUD to review submitted AFHs – common suggestions are 90 or 120 days – and HUD should also consider staggering AFH submission dates for different participants and grantees in order to ensure HUD has the capacity to adequately review each AFH as submitted.
4. Community Participation. Advocates support HUD’s increased focus on public participation throughout the AFH process, but believe more should be done to make participation truly effective. Specifically, they suggest that HUD clarify the public participation requirements and make clear the minimum that participants must do, which should include making draft AFHs and the final AFH available in a timely manner on an accessible (sec. 508-compliant) website, and providing translations of all AFH-related documents to appropriate languages for their community. HUD should also amend the rule to allow an appeal process for the public to challenge acceptance of an AFH.
5. Clarify the Requirement to *both* Invest in Neighborhood Revitalization and Enhance Mobility and Access to Existing Community Assets. Many advocates (and recipients) have noted that the current language of the New Rule’s statement of purpose suggests a false choice by saying that participants may do one *or* the other, so the word “or” should be changed to “and,” in order to avoid confusion or a directive to divest from neighborhoods of concentrated poverty.<sup>120</sup>
6. LGBT-Inclusive and Disability Information. Multiple advocate comments have noted that the regulation does not require participants to consider the housing needs faced by LGBT individuals, but it should be amended to include them as a protected class based on HUD’s March, 2012 regulations prohibiting discrimination against LGBT individuals in HUD-funded housing.<sup>121</sup> Advocates have also noted that the New Rule doesn’t provide adequate clarity on protection for disabled individuals and should be amended to make protection of disabled individuals more explicit.<sup>122</sup>

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<sup>120</sup> The New Rule in §5.150 says “A program participant’s strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) **or** promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals.” *Id.* at 43,729 (emphasis added). Many suggest the bolded “or” be changed to an “and.”

<sup>121</sup> See e.g., Comment Submitted by the Housing Center.

<sup>122</sup> See e.g., Comment Submitted by Anne-Marie Mokritsky-Martin, Fair Housing Advocate.

7. Strengthen Regional Collaboration Provisions. Advocates (and many recipients) acknowledge the usefulness of regional collaboration as “segregation does not stop at a community’s borders,” but encourage HUD to provide financial or non-financial incentives for participants engaging in regional collaboration as it may be a difficult process that participants are reluctant to take on otherwise.<sup>123</sup>
8. Data, Geospatial Tool, and Assessment Tools. Many commentaries have weighed in on the usefulness of HUD’s proposed data and assessment tools, and the general response is that HUD should make these tools available to the public for comment before the rule is finalized.

The above represents the most common issues identified by the fair housing and civil rights community, although there were certainly many more recommendations and suggestions made beyond this list.

It is hard to predict at this point what changes HUD will make to the final rule based on all of the comments it has received. However, those listed in the two sections above represent some of the most common suggestions that may ultimately be incorporated into the final rule.

## **V. Conclusion**

Grant recipients and sub-recipients are faced with increasing enforcement and a shifting regulatory framework. A careful, compliance-based approach which views affordable housing policy through the AFFH prism is required. Recipients that have traditionally rubberstamped their actions with the label AFFH must reorient; it is no longer an afterthought. Those that fail to adapt, or worse still, refuse to adapt, will continue to incur significant liability.

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<sup>123</sup> See e.g., Comment Submitted by NAACP.