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### Agencies “Shall Cooperate”: A Blueprint for Affirmatively Furthering Fair Housing

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# AGENCIES “SHALL COOPERATE”: A BLUEPRINT FOR AFFIRMATIVELY FURTHERING FAIR HOUSING

HEATHER R. ABRAHAM\*

*Abstract: Every federal agency perpetuates housing segregation. As if on autopilot, agencies routinely reinforce segregation unless they take intentional steps to counteract it. Building on my prior work on the Fair Housing Act’s statutory duty to “affirmatively further fair housing” (“AFFH”), this Article examines an agency’s obligation to reduce housing segregation in how it regulates, spends, and administers its programs. Addressing a gap in existing fair housing scholarship, this Article considers the overlooked statutory command that all federal agencies “shall cooperate” with the U.S. Department of Housing and Urban Development (“HUD”) to reduce housing segregation. In light of HUD’s newly proposed AFFH regulation, this Article examines what agencies must do to fulfill their statutory duty and what they can learn from HUD’s proposed approach. It also considers what legal mechanisms HUD and private actors may have to incentivize or compel other agencies to act. It concludes by offering a blueprint for how the executive branch can better coordinate AFFH enforcement and how agencies can reduce their segregative footprint.*

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## I. INTRODUCTION

When Congress passed the Fair Housing Act in 1968, it

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declared that “[a]ll executive departments and agencies” “*shall administer*” their housing programs “in a manner affirmatively to further [fair housing]” and “*shall cooperate*” with the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) “to further such purposes.”<sup>1</sup> Taken together, these obligations are commonly referred to as the duty to “affirmatively further fair housing” (“AFFH”). The judicial consensus is that the statutory mandate requires every agency to take programmatic steps designed to overcome persistent housing segregation,<sup>2</sup> or, put another way, an agency must take affirmative steps to replace segregation with “truly integrated and balanced living patterns.”<sup>3</sup> The mandate extends: (1) to all housing and community development programs operated or regulated by any federal agency, not just HUD, and (2) to the programs and activities of states, municipalities, and public housing authorities that receive federal funding (hereinafter “grantees”). Altogether, the mandate covers thousands of housing and community development initiatives across the country.<sup>4</sup>

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1. 42 U.S.C. § 3608(d) (2021) (emphasis added). The Fair Housing Act contains two related provisions, collectively known as the AFFH mandate. The first subsection reads: “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* [fair housing] and *shall cooperate* with [HUD] to further such purposes.” *Id.* (emphasis added). In virtually identical language, a subsequent subsection directs HUD to “administer programs and activities relating to housing and urban development in a manner *affirmatively to further* [fair housing].” *Id.* § 3608(e)(5) (emphasis added). In addition to federal agencies, federal grantees, including states, municipalities, and public housing authorities, may also be liable for failure to comply with their AFFH duties. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 21:5 (2023) (discussing legal theories and grantee certification).

2. See, e.g., Final Rule, Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47902 & nn.42–43 (Aug. 7, 2020) (previously codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (describing the “judicial consensus that AFFH requires more than simply not discriminating. Grantees may not be passive. They must actually promote fair housing for example by fighting overt discrimination.”); see also *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 840 (N.D. Ohio 1989) (describing the Sixth Circuit’s instructions on remand as holding, “at a minimum, [that an agency] may not expend federal funds in a manner that promotes or fails to deter discrimination” and may not fail to act when it learns that a grantee used federal funds in such a manner).

3. See, e.g., *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (citing legislative history). The Supreme Court has also acknowledged the reduction of segregation as a primary policy goal of the Act. See *Trafficante v. Metro. Life. Ins. Co.*, 409 U.S. 205, 211 (1972). See also Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 IOWA L. REV. 1963, 1971–88 (2022) [hereinafter *Segregation Autopilot*] (providing a comprehensive discussion of AFFH case law).

4. In addition to federal housing programs, the AFFH duty extends to over 1,200 state and local jurisdictions administering housing-related programs. See,

If enforced, the long-overlooked AFFH mandate would be the government's most promising legal tool to counteract housing segregation.<sup>5</sup> Regrettably, however, the federal government has not enforced it. For decades, the federal government has ignored, side-stepped, or “ghosted” its AFFH obligations.<sup>6</sup> It was not until 2015—more than four decades after Congress enshrined the AFFH mandate into law—that HUD promulgated the first regulation defining what it means to “affirmatively further fair housing.”<sup>7</sup> The Obama-era rule required HUD grantees to produce fair housing plans that identified the key barriers to housing choice and key contributing factors to segregation.<sup>8</sup> The new rule was momentous but short-lived. The Trump Administration suspended the rule, replacing it with a watered-down version that shifted the focus away from the government's legacy of racial discrimination.<sup>9</sup>

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*e.g.*, Press Release, Dep't of Hous. & Urban Dev., HUD Awards \$5.6 Billion in Annual Grants for Affordable Housing, Community Development, and Homeless Assistance (Feb. 27, 2023), available at [www.hud.gov/press/press\\_releases\\_media\\_advisories/hud\\_no\\_23\\_045](http://www.hud.gov/press/press_releases_media_advisories/hud_no_23_045) [perma.cc/GDL8-J447] (announcing awards to over 1,200 jurisdictions). *See also Segregation Autopilot*, *supra* note 3, at 1971–88 (providing a comprehensive discussion of AFFH case law).

5. *See, e.g., Segregation Autopilot*, *supra* note 3, at 1968 (“Unleashing the AFFH mandate's potential has profound real-world implications. Even modest reductions in segregation can meaningfully improve access to opportunity and quality of life for communities of color.”) (citing RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION 11 (Richard H. Sander et al. eds., 2018)). Moreover, a federal AFFH regulatory schema would be a model for states to enact similar initiatives to reduce segregation through state-funded programs, as California has done through its AFFH-related initiatives. *See, e.g., Assem. B. 686, 2017-2018 Leg., Reg. Sess. (Cal. 2018)* (establishing a duty to affirmatively further fair housing under state law).

6. *See* Heather R. Abraham, “Don't Blame Stokely Carmichael”: *The Need for Cabinet-Level Fair Housing Leadership*, 29 ABA J. OF AFF. HOUS. & COMM. DEV. L. 555, 561 (2021) [hereinafter *Don't Blame Stokely Carmichael*] (detailing the government's lack of enforcement).

7. *See* Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015) (previously codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

8. *See generally id.*

9. In 2020, the Trump Administration promulgated a weak replacement rule that elevated local control above civil rights. *See* Final Rule, Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899. While it did not—and legally could not—remove the mandate from the Fair Housing Act, HUD reinterpreted the mandate to allow “any action . . . rationally related to promoting fair housing” to satisfy the mandate's requirements. *See id.* at 47904; *see also* Ed Gramlich, *Affirmatively Furthering Fair Housing (AFFH), Part 1: Trump Administration Eliminates AFFH Rule*, 2021 ADVOCATES GUIDE 7-14, 7-14 to 7-16 (2021), [nlihc.org/sites/default/files/AG-2021/07-04\\_AFFH-Part-1.pdf](http://nlihc.org/sites/default/files/AG-2021/07-04_AFFH-Part-1.pdf) [perma.cc/T7RN-ARM6] (describing how HUD reinterpreted the mandate); *Segregation Autopilot*, *supra* note 3, at 1968 & n.21 (detailing the Trump-era rule); Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL

During the short time the AFFH rule was in effect (2015–2018), HUD received forty-nine fair housing plans representing 103 municipalities and public housing agencies (of the over 1200 total jurisdictions).<sup>10</sup> Initial analysis suggests that the AFFH rule was effective at producing better fair housing plans, although it remains unclear whether these plans will result in a measurable reduction in segregation.<sup>11</sup> In 2021, when the White House again changed hands, the Biden Administration revoked the Trump-era rule.<sup>12</sup> In early 2023, it released a new proposed regulation modeled on the Obama-era rule.<sup>13</sup>

Despite the political turbulence, the statutory mandate remains intact. Every executive agency must administer its housing and urban development programs in a manner that reduces housing segregation. Empirically, nearly all agencies administer or regulate housing-related activities, including the Department of Defense and Internal Revenue Service.<sup>14</sup> Accordingly, virtually every agency has a legal obligation to affirmatively further fair housing.

Building on my scholarship on how agencies perpetuate

FAIR HOUSING ACT 189, 190–91 (Gregory D. Squires ed., 2018) (describing HUD’s “early retreat” from its AFFH duty); Raphael W. Bostic et al., *Fair Housing From the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, in FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS 74, 77–85 (Justin P. Steil et al. eds., 2021).

10. Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, in 29 HOUSING POLICY DEBATE 736, 741 (2019) (citing Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683, 684 (Jan. 5, 2018)).

11. *Id.* at 742–49. This analysis suggests that the Obama-era AFFH regulatory scheme was stronger than the prior Analysis of Impediments process in that (1) HUD had engaged in “a careful and thorough review” of the plans, (2) HUD’s nonacceptance letters were detailed and constructive and the rule’s procedural process gave jurisdictions time to remedy defects, and (3) jurisdictions benefitted from the more explicit guidance under the 2015 rule than previous regulations, which led to better plans. *Id.*; see also Nicholas F. Kelly et al., *The Promise Fulfilled? Taking Stock of Assessments of Fair Housing*, in FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS 93, 93–121 (Justin P. Steil et al. eds., 2021) (analyzing the plan submissions and detailing case studies).

12. See Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,779 (June 10, 2021) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (restoring several definitions from the 2015 rule but also stating that HUD would promulgate a separate Notice of Proposed Rulemaking regarding a grantee’s specific AFFH obligations).

13. See Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516 (Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91–93, 570, 574, 576, 903, 983).

14. See *Segregation Autopilot*, *supra* note 3, at 1996–2000, 2011–14 (discussing housing programs administered by the Department of Defense and Internal Revenue Services).

segregation, this Article takes stock of where we stand today. It asks what agencies can do to reduce their segregative effect, particularly in light of HUD's proposed rule. It considers each agency's obligation, and what tools HUD has at its disposal to nudge, prod, or even compel agencies to take actions that affirmatively further fair housing.

The government is no stranger to housing segregation. It has had a heavy hand in producing the segregated housing landscape of today. As told by HUD, for much of the 19th and 20th centuries, the government, with private developers, and mortgage lenders, played an active role in creating segregated living patterns and related housing inequities.

“[It] used the power of the military to remove Native Americans from their homelands, restricted federally insured mortgages on the basis of race and used ‘slum clearance’ and ‘urban renewal’ programs to demolish neighborhoods for infrastructure projects that largely benefitted white Americans at a significant cost to and perpetuated the segregation of Black communities.”<sup>15</sup>

Moreover, the government—aided by private actors like realtors and developers—redlined neighborhoods, enforced racially restrictive covenants, and both established and promoted racially discriminatory appraisal criteria that systematically devalued neighborhoods of color.<sup>16</sup>

This article proceeds in three parts. Part II describes the current legal landscape.<sup>17</sup> It details the scope of the AFFH mandate, which applies to all federal agencies and state and local grantees that accept federal funds, and highlights the seminal appellate case law interpreting the statutory language. It also describes recent developments in AFFH law, namely HUD's current efforts to reinstate an AFFH regulation. A new contribution to the literature, it looks at the AFFH mandate as encompassing two interrelated duties: (1) an agency's duty to affirmatively further fair housing in how it spends, administers, and regulates housing and community development programs, and (2) an agency's duty to “cooperate with

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15. *Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEPT OF HOUS. AND URB. DEV., [www.hud.gov/AFFH](http://www.hud.gov/AFFH) [perma.cc/SN34-GVT4] (last visited Nov. 24, 2023) (describing the historical context in which the Fair Housing Act was passed and how the AFFH mandate responded to it); see also Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. 1, 5-9 (2021) [hereinafter *Fair Housing's Third Act*] (describing the government policies that produced, contributed to, or otherwise perpetuated today's segregated landscape).

16. See *Fair Housing's Third Act*, *supra* note 15, at 5-9; Heather Abraham, *Appraisal Discrimination: Five Lessons for Litigators*, 76 SMU L. REV. 205, 215-17 (2023) [hereinafter *Appraisal Discrimination*] (describing how the government developed and promoted racist appraisal criteria that undervalued homes in neighborhoods of color and integrated neighborhoods).

17. See *infra* Part II.

HUD” in how it advances fair housing. This long-overlooked second duty takes on new meaning as HUD finalizes its proposed regulation.

Part III builds on this framework by asking what legal mechanisms HUD may have to incentivize or compel other agencies to affirmatively further fair housing.<sup>18</sup> In order of escalation, these mechanisms include: soft-power incentives like resource-sharing or joint programming, Memoranda of Understanding (“MOUs”) and similar interagency guidance, and enforcement actions. It also considers a second category—the tools available to private actors, like fair housing centers and civil rights attorneys, to compel federal agencies to act.

Finally, Part IV presents a blueprint for tackling housing segregation from within the government.<sup>19</sup> It begins with the steps the executive branch can take to better coordinate AFFH enforcement. It then describes how agencies can correct course, disengaging the “segregation autopilot” setting through targeted programmatic actions in how agencies spend funds, administer their programs, and regulate nongovernmental entities.<sup>20</sup> The blueprint builds on past efforts to implement the AFFH duty through executive orders, then offers improvements based on the Equity Action Plans agencies recently produced in response to a Biden executive order.

## II. AN AGENCY’S TWIN AFFH DUTIES

The Fair Housing Act is best known as the federal law that prohibits housing discrimination based on race and other protected classes. However, it has a second, lesser known objective—reducing segregation—which is embodied in the duty to affirmatively further fair housing.<sup>21</sup> The AFFH mandate is broad. It extends to every federal housing or development program. Moreover, it extends to all state and local grantees and public housing authorities that receive federal funding. The statutory text provides:

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 [fair housing,] and *shall cooperate* with [HUD] to further such

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18. *See infra* Part III.

19. *See infra* Part IV.

20. *See generally Segregation Autopilot, supra* note 3 (describing the “segregation autopilot” phenomenon in how agencies spend funds, administer programs, and regulate third-party entities).

21. For a review of the legislative history, see SCHWEMM, *supra* note 1, at § 21:1. The Supreme Court has acknowledged reducing segregation as a primary policy goal of the Fair Housing Act. *See Trafficante*, 409 U.S. at 211 (citing legislative history).

purposes.<sup>22</sup>

The mandate's plain language extends beyond HUD to "all" departments and agencies administering or regulating housing-related programs, which encompasses virtually all agencies.<sup>23</sup>

The statute's legislative history reinforces its breadth. As originally introduced, "the Act would have established the Secretary of Housing and Urban Development as the sole authority for enforcing the Act," but the "proposed single-agency approach was severely criticized in both houses of Congress and was a principal point of objection during the filibuster on the bill."<sup>24</sup> "As a result, the bill was amended in the course of Senate debate to diffuse administrative authority to the other departments and agencies."<sup>25</sup> It is also noteworthy that the only time Congress has amended the AFFH mandate was to clarify its breadth by inserting a parenthetical into the statutory text stating that the duty to affirmatively further fair housing applies to "any Federal agency having regulatory or supervisory authority over financial institutions."<sup>26</sup>

Federal agencies (as distinguished from state and local grantees) have two interrelated AFFH duties: (1) As they "administer" their programs and regulate entities under their legal authority, they must take programmatic steps designed to reduce segregation, and (2) they must "cooperate" with HUD in an interagency effort to reduce segregation. This section analyzes these duties, particularly in light of HUD's forthcoming AFFH regulation.

### *A. Duty One: "Shall Administer"*

An agency's first duty is to reduce its segregative effect through administration of its programs and activities. To date, legal

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22. 42 U.S.C. § 3608(d) (emphasis added). In near-identical language, the next subsection directs HUD to "administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing]." *Id.* at § 3608(e)(5).

23. See generally Memorandum on Fair Housing, 30 Weekly Comp. Pres. Doc. 114-16 (Jan. 17, 1994) (describing the duty of every agency to coordinate with HUD). See also Exec. Order No. 12,892, reprinted in 59 Fed. Reg. 2939 (Jan. 17, 1994) (enumerating relevant agencies named to the President's Fair Housing Council).

24. See generally Civil Rights Authority and Responsibility of the Board, Office of the General Counsel, Office of Thrift Supervision, 1972 WL 125725, at \*33 (June 30, 1972).

25. See *id.*

26. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 7, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3608(d)); see also SCHWEMM, *supra* note 1, at n.3. (amendment simply "clarif[ied] that such agencies are subject to the requirements of § 3608(d)") (citing U.S. H. Comm. on the Judiciary, H. Rep. 100-711: the Fair Housing Amendments Act of 1988, at 32, 100th Cong., 2nd Sess., 1988 U.S. Code Congressional and Administrative News 2173, 2193 (1988) (under the heading "Additional Administrative Authority")).



scholarship has focused almost exclusively on HUD's obligation, and not that of other agencies.<sup>27</sup>

Courts have interpreted the "shall administer" duty as an agency's affirmative obligation to consider the impact of an agency's proposed actions on racial segregation, and take steps to reduce that segregation.<sup>28</sup> "[I]f fair housing means that a person's housing choice should not determine their access to opportunity and amenities, then AFFH means taking steps to eliminate or reduce existing disparities in income, housing, and other areas."<sup>29</sup>

While the statutory language leaves room for interpretation, federal courts have reached a judicial consensus about the AFFH mandate's meaning.<sup>30</sup> At least seven federal circuits have considered the meaning or scope of the AFFH mandate. They have interpreted the AFFH mandate as imposing a duty on each agency to consider the impact of its proposed actions on racial segregation

27. The exception is a set of articles on the application of the AFFH duty to the Low Income Housing Tax Credit Program. See Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Program and the Civil Rights Laws*, 52 UNIV. MIAMI L. REV. 1011, 1028 (1998); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VANDERBILT L. REV. 1747, 1747 (2019); see also *Segregation Autopilot*, *supra* note 3, at 1973 & n.40 (describing the AFFH obligation as two interrelated duties).

28. See, e.g., *N.A.A.C.P.*, 817 F.2d at 155 (citing various cases discussing the duty); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973); *Shannon v. U.S. Dep't of Hous. & Urb. Dev.*, 436 F.2d 809, 822–23 (3d Cir. 1970); *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203, 1208 (6th Cir. 1987); *Alschuler v. Dep't of Hous. & Urb. Dev.*, 686 F.2d 472, 482 (7th Cir. 1982); *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983); *Anderson v. Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir. 1984); see also SCHWEMM, *supra* note 1, at n.25 (citing *Clients' Council*, 711 F.2d at 1425; *Alschuler*, 686 F.2d at 482); *Jorman v. Veteran's Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); *Young v. Pierce*, 544 F. Supp. 1010, 1017–18 (E.D. Tex. 1982); *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996–97 (D. Mass. 1981); *King v. Harris*, 464 F. Supp. 827, 837 (E.D. N.Y. 1979); *Blackshear Resident's Org. v. Hous. Auth. of City of Austin*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1971)).

The Supreme Court has not had occasion to interpret the AFFH duty's scope but has acknowledged integration as a central objective of the Fair Housing Act. See *Trafficante*, 409 U.S. at 211; *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546–47 (2015); see generally *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (upholding standing based on injury of denying access to integrated community); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 95 (1977) (describing the Act's "strong national commitment to promote integrated housing").

29. See *Bostic & Acolin*, *supra* note 9, at 193.

30. See, e.g., *N.A.A.C.P.*, 817 F.2d at 155 (interpreting the AFFH mandate as requiring agencies to take affirmative steps to promote fair housing—not simply prohibit discrimination). Even the Trump Administration's hostile interpretation of the AFFH mandate recognized the "judicial consensus." Final Rule, *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. at 47,902 (describing the "judicial consensus that AFFH requires more than simply not discriminating. Grantees may not be passive. They must actually promote fair housing . . .").

and take affirmative steps to reduce its segregative impact over time.<sup>31</sup> Built into this obligation, the agency itself must take steps to affirmatively promote fair housing and “must not ‘fund a grantee [that] engage[s] in . . . discriminatory conduct’” in a way that furthers discriminatory conduct, but instead must ensure that grantees take parallel affirmative steps to promote fair housing.<sup>32</sup> The Third Circuit has described this duty as requiring an agency to adopt an “institutionalized method” for assessing the potential segregative effect of a proposed agency action and offered examples of what factors to consider in such an institutionalized method analysis.<sup>33</sup>

In short, the “shall administer” duty requires an agency to take proactive programmatic actions—in how it administers its programs, spends its money, and regulates third-party entities within its regulatory authority—that are designed to reduce segregation. To date, it is this legal obligation that has received the most attention in the courts and legal scholarship. However, an agency’s duty does not end there.

### B. Duty Two: “Shall Cooperate”

Agencies also have a duty to cooperate with HUD. At a minimum, this duty means at least two things based on existing jurisprudence. First, an agency cannot simply stand idly by while

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31. See, e.g., *N.A.A.C.P.*, 817 F.2d at 155. For the seminal cases, see *supra* note 28; see also Final Rule, *supra* note 2, at 47,902 & nn.42-43 (describing the “judicial consensus” interpreting the meaning of the AFFH mandate).

32. See Roisman, *supra* note 27, at 1026–27.

33. *Shannon*, 436 F.2d at 822–23 (describing an “institutionalized method” and offering factors in the case of site selection for affordable housing).

A noteworthy district court case that illustrates the AFFH duty’s substantive obligation is *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, which involved a False Claims Act claim predicated on grantee certifications to HUD under the AFFH mandate. See *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). In that case, the court held that the County’s certification violated its AFFH obligation by failing to “consider race” in its analysis of impediments to fair housing choice. See *id.* at 570–71. The court granted partial summary judgment in favor of the plaintiff on the basis that the County had falsely certified seven annual AFFH certifications. See *id.* at 561. “*Westchester’s* real significance is that it provided a wake-up call to the federal government regarding the fact that its 1200 [Community Development Block Grant] grantees could be, and should be, required to do what for many years the law has mandated as a condition of receiving HUD funds. At a minimum, these requirements mean that local governments should not be allowed to use their land-use and other powers in ways that frustrate efforts to provide integrated housing.” 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, 163 (2012) [hereinafter *Overcoming Structural Barriers*].

HUD acts to affirmatively further fair housing.<sup>34</sup> Second, an agency cannot act in a manner that materially interferes with HUD's efforts to reduce housing segregation. To cooperate, an agency must therefore engage with HUD in some proactive manner calculated to achieve fair housing goals.

The duty to cooperate has received almost no attention in legal scholarship or fair housing enforcement. There is some reason for this. For forty years, HUD did not have a substantive regulation implementing the AFFH mandate. As such, agencies lacked guidance on what it meant to "affirmatively further fair housing," and HUD's AFFH objectives were largely nonexistent. Today, however, as HUD finalizes a new AFFH regulation, the obligation to cooperate with HUD takes on a new, more defined meaning.

This section examines what the duty to cooperate may entail.<sup>35</sup> It reviews HUD's efforts to promulgate a new AFFH regulation and considers how that informs what steps agencies might take to cooperate with HUD. This sets the stage for Part III, which discusses what authority HUD has to influence other agencies to affirmatively further fair housing.<sup>36</sup>

### 1. HUD's Proposed Rule

In 2023, HUD released a proposed AFFH regulation that would reinstate a revised version of the short-lived Obama-era AFFH rule. The proposed rule "builds on the planning framework" of the prior rule, with "refinements based on considerable input from a wide variety of stakeholders."<sup>37</sup> Its preamble explains that the rule "takes as its starting point the fair housing planning process created by the 2015 Rule ... then proposes refinements informed by lessons HUD learned from its implementation of the 2015 AFFH Rule, by feedback provided by States and localities across the country, and by stakeholder input."<sup>38</sup> Among these refinements is a streamlined set of questions that grantees must answer to adequately analyze the fair housing issues present in their regions, a change that responds to public criticism of the 2015 rule.<sup>39</sup>

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34. See, e.g., *N.A.A.C.P.*, 817 F.2d at 155; Roisman, *supra* note 27, at 1026.

35. See *infra* Part III.B.1, Part III.B.2.

36. See *infra* Part IV.

37. See *HUD Fact Sheet and Frequently Asked Questions: Affirmatively Furthering Fair Housing, Notice of Proposed Rulemaking*, U.S. DEP'T OF HOUS. AND URB. DEV., [www.hud.gov/sites/dfiles/FHEO/documents/AFFH%20Fact%20Sheet.pdf](http://www.hud.gov/sites/dfiles/FHEO/documents/AFFH%20Fact%20Sheet.pdf) [perma.cc/6U54-PBC2] (last visited Nov. 24, 2023); see also Proposed Rule, *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. at 8517.

38. Proposed Rule, *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. at 8517.

39. *Id.* (highlighting that stakeholders asked HUD to "reduce burden on program participants by streamlining the analysis of fair housing issues ..., allowing [grantees] to focus more directly on the setting of effective fair housing

The proposed rule focuses on the AFFH obligations of HUD grantees (e.g., states, municipalities, and public housing authorities) that are undertaken as a condition of receiving federal funds.<sup>40</sup> Like its predecessor, the proposed rule would require grantees to engage in a planning process that assesses the state of segregation in their jurisdictions. All grantees would be required to produce an Equity Plan, which they would submit to HUD at regular intervals. HUD has described an Equity Plan as a grantee-prepared fair housing document committing them “to goals that advance equity in housing, community development programs, and residents’ access to well-resourced areas, opportunity, and community assets.”<sup>41</sup> The Plan would be “developed with the input of the community and consist of an analysis of fair housing data and issues, a prioritization of the issues that would be addressed, and the establishment of and commitment to undertake fair housing goals.”<sup>42</sup> Those goals would be “incorporated into subsequent planning documents, such as the [grantee’s] consolidated plan ...”<sup>43</sup> At a minimum, each jurisdiction would be required to: (1) identify barriers to fair housing, (2) set goals to overcome those barriers, and (3) adopt metrics and strategies to achieve those goals. The ultimate goal of these requirements is to reduce housing segregation and increase access to housing opportunities without discrimination.<sup>44</sup>

The proposed rule aims for enduring change, not short-term gain. The “theory of change” behind the rule is that a mandatory planning process that assesses fair housing barriers and identifies strategies and metrics to overcome those barriers would instill a new paradigm among grantees.<sup>45</sup> Thus, over multiple planning cycles across multiple years, fair housing principles would become a normal part of a grantee’s comprehensive planning.<sup>46</sup> HUD summarizes this normalization in the preamble to its proposed rule, teaching grantees to “embed fairness and equity into their decision-

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goals and strategies to achieve them” and “provide greater accountability mechanisms and increase transparency to and participation by the public”).

40. As discussed in Part IV, the distinction is that the proposed rule focuses on grantee obligations, not HUD’s obligations. *See infra* Part IV. The CDBG and other programs represent only one part of HUD’s overall programming. Monitoring grantee compliance is one part of HUD’s duty to administer its programs to further fair housing, but this distinction is significant if HUD seeks to promulgate a model for how other agencies can affirmatively further fair housing, i.e., go beyond simply ensuring that grantees are furthering fair housing.

41. *HUD Fact Sheet*, *supra* note 37, at 3.

42. *Id.*

43. *Id.*

44. *See generally* Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8516.

45. Heather R. Abraham et al., *Just a “Planning Rule,” Enforcing the Duty to Affirmatively Further Fair Housing*, 31 ABA J. OF AFF. HOUS. & COMM. DEV. L. 203, 210 (2022) [hereinafter *Just a Planning Rule*].

46. *Id.* at 210.

making processes.”<sup>47</sup> As a planning rule, “the ‘ideal outcome’ for the AFFH regulation [is] to create a planning ‘conversation’ or an ‘incremental layer’ that function[s] as an invitation to discuss what [is] working and what [is] not.”<sup>48</sup> This is a significant contrast compared to an older AFFH planning process known as an “Analysis of Impediments” that has been universally dismissed as ineffective.<sup>49</sup> Instead, under the new process, HUD anticipates that “communities would gain a very clear, transparent entry into what had been a hidden process bogged down by the baffling language of consultants during the [Analysis of Impediments] era.”<sup>50</sup>

The proposed regulation reflects five key refinements to the 2015 rule. Specifically, it (1) simplifies the fair housing analysis to allow participants to allocate more time to effective goal setting, (2) provides more public transparency and opportunities for public input, (3) enables HUD to provide more meaningful feedback to improve initial submissions, (4) creates a mechanism for regular progress evaluation, and (5) increases grantee accountability through enhanced enforcement mechanisms. These refinements respond to significant stakeholder feedback about the weaknesses of the prior rule.<sup>51</sup>

The most significant legal enhancement is enforcement. The proposed rule would establish two new enforcement mechanisms.<sup>52</sup> The first enforcement mechanism allows stakeholders—such as a community-based disability rights group that advocate for accessible housing—to provide public input directly to HUD on a grantee’s Equity Plan.<sup>53</sup> This process invites interested parties into a conversation with HUD about the proposed Equity Plan, thus flagging potential strengths and weaknesses of the Equity Plan before HUD accepts or rejects a grantee’s plan.

The second enforcement mechanism is an AFFH-specific HUD complaint process, which has never before existed.<sup>54</sup> This is

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47. Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8536.

48. *Just a Planning Rule*, *supra* note 45, at 210.

49. *Id.* at 210–11; *see also* Bostic et al., *supra* note 9, at 80 (describing common criticisms of the Analysis of Impediment process).

50. Bostic et al., *supra* note 9, at 80.

51. *See generally* Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8516.

52. These enhancements respond to fair housing advocate input. The way they are designed appears to walk a line between the rule as an “enforcement” rule and a “planning” rule. *See Just a Planning Rule*, *supra* note 45, at 217–18 (discussing public comments made at HUD listening sessions).

53. Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8567–68 (proposed rule 24 C.F.R. 5.154(j)(3)) (describing the public input process); *id.* at 8571–72 (proposed rule 24 C.F.R. 5.162) (describing HUD’s review of Equity Plans).

54. *See Just a Planning Rule*, *supra* note 45, at 217–25 (discussing potential revisions to the 2015 rule to enhance enforcement); *see also* Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8557, 8575 (to be

particularly important because the Fair Housing Act does not provide for an explicit private right of action against an agency or grantee that fails to affirmatively further fair housing.<sup>55</sup> Instead, complainants must rely on HUD (or the relevant federal agency) to enforce the AFFH mandate against its own grantees. While HUD has claimed that it has always had a complaint mechanism, filing an AFFH complaint was a murky process and rarely resulted in material change.<sup>56</sup>

Finally, it bears noting that the proposed rule necessitates inter-agency collaboration. For instance, the proposed rule would require HUD grantees “to incorporate the fair housing goals from their Equity Plans into planning documents required in connection with the receipt of [federal funding] from *any other Federal executive department or agency*.”<sup>57</sup> According to the rule, “[t]his incorporation shall include the allocation of resources necessary for achievement of this goal. The [grantee’s] progress evaluation includes an evaluation of the goals incorporated into these other planning documents ....”<sup>58</sup> In effect, the proposed rule would obligate all HUD grantees to incorporate their AFFH goals into their planning and progress reports to all other federal agencies. It thus strengthens the inter-agency connection of overlapping federal programs, as anticipated in the AFFH statute.<sup>59</sup> As illustrated below, virtually every agency oversees some housing and urban development programs. In other words, any grantee that receives HUD funding must also report their AFFH goals to non-HUD agencies.

## 2. Cooperating with HUD

With the advent of HUD’s proposed AFFH rule, what must an agency do to “cooperate” with HUD? This subsection considers how federal AFFH jurisprudence extends beyond HUD to other agencies. It also considers case law interpreting the duty to “cooperate” outside of the AFFH context.

As a matter of course, agencies routinely counteract HUD’s efforts to affirmatively further fair housing. As if on “segregation autopilot,” agencies enable segregation in three common ways:

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codified at 24 C.F.R. § 5.170) (discussing HUD’s new complaint process).

55. See *Fair Housing’s Third Act*, *supra* note 15, at 56-62 (discussing the need for an explicit private right of action); *id.* at 28-29 n.105 (discussing the lack of private right of action); see also SCHWEMM, *supra* note 1, at 144 n.115 (citing cases) (“Whether a private action to enforce § 3608’s mandates can be brought under 42 U.S.C. § 1983 had not been authoritatively determined at this time”).

56. See *Just a Planning Rule*, *supra* note 45, at 219–23 (describing the lack of a clear AFFH complaint process).

57. Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8568 (to be codified at 24 C.F.R. § 5.156(c)) (emphasis added).

58. *Id.*

59. See 42 U.S.C. § 3608(d).

- (1) Spending money on exclusionary activities (*i.e.*, *furthering existing segregation*),
- (2) Failing to modify programs to promote fair housing (*i.e.*, *failing to affirmatively counteract segregation*),<sup>60</sup> and
- (3) Failing to enforce existing laws or treating regulated parties differently (*i.e.*, *failing to enforce or selectively enforcing*).<sup>61</sup>

Regrettably, illustrations of the “segregation autopilot” phenomenon are plentiful. For decades, the Department of Transportation (“DOT”) has perpetuated segregation in how it has funded highways, roads, bridges, sidewalks, public transit, and in its reinforcement of exclusionary zoning.<sup>62</sup> Its Surface Transportation Block Grant program (“STBG”) is an example of how DOT invests and reinvests in segregation.<sup>63</sup> By contrast, DOT could reduce exclusionary zoning by requiring STBG and other DOT grants to be tied to local land use reform or by assigning competitive grants to local applicants that voluntarily commit to specific zoning reform.<sup>64</sup> Other government programs that have a tendency to perpetuate housing segregation are the Department of Treasury’s Low Income Housing Tax Credit (“LIHTC”) program, and housing finance programs operated or regulated by the Treasury, Federal Reserve, Federal Home Loan Bank system, Office of Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Internal Revenue Service, Securities Exchange Commission, and government-sponsored enterprises.<sup>65</sup>

At a minimum, agencies must do two things to cooperate with HUD: (1) enact affirmative measures to reduce segregation, and (2) refrain from taking actions that are materially inconsistent with HUD’s enforcement efforts.

60. This refers to inaction or superficial action that leaves intact “the white privilege and Black subordination fostered by systems of interlocking private and public power.” Deborah N. Archer, *White Men’s Roads Through Black Men’s Homes: Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1271, 1306 (2020) (describing the legal distinction between “officially sanctioned” racial inequality and policies that have the same effect) (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1757 (1993) (discussing the “substantive inequality of power and resources” following *Brown v. Board* that remained after *Milliken v. Bradley*)).

61. *Segregation Autopilot*, *supra* note 3, at 1990 (describing how agencies perpetuate segregation, explaining that “even ostensibly innocuous activities contribute to housing segregation.”).

62. See Archer, *supra* note 60; *Segregation Autopilot*, *supra* note 3, at 1994-96 (describing Department of Transportation program: “The problem with STBG is two-fold. First, these grants are given to communities with exclusionary zoning with no expectation of reform. Second, operating on a hyper-segregated map, these grants are routinely spent to preserve and maintain existing highway and road networks that were designed decades ago to intentionally, or incidentally, separate neighborhoods by race.”).

63. *Segregation Autopilot*, *supra* note 3, at 1995.

64. *Id.*

65. *Id.* at 2001.

*Affirmative Measures.* First, judicial consensus holds that an agency must take affirmative steps, not simply remain neutral regarding its segregative effect.<sup>66</sup> It is well established that the AFFH mandate requires agencies to do more than adopt a non-discrimination policy. Rather they must take affirmative steps to counteract the government’s legacy of perpetuating segregation. As it applies to the duty to cooperate, an agency may not outsource its AFFH obligations to HUD as the sole enforcer. Rather, each agency must take its own affirmative measures to amplify and reinforce HUD’s efforts.

As described by the First Circuit in *N.A.A.C.P., Boston Chapter v. Secretary of Housing and Urban Development*, “every court that has considered the question has held or stated that [the Fair Housing Act] imposes upon [an agency] an obligation to do more than simply refrain from discrimination (and from purposely aiding discrimination by others)...”<sup>67</sup> Rather, the mandate reflects “a desire to have [the agency] use its grant programs to assist in ending discrimination and segregation, to the ‘point where the supply of genuinely open housing increases.’”<sup>68</sup>

Accordingly, an agency’s “cooperation” should be measured by whether its decisions—regulatory, spending, and overall program administration—result in, or foreseeably will result in, an increased supply of open housing (*i.e.*, housing free from discrimination) and an overall reduction in segregation. Viewed this way, an agency’s cooperation could be measured by its joint enforcement efforts with HUD, such as through a formal MOU (or similar joint agreements)<sup>69</sup>

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66. *See, e.g., N.A.A.C.P.*, 817 F.2d at 155 (describing the judicial consensus); *see also supra* notes 2, 24; Exec. Order No. 12,892, *reprinted in* 59 Fed. Reg. 2939 (Jan. 17, 1994) (describing an agency’s obligation to monitor and impose sanctions on “any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under [an agency’s program or activity related to housing and urban development]” for failure to affirmatively further fair housing).

67. *N.A.A.C.P.*, 817 F.2d at 155.

68. *Id.* *See also* *Darst-Webbe Tenant Assoc. Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898 (8th Cir. 2005); *Clients’ Council v. Pierce*, 711 F.2d 1406 (8th Cir. 1983); *Alschuler v. HUD*, 686 F.2d 472 (7th Cir. 1981); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Otero v. N. Y. C. Hous. Auth.*, 484 F.2d 122 (2d Cir. 1973); *Inclusive Communities Project v. HUD*, No. 3:07-CV-0945-O, 2009 WL 3122610 (N.D. Tex. Sep. 29, 2009); *Jorman v. Veterans Admin.*, 500 F. Supp. 460 (N.D. Ill. 1980); *Resident Advisory Bd. V. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), *aff’d as modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

69. Other similar tools are interagency agreements, such as Title VI Interagency Delegation Agreements, executive orders, and regulations that encourage or require interagency collaboration. For a discussion of the Title VI context, see Memorandum from Thomas E. Perez, Assistant Att’y Gen., on Title VI Interagency Coordination to the Fed. Funding Agency Civ. Rts. Dir. (May 20, 2013), available at [www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG\\_Perez\\_Coordinat](http://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordinat)



or participation in interagency task forces, like the Interagency Task Force on Property Appraisal and Valuation Equity (“PAVE”) that was established to reduce appraisal bias, which perpetuates housing segregation.<sup>70</sup> Other affirmative measures may include joint planning, coordinated investigations, joint public awareness campaigns, coordinated technical assistance to grantees, and resource sharing.

*Non-Interference.* Additionally, an agency may not counteract HUD’s efforts to achieve AFFH goals by acting in a manner that is “materially inconsistent” with HUD’s efforts.<sup>71</sup> The word “cooperate” means to “act or work together with another for a particular purpose.”<sup>72</sup> Black’s Law Dictionary defines cooperation as people “join[ing] together for a common benefit”<sup>73</sup> and “proactive cooperation” (in the criminal defense context) as “doing more to help the prosecution than simply testifying against a codefendant [such as] setting up drug deals and participating in sting operations.”<sup>74</sup> To cooperate must, at a minimum, mean that the agency cannot act in a manner that is “materially inconsistent” with HUD’s AFFH

ion\_memo\_5\_20\_13.pdf [perma.cc/J4LJ-8QZ4].

As a comparison, the Department of Justice has a duty to encourage interagency coordination and communication to implement Title VI and other civil rights laws. Exec. Order No. 12250, *reprinted in* 45 Fed. Reg. 72,995 (Nov. 4, 1980). Collaborative efforts include joint planning, complaint investigations, coordinated programming and policy planning, and resource sharing, such as sharing agency experts. *See id.*

70. The Interagency Task Force on Property Appraisal Valuation Equity (PAVE) is a thirteen-agency task force launched in 2021 to address home appraisal inequity. Chaired by the HUD Secretary, it seeks to identify the “levers at the federal government’s disposal,” like “regulatory action, and development of standards and guidance in close partnership with industry and state and local governments,” to mitigate discrimination in the appraisal process. *See, e.g., Action Plan to Advance Property Appraisal and Valuation Equity*, PAVE INTERAGENCY TASKFORCE ON PROP. APPRAISAL AND VALUATION EQUITY 1 (MAR. 2022), [pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf](https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf) [perma.cc/RV6N-DULQ] [hereinafter PAVE ACTION PLAN]. *See also Appraisal Discrimination*, *supra* note 16, at 209-10 (discussing appraisal discrimination’s contribution to residential segregation).

71. HUD’s proposed rule sets “materially inconsistent” as the standard for HUD’s grantees. This standard seems equally appropriate for measuring agency cooperation. *See Proposed Rule, Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8538-39, 8571-74 (to be codified at 24 C.F.R. §§ 5.162, 5.166, 5.170) (stating that grantees may not take actions that are “materially inconsistent” with their AFFH obligations); *Proposed Rule, Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8568 (to be codified at 24 C.F.R. § 5.156(c)) (describing multi-agency reporting); *see also Segregation Autopilot*, *supra* note 3, at 1994-95 (describing the Department of Transportation’s Surface Transportation Block Grant program).

72. *Cooperate*, CAMBRIDGE DICTIONARY, [dictionary.cambridge.org/us/dictionary/english/cooperate](https://dictionary.cambridge.org/us/dictionary/english/cooperate) [perma.cc/8W2R-AQ5T] (last visited Nov. 24, 2023).

73. *COOPERATION*, BLACK’S LAW DICTIONARY (11th ed. 2019).

74. *Id.*

efforts.<sup>75</sup>

The proposed HUD rule reinforces this point by requiring grantees to incorporate their AFFH planning goals into their reporting to other federal agencies (*e.g.* reporting to the Department of Transportation for Surface Transportation Block Grant funding).<sup>76</sup> One illustration of a HUD grantee’s overlapping, multi-agency reporting duties is the Department of Commerce’s economic planning process known as a Comprehensive Economic Development Strategy (“CEDS”).<sup>77</sup> CEDS reports are mandatory “strategy-drive plan[s] for regional economic development” prepared by U.S. Department Commerce grantees under the U.S. Economic Development Administration (“EDA”).<sup>78</sup> CEDS reports take into account the use of other available federal funds, private sector resources, and state support, and must be updated every five years for a region to qualify for EDA assistance and to be designated as an Economic Development District.<sup>79</sup> To coordinate this process, HUD and the Department of Commerce have signed an MOU to coordinate enforcement of the CEDS’ proposed regional development.<sup>80</sup> These programs and similar coordination efforts are the very places where HUD can leverage its existing relationships to encourage other agencies to affirmatively further fair housing.

Currently, agencies are likely failing to comply with their duty to cooperate with HUD because they administer programs and activities in a manner that perpetuates—not counteracts—segregation. Under the proposed rule, this posture would be materially inconsistent with HUD’s effort to affirmatively further fair housing.

### III. ENFORCEMENT MECHANISMS

To meaningfully counteract the “segregation autopilot”

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75. *See supra* note 71; Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8538-39, 8571-74 (to be codified at 24 C.F.R. §§ 5.162, 5.166, 5.170).

76. *See* Proposed Rule, Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8568 (to be codified at 24 C.F.R. § 5.156(c)) (describing multi-agency reporting); *see also Segregation Autopilot, supra* note 3, at 1994-95 (describing the Department of Transportation’s Surface Transportation Block Grant program).

77. 13 C.F.R. § 303.6 (2023).

78. 13 C.F.R. § 303.2 (2023) (defining “Planning Organization”).

79. *Comprehensive Economic Development Strategy (CEDS)*, U.S. ECON. DEV. ADMIN., [www.eda.gov/grant-resources/comprehensive-economic-development-strategy](http://www.eda.gov/grant-resources/comprehensive-economic-development-strategy) [perma.cc/K5RS-T6PS] (last visited Nov. 24, 2023).

80. Memorandum of Understanding Between the U.S. Dep’t of Hous. & Urb. Dev. and the Econ. Dev. Admin. U.S. Dep’t of Commerce Regarding Integrated Cmty. and Econ. Dev. Planning (Sept. 28, 2016), [www.hud.gov/sites/documents/HUD\\_EDAPLANMOU\\_EDA.PDF](http://www.hud.gov/sites/documents/HUD_EDAPLANMOU_EDA.PDF) [perma.cc/HJY5-3Q8F] [hereinafter Memorandum U.S. Dep’t of Hous. & Urb. Dev. et al.].

phenomenon, HUD and other stakeholders must ensure compliance by all agencies with their AFFH obligations. This Part considers two categories of legal tools to compel agencies to act: (1) HUD's enforcement mechanisms, and (2) private actions.<sup>81</sup>

### A. HUD's Enforcement Authority

While agencies are well accustomed to regulating their grantees,<sup>82</sup> they do not typically regulate other federal agencies. This section details what legal tools may be available to HUD to compel other federal agencies to affirmatively further fair housing. In addition to the legal mechanisms available to all agencies, it considers whether HUD has any additional leverage from Congress' designation in the Fair Housing Act of HUD's responsibility to enforce the AFFH mandate. In order of escalation, the primary tools available to HUD are (1) soft-power incentives like resource-sharing and joint programming, (2) modeling best practices, (3) MOUs and similar interagency guidance with one or more agencies, (4) interagency task forces or coordination models like the President's Fair Housing Council, (5) interagency guidance, and (6) investigation and enforcement actions.

*Resource Incentives.* The first category comprises resource incentives like sharing experts and other staff, joint appropriations requests, and joint programming. These can be one-time collaborations or longer-term initiatives defined by a specific interagency agreement, as described below. For instance, HUD might invite another agency to participate in a joint forum to draw attention to a timely issue. One area of opportunity is a widespread effort to reunite neighborhoods that were once divided by federal highways. Landmark projects may present opportunities for HUD and the Department of Transportation to hold joint events to discuss how a community's efforts to reunite neighborhoods may affirmatively further fair housing. Other examples include coordinated public relations campaigns that garner positive media coverage, leveraging common goals or interests, and promoting the benefits of collaboration, such as decreased administrative burden, productivity, and cost effectiveness.<sup>83</sup> Leveraging common interests

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81. See *infra* Part III-A and Part III-B.

82. Most notable among federal powers to regulate grantees is the federal government's authority to set conditions on federal funding allocated to states and localities. A series of seminal cases interpreting the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, defines the outer bounds of the federal government's authority. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987), and its progeny.

83. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-15, RESULTS ORIENTED GOV'T PRACTICES THAT CAN HELP ENHANCE AND SUSTAIN COLLABORATION AMONG FED. AGENCIES 11 (2005), available at [www.gao.gov/assets/gao-06-15.pdf](http://www.gao.gov/assets/gao-06-15.pdf) [perma.cc/4GPB-CXWP]; Jane Fountain, *Implementing Cross-Agency Collaboration: A Guide for Federal Managers*, IBM CTR. FOR THE BUS. OF GOV'T (2013),

can generate or renew momentum and deliver better policy outcomes.

*Modeling Best Practices.* HUD can set the standard for other agencies by adopting benchmarks and protocol for assessing its own AFFH compliance. Particularly important is that HUD holds itself accountable as it proposes to do to its grantees. While HUD’s 2023 proposed regulation addresses some of HUD’s overall programming—such as Community Development Block Grants and similar HUD funding—it does not comprehensively address the full scope of HUD’s AFFH obligation.<sup>84</sup> A public comment letter submitted by the National Fair Housing Alliance calls on HUD to “separately undertake an analysis of its own operations, identify the actions that it should take with respect to its program implementation and its own decision making to ensure that the operations of its own programs and activities affirmatively further fair housing.”<sup>85</sup> Ideally, HUD would issue a separate or amended AFFH regulation that mandates an internal department AFFH equity analysis. Through this self-reflection, HUD could identify impediments to achieving fair housing through its programs, as well as set benchmarks with specific and measurable metrics and timetables for reaching those benchmarks.

*Interagency Guidance.* Agencies have authority to issue agency guidance documents that delineate agency policy and interpretations. The Administrative Procedure Act notes that interagency guidance can include “general statements of policy’ and ‘interpretative rules’ ... [that] cover[] all general statements an agency issues announcing how it proposes to exercise the discretion created by its enabling statutes and legislative rules.”<sup>86</sup> Guidance “is conventionally said to be nonbinding—a mere tentative

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[www.businessofgovernment.org/sites/default/files/Implementing%20Cross%20Agency%20Collaboration.pdf](http://www.businessofgovernment.org/sites/default/files/Implementing%20Cross%20Agency%20Collaboration.pdf) [perma.cc/F5CT-9T5J] (discussing the benefits of Interagency collaboration and four common “institutional constraints” that can inhibit collaboration).

84. The proposed regulation covers jurisdictions that receive funds from any of the following programs: CDBG, Emergency Solution Grants (ESG), The HOME Investment Partnerships (HOME), the Housing Trust Fund (HTF), and the Housing Opportunities for Persons with Aids (HOPWA), in addition to public housing agencies that receive assistance under sections 8 or 9 of the United States Housing Act of 1937. See *HUD Fact Sheet*, *supra* note 37, at 3.

85. National Fair Housing Alliance Comment Letter on HUD’s Proposed Affirmatively Furthering Fair Housing (AFFH) Regulation (Apr. 24, 2023), at 3-6 (“Just as it is unacceptable for a local jurisdiction to simply analyze how it will operate its programs for affordable housing, without considering race, national origin, or other protected classes, HUD may not operate its programs without imbedding fair housing principles in those programs”).

86. See, e.g., NICHOLAS R. PARRILLO, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 4 (2017), available at [www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf](http://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf) [perma.cc/ZE5D-R5UH]; see also Administrative Procedure Act, 5 U.S.C. § 553.

announcement of the agency's current thinking about what to do in individual adjudicatory or enforcement proceedings."<sup>87</sup> Nevertheless, guidance documents can be valuable for having the weight of an agency's imprimatur. Often agency or interagency guidance is one of the action items that MOUs enumerate. Such documents offer guidance to any stakeholders seeking direction, particularly states and localities who seek to maintain federal compliance as grantees.<sup>88</sup> In the AFFH context, HUD could work with other agencies, or specific offices within an agency, to specify the scope of the AFFH obligation as it applies to certain programs or regulated entities. For instance, HUD could work with the Treasury to issue specific guidance on the applicability of the AFFH mandate to the Low Income Housing Tax Credit program.<sup>89</sup>

*Interagency Agreements.* A second category of tools available to HUD is interagency agreements, the most common of which are MOUs.<sup>90</sup> Agencies use MOUs to define their legal relationship and duties. HUD frequently employs MOUs to coordinate the delivery of housing-related services and fair housing enforcement,<sup>91</sup> but has not explicitly used them as a vehicle to enforce the AFFH

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87. PARRILLO, *supra* note 86, at 4.

88. In 1994, ten agencies issued a joint Policy Statement on Discrimination in Lending that describes the "general principles that these Agencies will consider to identify lending discrimination in violation of the Equal Credit Opportunity Act or the Fair Housing Act." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,266 (Apr. 15, 1994). Agencies included HUD, the Board of Governors of the Federal Reserve, Federal Deposit Insurance Corporation, and the Federal Housing Finance Board. *Id.* This guidance served to coordinate agency efforts to address lending discrimination.

89. To date, Treasury has not issued an agency-specific AFFH regulation, but it has referenced the statutory duty to AFFH in an IRS Revenue Ruling related to the LIHTC program. *See* Rev. Rul. 2016-29, 2016-52 I.R.B. 875 (describing the "firmly established" federal policy to affirmatively further fair housing); *infra* Part IV (discussing the Low Income Housing Tax Credit program).

90. Similar agreements include interagency guidance documents and interagency planning documents, typically signed by senior officials in the respective agencies. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-15, *supra* note 83, at 11.

91. *See, e.g.*, Memorandum of Understanding Among The Dept. of Treasury, HUD, and the DOJ (Aug. 11, 2000), available at [www.justice.gov/crt/memorandum-understanding-among-department-treasury-department-housing-and-urban-development-an-0](http://www.justice.gov/crt/memorandum-understanding-among-department-treasury-department-housing-and-urban-development-an-0) [perma.cc/5375-7G45] [hereinafter Memorandum Dept. of Treasury et al.] (regarding LIHTC properties); Memorandum of Understanding Between HUD and U.S. Dept. of Agriculture and Dept. of Interior (Sept. 29, 2004) (identifying homeownership opportunities for Native Americans); Memorandum of Understanding Between the Dep't of Energy and HUD (May 6, 2009) (setting standards on home energy retrofitting); Memorandum of Understanding, HUD and DOJ (Oct. 28, 2019) (addressing False Claims Act enforcement in FHA Single Family Mortgage Insurance Programs); Memorandum of Understanding Between the FCC and HUD (Aug. 24, 2023) (promoting Affordable Connectivity Program).

mandate.<sup>92</sup> HUD has significant room to explore both expanding existing MOUs to encompass explicit AFFH coordination and enter into new MOUs with new agencies.

One such agreement is HUD’s MOU with the Economic Development Administration (“EDA”) of the Department of Commerce.<sup>93</sup> It defines a series of strategic efforts the agencies will take to optimize government investments in “sustainable, innovative economic community development projects.”<sup>94</sup> For instance, the agencies will issue joint agency guidance that describes “how grantees can better coordinate their local planning efforts, and how planning documents prepared for submission to one [agency] can be adapted for submission to the other [agency].”<sup>95</sup> It also highlights the joint benefits to the agencies and their grantees:

This will result in HUD-funded and EDA-funded projects that will complement each other. This will also help reduce grantees’ administrative and planning burden by encouraging HUD and EDA grantees to coordinate planning information and strategies and streamline local planning efforts.... [and ultimately] ... effectively align and coordinate [] resources for greater impact.<sup>96</sup>

Given the MOU’s focus on local planning, this MOU is ripe for revision to include AFFH-specific goals, like issuing joint agency guidance on how collaborating agencies can affirmatively further fair housing.

In the case of fair housing enforcement, HUD has entered into MOUs with a variety of agencies, including a three-way agreement with the Department of Justice and the Treasury Department to improve Fair Housing Act compliance for LIHTC properties. The MOU defines each agency’s legal authority and legal duties and describes specific tasks: The agencies will jointly (1) designate specific personnel to provide interagency technical assistance and training, (2) offer training to state housing finance agencies, (3) start a pilot program to train architects on accessibility requirements, (4) cooperate on research concerning LIHTC properties, and (5) jointly host an annual civil rights meeting among federal agencies and state housing finance agencies, among other activities.<sup>97</sup>

Existing MOUs could be effective vehicles for AFFH enforcement.<sup>98</sup> Some existing MOUs may be interpreted to cover

92. *See supra* note 91.

93. *See generally* Memorandum U.S. Dep’t of Hous. & Urb. Dev. et al., *supra* note 80, at 1-2 (describing the strategic efforts the agencies will take to optimize government investments in economic development projects).

94. *Id.* at 1.

95. *Id.*

96. *Id.* at 2.

97. *See generally* Memorandum Dept. of Treasury et al., *supra* note 91.

98. CIV. RTS. DIV. U.S. DEP’T OF JUST., FEDERAL AGENCY SPECIFIC REGULATIONS (database updated Apr. 9, 2023),

AFFH obligations.<sup>99</sup> Even so, MOUs would be more effective if HUD renegotiated them to specify the steps that each agency would take to coordinate AFFH efforts. For instance, the HUD-EDA agreement does not specifically address the agencies' AFFH obligations. However, in light of the Biden Administration's whole-of-government initiative to address systemic racism in the administrative state, the agencies could revise and update the MOU to explicitly address their AFFH obligations.<sup>100</sup> The more specific an agency's agreement, the more likely it will carry out those obligations.

*Interagency Coordinating Bodies.* Beyond interagency agreements, agencies may establish interagency coordinating bodies, such as task forces. These bodies are typically organized around a specific, discrete, and timely issue. A recent fair housing example is the Interagency Task Force on Property Appraisal and Valuation Equity ("PAVE"), established by the Biden Administration to address appraisal bias.<sup>101</sup> One potential coordinating body for financial institutions is the Federal Financial Institutions Examination Council ("FFIEC"), a "formal interagency body empowered to prescribe uniform principles, standards, and report forms" for federal financial regulators.<sup>102</sup> While these interagency bodies are often formed by executive order, one agency may be able to prompt its formation, especially in response to a timely issue of public concern.<sup>103</sup>

Coordination can take many forms. Two common collaboration

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[www.justice.gov/crt/fcs/Agency\\_Regulations](http://www.justice.gov/crt/fcs/Agency_Regulations) [perma.cc/4574-MCH5] (under "Memoranda of Understanding") (cataloging the archive of interagency actions and agreements involving DOJ).

99. Language pledging an agency to take steps to enforce the Fair Housing Act as it administers its programs and activities, or by investigating state, local, and other federal grantees, may reasonably be read as an agreement to affirmatively further fair housing.

100. Recently, the U.S. Government Accountability Office issued a report highlighting potential opportunities to improve community development planning by involving the U.S. Department of Agriculture in the agreement. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-579, OPPORTUNITIES EXIST FOR FURTHER COLLABORATION AMONG EDA, HUD, AND USDA 16 (2021), available at [www.gao.gov/assets/gao-21-579.pdf](http://www.gao.gov/assets/gao-21-579.pdf) [perma.cc/CN3T-BWP4] (observing in the executive summary that EDA and HUD have not regularly monitored or updated their interagency agreement to reflect either agency's changing priorities and have "made limited efforts to involve USDA in their collaborative efforts" despite that all three agencies invest in and administer economic development programs).

101. See *Segregation Autopilot*, *supra* note 3, at 2001; see also PAVE ACTION PLAN, *supra* note 70.

102. About the FFIEC, FED. FIN. INSTITUTIONS EXAMINATION COUNCIL (Apr. 15, 2020, 11:10 AM), [www.ffiec.gov/about.htm](http://www.ffiec.gov/about.htm) [perma.cc/CQU3-7CRR].

103. Among the events that spurred the government to form PAVE was the substantial number of news reports about couples who had faced appraisal discrimination. See PAVE ACTION PLAN, *supra* note 70, at 24; see also *Just a Planning Rule*, *supra* note 45, at 207 & nn.13-14 (citing news stories).

models are working groups (or “councils” or “task forces”) and “czars.”<sup>104</sup> Councils typically involve high-level coordination efforts among the heads of agencies, whereas “czars” are specifically appointed individuals who head a team with a specific issue or set of objectives to accomplish.<sup>105</sup> The closest the federal government has come to high-level interagency fair housing leadership is the President’s Fair Housing Council, a short-lived initiative established by President Clinton by Executive Order 12892 to implement the AFFH mandate.<sup>106</sup> As discussed in Part IV, this model still holds promise for AFFH enforcement.<sup>107</sup> Also noteworthy is President Biden’s “whole of government” Executive Order 13985, which tasked each agency with conducting an “equity assessment” of its agency that addresses “[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services [of that agency’s] programs.” The Executive Order also identifies specific agency offices and resources responsible for advancing civil rights or whose mandates specifically include serving underrepresented or underserved communities. While the Biden Executive Order addresses more than just fair housing, it is relevant because it illustrates the power of cabinet-level, issue-focused coordination. Moreover, the racial equity assessments produced by each agency act as treasure troves of agency-specific information that could inform what each agency can do to affirmatively further fair housing.

*Investigations and Enforcement Actions.* A fifth potential tool available to HUD is the department’s ability to initiate investigations and related enforcement actions. This category has the least historical or legal precedent and raises potential constitutional concerns. It warrants more research and scholarly attention. The category spans both HUD’s own enforcement actions and referrals to third parties, like the Attorney General or the agency in question.

As a threshold matter, enforcement actions by one agency against another raise constitutional questions. In 1994, the Department of Justice (“DOJ”) Office of Legal Counsel (“OLC”) took the position that DOJ could not enforce a charge of housing discrimination issued by HUD against the U.S. Department of Agriculture for violation of the Fair Housing Act.<sup>108</sup> OLC’s position

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104. See *Segregation Autopilot*, *supra* note 3, at 2019-23 (describing coordination models).

105. See *id.* (identifying historic and contemporary examples of each model).

106. See *Don’t Blame Stokely Carmichael*, *supra* note 6, at 561-63 (discussing the need for renewed cabinet-level fair housing leadership like the President’s Fair Housing Council) (citing Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), [www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law](http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law) [perma.cc/R8LB-E8HF]).

107. See *infra* Part IV.

108. See Authority of Dep’t of Hous. and Urb. Dev. to Initiate Enforcement



was based on the “substantial separation of powers concerns” raised by construing the Fair Housing Act to authorize one agency to bring enforcement proceedings against another agency within the executive branch.<sup>109</sup> Relying on Supreme Court precedent interpreting the Administrative Procedure Act, OLC reasoned that because the Act does not contain an “express statement” authorizing HUD to name another agency as a respondent, Congress did not grant HUD this authority.<sup>110</sup> In response, HUD amended its intake protocol.

According to its investigation handbook, HUD will still investigate complaints against other agencies or its employees (naming the head of the agency as the respondent) as long as the complaints are “otherwise jurisdictional.”<sup>111</sup> The amended handbook states that “[i]nvestigations should be conducted, and conciliation should be attempted ... [but if] conciliation is unsuccessful, the case file should be forwarded to the [office of Fair Housing and Equal Opportunity] Headquarters” for further action.<sup>112</sup> It also cautions: “Regional Offices should not administratively close such complaints on the ground of lack of jurisdiction under the Act.”<sup>113</sup> Ultimately, as implied in HUD’s handbook, there are limits to OLC’s opinion that may not fully constrain HUD from acting against another agency. Moreover, the opinion is based on HUD’s enforcement authority under provisions under four other subsections of the Fair Housing Act, not the AFFH subsection.<sup>114</sup> Given Congress’s designation of HUD as the central coordinating agency for the AFFH mandate under § 3608, HUD may have more room than OLC acknowledged.<sup>115</sup>

Alternatively, HUD might ask a third party, such as an auditor, inspector, or oversight body, to investigate another agency. For instance, HUD could contact an agency’s Office Inspector

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Actions Under the Fair Housing Act Against Other Executive Branch Agencies, 18 Op. O.L.C. 101, 108 (May 17, 1994); *see also* U.S. DEP’T HOUS. & URB. DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK (8024.1 REV-2), at 4-27 (2005), available at [www.hud.gov/program\\_offices/administration/hudclips/handbooks/ftheo/80241](http://www.hud.gov/program_offices/administration/hudclips/handbooks/ftheo/80241) [perma.cc/P6FM-AM87] [hereinafter HUD HANDBOOK] (describing the opinion and its effect on HUD protocol).

109. *See* 18 Op. O.L.C. 101, at 104-08.

110. *Id.*

111. *See* HUD HANDBOOK, *supra* note 108, at 4-27 to 4-28.

112. *Id.*

113. *Id.*

114. *See* 18 Op. O.L.C. 101, at 101 (identifying 42 U.S.C. §§ 3610-3612, 3614, but not § 3608).

115. 42 U.S.C. § 3608(d).

General<sup>116</sup> or the U.S. Attorney General.<sup>117</sup> Depending on the outcome of the investigation, DOJ may have its own authority to bring legal action against the agency for failure to satisfy its AFFH duties.<sup>118</sup>

HUD might also involve third parties in ways that do not implicate constitutional concerns. For instance, HUD could work with the White House Office of Management and Budget (“OMB”) to identify more effective ways for agencies to use their budgets to further fair housing. One promising mechanism would be for OMB to institute a policy for flagging government expenditures that are most likely to perpetuate housing segregation. OMB also has authority over the Office of Information and Regulatory Affairs (“OIRA”), which oversees the notice-and-comment rulemaking process under the Administrative Procedure Act.<sup>119</sup> As I describe in another article, OIRA “could use segregative effect as a litmus test in reviewing proposed regulations.”<sup>120</sup> OIRA could conduct the analysis under the legal authority of the AFFH mandate, or it could ask HUD or another agency to establish a rubric for this analysis.<sup>121</sup> Additionally, HUD could submit comments to OIRA about the

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116. See, e.g., *Organization*, OFF. OF INSPECTOR GEN., U.S. DEP’T OF COM., [www.oig.doc.gov/Pages/Organization.aspx](http://www.oig.doc.gov/Pages/Organization.aspx) [perma.cc/PZ8F-RNQL] (last visited Nov. 24, 2023) (describing the offices of the Inspector General and listing oversight areas); see also *Report, Fraud, Waste, Abuse, & Whistleblower Reprisal*, OFF. OF INSPECTOR GEN., U.S. DEP’T OF COM., [www.oig.doc.gov/Pages/Hotline.aspx](http://www.oig.doc.gov/Pages/Hotline.aspx) [perma.cc/TJK9-KHQL] (last visited Nov. 24, 2023) (describing the complaint process). For a list of inspectors general, see *Inspectors General Directory*, COUNCIL ON THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, [www.ignet.gov/content/inspectors-general-directory](http://www.ignet.gov/content/inspectors-general-directory) [perma.cc/9ZQC-TSDK] (last visited Nov. 24, 2023).

117. Referral to the Attorney General may trigger the same separation of powers concerns discussed in the OLC opinion. However, the Attorney General has plenary authority under Title VI and may therefore find other means to compel another agency to Act. They may also have authority under an executive order. The OLC opinion is largely predicated on “unitary executive theory,” meaning the president cannot be in a position of adjudicating a matter between two agencies within the same executive. However, if the executive has issued an order authorizing one agency to act against another agency, the same constitutional concerns may not be implicated. Thus, if a president were to issue a new executive order, as discussed in *infra*, Part IV, it may alleviate these constitutional concerns.

118. See *infra* Part III-A.

119. *Information and Regulatory Affairs*, THE WHITE HOUSE, [www.whitehouse.gov/omb/information-regulatory-affairs/](http://www.whitehouse.gov/omb/information-regulatory-affairs/) [perma.cc/J7KX-Y9CS] (last visited Oct. 6, 2023); see also Exec. Order No. 12866, *reprinted in* 48 Fed. Reg. 51735 (Oct. 4, 1993) (establishing OIRA).

120. *Segregation Autopilot*, *supra* note 3, at 2018 (offering administrative law recommendations for reducing the government’s effect on segregation, such as engaging OIRA as a watchdog for government policies that contribute to segregation).

121. See *id.* (offering the Small Business Administration’s Office as an example of a small body within a larger agency that has authority to conduct comparable impact reviews) (citing CONG. RESEARCH SERV., R43625, SBA OFFICE OF ADVOCACY: OVERVIEW, HISTORY, AND CURRENT ISSUES (2021)).

AFFH implications of any agency's proposed regulations.

Additionally, HUD might encourage Congress to request a Government Accountability Office ("GAO") investigation into whether an agency is complying with its AFFH obligations. GAO could also research strategies for HUD to improve its interagency AFFH enforcement.<sup>122</sup>

This is not an exhaustive list. Operating on a relatively blank slate, other mechanisms may be available to HUD, some of which HUD may use in other enforcement efforts. However, the AFFH mandate is unique in that it implicates all departments and agencies and tasks the Secretary of HUD with coordinating enforcement. As such, the DOJ or courts may ultimately interpret the statute as giving HUD heightened authority to compel other agencies to act.<sup>123</sup>

When it comes to interagency enforcement of the duty to affirmatively further fair housing, HUD has a toolbox of options available to advance this objective. HUD regularly employs some of these tools to enforce the non-discrimination provisions of the Fair Housing Act, but it remains to be seen whether HUD will use these and other tools to enforce every agency's duty to affirmatively further fair housing.

### B. Private Actions

Historically, private parties have been the driving force behind the Fair Housing Act. "For much of the Act's history, private action has been the backbone of anti-discrimination enforcement."<sup>124</sup> For its first twenty years (1968-1988), the Act did not authorize HUD to take meaningful action to adjudicate complaints.<sup>125</sup> Rather, Congress assumed that enforcement would occur through private action. In 1988, Congress amended the Act to give HUD authority to initiate judicial enforcement proceedings.<sup>126</sup> Since then, the government has had a more expanded role, but private action remains central to enforcement.

By contrast, AFFH enforcement necessarily implicates government involvement because there is no explicit private right of action to bring suit against a non-compliant federal agency or state or local grantee.<sup>127</sup> Even so, private actors play a critical role

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122. There is GAO precedent for researching how an agency or group of agencies can better coordinate policy goals and outcomes. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-579, *supra* note 100.

123. *See* 42 U.S.C. § 3604(d)-(e).

124. *Fair Housing's Third Act*, *supra* note 15, at 58 (discussing the role of private parties in fair housing enforcement) (citing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 197-212 (1st ed. 1993)).

125. *See id.*

126. *See id.*

127. While courts have not universally held that there is no private right of action, existing case law strongly suggests courts disfavor the approach.

in advancing enforcement of the AFFH mandate among non-HUD agencies. This section looks at the legal mechanisms that may be available to nongovernmental actors.<sup>128</sup> In order of escalation, these tools include: (1) advocacy campaigns targeting agency leadership, (2) administrative complaints to the agency or a third-party investigator, and (3) judicial action under the Administrative Procedure Act or Title VI.

*Advocacy Campaigns.* One body of tools that fair housing advocates have leveraged is advocacy letters urging agency leaders to affirmatively further fair housing. One nonprofit leader in this effort, the Poverty & Race Research Action Council, has deployed a series of letters to the heads of various agencies involved in housing enforcement and policy. For instance, it has directed letters to the Secretary of the Treasury (“Treasury”) and the Assistant Attorney General for the Civil Rights Division of the DOJ addressing the lack of AFFH guidance on the LIHTC, which has been called the “most significant source of low-income housing production in the country.”<sup>129</sup> These letters call on the Internal Revenue Service (“IRS”) to issue some agency guidance and on the DOJ to better enforce the IRS’s obligation, whether through an MOU (including expanding an existing MOU between Treasury, DOJ and HUD) or other commitments.<sup>130</sup> They ask the agencies to collect and publicly share data on race, ethnicity, disability, and other information on

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*Overcoming Structural Barriers*, *supra* note 33, at 144 n.115 (citing cases). Additionally, while there may be the possibility of bringing private False Claims Act (FCA) claims against federal grantees, fair housing litigators have identified significant limitations to potential FCA claims. *See Fair Housing’s Third Act*, *supra* note 15, at 59 (“They are only likely to prevail where a grantee literally falsified its federal grant application by failing to undertake even a nominal fair housing analysis of race. Since the historic Westchester settlement, grantees have presumably taken steps to insulate themselves from false claims liability.”); *see also* JOHN P. RELMAN, 1 HOUSING DISCRIMINATION PRACTICE MANUAL § 2:17 & nn.12–14 (2023) (discussing the leading FCA cases).

128. *See infra* Part III-B.

129. Poverty & Race Research Action Council Letter to Assistant Att’y Gen. Thomas Perez, Dep’t of Justice Civil Rts. Div. 1 (Aug. 9, 2010) [hereinafter Council Letter to Thomas Perez]; *see also* Poverty & Race Research Action Council Letter to Michael Stegman, U.S. Dep’t of Treasury (May 15, 2012) [hereinafter Council Letter to Michael Stegman]. Another example is the “Petition for Rulemaking” by the Dallas-based law firm Daniel & Beshara, which has represented the Inclusive Communities Project in AFFH litigation challenging site placements in the Low Income Housing Tax Credit Program. *See* Petition for Rulemaking from Laura B. Beshara & Michael M. Daniel, Attorneys at Law, Daniel & Beshara, P.C., to Charles P. Rettig, Comm’r of Internal Revenue Serv. & Janet Yellen, Sec’y of the U.S. Dep’t of Treasury (Mar. 19, 2021) (petitioning the Treasury Department and IRS for AFFH regulation), available at [static1.squarespace.com/static/61af25763e561d7c6ac7f6be/t/61b9899a4e166818f1aea02b/1639549375719/Treasury+package+to+LB+%26+MD+3-19-21-compressed.pdf](https://static1.squarespace.com/static/61af25763e561d7c6ac7f6be/t/61b9899a4e166818f1aea02b/1639549375719/Treasury+package+to+LB+%26+MD+3-19-21-compressed.pdf) [perma.cc/YY8Y-KQ8F].

130. Council Letter to Thomas Perez, *supra* note 129; *see also* Council Letter to Michael Stegman, *supra* note 129.

LIHTC applicants and occupants to analyze the program's effect on housing segregation.<sup>131</sup> Additionally, they call on Treasury to issue regulations and guidance on LIHTC Title VI compliance and ask DOJ to investigate exclusionary "local approval" processes in some places that are not authorized and may result in exclusion based on race.<sup>132</sup> These letters draw attention to an agency's AFFH obligation to coordinate with HUD and its lack of existing regulations or other guidance implementing this duty. Moreover, the letters cite relevant legal authority, including the AFFH statute and Executive Order 12892, illustrating the collaborative, multi-agency nature of the AFFH obligation.<sup>133</sup> Other tools exist to put pressure on these agencies, including advocacy meetings, letters to congressional leaders, letters to the editor, and social media campaigns.

*Administrative Complaints.* Administratively, an interested person could file an administrative complaint directly with an agency that fails to affirmatively further fair housing.<sup>134</sup> If the filing person determines that the agency has not sufficiently addressed the omission underlying the complaint, the person can file a complaint with the agency's Office of the Inspector General ("OIG"), or can submit a Title VI complaint.<sup>135</sup> In 2015, the NAACP Legal Defense and Education Fund used the latter process to challenge the State of Maryland and its agencies after the State cancelled construction of the Red Line, a light rail line scheduled to run east-west through Baltimore, instead diverting the funding to a newly-created initiative largely focused on projects in rural and suburban Maryland.<sup>136</sup> In a different case in 2021, the Department of

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131. *Id.*

132. *Id.*

133. Exec. Order No. 12892, 59 Fed. Reg. 2939, 2940–41 (Jan. 20, 1994).

134. Each agency is tasked with having an internal administrative grievance process. A directory created by the U.S. Government offers civilians contact information for the specific agency or program to file a complaint with the agency. See *File a Complaint Against a Federal or State Government Agency*, USA.GOV (Nov. 14, 2023), [usa.gov/government-agency-complaints](https://www.usa.gov/government-agency-complaints) [perma.cc/Z8KJ-RLAZ] (directing users to a directory of agencies and programs to file a complaint).

135. *Id.* (directing users to the Council of the Inspectors General on Integrity and Efficiency's Inspectors General Directory).

136. Press Release, N.A.A.C.P. Legal Defense and Education Fund, Baltimore Residents and Civic Groups File Title VI Complaint with United States Department of Transportation Over Maryland's Discriminatory Decision to Strip Baltimore of Transportation Funding (Dec. 18, 2015), available at [www.naacpldf.org/press-release/baltimore-residents-and-civic-groups-file-title-vi-complaint-with-united-states-department-of-transportation-over-marylands-discriminatory-decision-to-strip-baltimore-of-transportation-fundin/](https://www.naacpldf.org/press-release/baltimore-residents-and-civic-groups-file-title-vi-complaint-with-united-states-department-of-transportation-over-marylands-discriminatory-decision-to-strip-baltimore-of-transportation-fundin/) [perma.cc/YB9T-Z7BT]; see also Complaint, Baltimore Regional Initiative Developing Genuine Equality, Inc. et al. v. State of Maryland et al., (filed with Maryland Dep't of Transp. 2015), available at [www.naacpldf.org/wp-content/uploads/Baltimore-Red-Line-Complaint.pdf](https://www.naacpldf.org/wp-content/uploads/Baltimore-Red-Line-Complaint.pdf) [perma.cc/UAM9-H8B2].

For more information on Title VI private action, see U.S. Dep't Justice, Title VI Legal Manual, Section IX: Private Right of Action & Individual Relief

Transportation cited Title VI concerns when it halted construction of a Texas highway.<sup>137</sup> The action arose in response to complaints by local advocates, including the community organization Texas Housers.<sup>138</sup>

Alternatively, an individual could file an administrative complaint with HUD, asserting that the other agency has failed to cooperate with HUD under 42 U.S.C. § 3608(e).<sup>139</sup> Or, if the proposed AFFH regulation is finalized, an individual might use HUD's proposed AFFH-specific administrative complaint process.<sup>140</sup> To prompt HUD to involve another agency, the complaint would need to specifically emphasize that the HUD-grantee jurisdiction also receives funding from the Department of Transportation (or another agency), thus emphasizing that the grantee is in violation of more than one agency's AFFH obligations. To date, using a HUD complaint process to compel another agency to affirmatively further fair housing is unprecedented. As such, it is unclear how HUD would respond.

*Judicial Action.* Additionally, private actors may file suit against an agency. Since the AFFH does not create an explicit private right of action, such lawsuits must be predicated on another statute, including the Administrative Procedure Act or Title VI.<sup>141</sup> To date, the primary vehicle that has been used to enforce the AFFH mandate is the Administrative Procedure Act (APA).<sup>142</sup> Most AFFH

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Through Agency Action (“Generally, Title VI does not provide a cause of action for private plaintiffs to sue the federal government directly or to address an allegation that the government has failed to perform its Title VI responsibilities.”) (citing cases); *see also* Olatunde C. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1296 (2014) (exploring private enforcement of Title VI) (“Outside of the school desegregation context, for much of its history, it has been unclear what exactly to do with Title V’s great substantive reach. And when private court enforcement activity began to pick up in the late 1990s, the Court’s 2001 decision in *Alexander v. Sandoval* held that, in fact, no private right of action existed to enforce the statute’s disparate impact regulations, shutting down much of the statute’s litigation promise.”).

137. *See* Fed. Highway Admin. Letter to Texas Dep’t of Transp. (Mar. 8, 2021), available at [www.politico.com/f/?id=00000178-8f27-d59d-a7f9-bf6fa4bb0000](http://www.politico.com/f/?id=00000178-8f27-d59d-a7f9-bf6fa4bb0000) [perma.cc/B929-B9AJ] [hereinafter Fed. Highway Letter]; *see also* Sam Mintz, *DOT Halts Texas Highway Project in Test of Biden’s Promises on Race*, POLITICO (April 1, 2021), [www.politico.com/news/2021/04/01/dot-texas-highway-equity-478864](http://www.politico.com/news/2021/04/01/dot-texas-highway-equity-478864) [perma.cc/HB3T-5GFA].

138. *See* Fed. Highway Letter, *supra* note 137 (citing letters from local advocacy organizations).

139. *But see supra* Part III.A (discussing the Office of Legal Counsel Opinion and HUD’s protocol for investigating other agencies).

140. *See* Fed. Reg. 8516, 8557, 8575 (to be codified at 24 C.F.R. § 5.170) (describing the new AFFH administrative complaint process).

141. *See supra* note 55 (discussing the lack of a private right of action under the Fair Housing Act).

142. *See* Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; *see also* Shannon v. U.S. Dep’t of Hous. & Urb. Dev., 436 F.2d 809, 819 (3d Cir. 1970); SCHWEMM, *supra* note 1, at § 21:7 (describing procedures and relief in § 3608

litigation has been directed at HUD, although some cases have been brought against other agencies.<sup>143</sup> The cases against HUD fall into three general categories: (1) cases challenging HUD's funding of a housing project that plaintiffs alleged increased housing segregation, (2) cases challenging HUD's support of local public housing authorities that are racially segregated or engaged in another form of unlawful discrimination, and (3) cases alleging that "HUD has not been aggressive enough in trying to influence local governments to promote fair housing".<sup>144</sup>

The third category has become increasingly prominent in recent years, and reflects a strategy that might be used against other agencies.<sup>145</sup> One example of successful litigation is *NAACP v. HUD*, in which the First Circuit held that an APA claim against HUD was reviewable under the "arbitrary and capricious" standard.<sup>146</sup> In that case, a chapter of the NAACP sued HUD for failing to adequately encourage the city of Boston to engage in fair housing activities.<sup>147</sup> In applying the APA standard to a failure-to-act claim, the First Circuit explained that the court was tasked with deciding whether, over time, HUD's pattern of activity revealed a failure to live up to its AFFH obligations.<sup>148</sup> It explained:

This standard, like many, may be difficult to apply to borderline instances, yet a court should be able to determine a clear failure to live up to the instruction over time. It should be able to determine whether the agency's practice, over time, in respect to this mandate

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enforcement actions and citing APA cases) ("Even if there is no private right of action under § 3608, courts may review § 3608 claims pursuant to the [APA]. The APA authorizes courts to set aside any action by a federal agency if that action is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' unless judicial action is precluded by statute or the agency's action is 'committed to the agency discretion by law.'") (internal citations omitted).

There may be other possible litigation vehicles, including the False Claims Act and Section 1983 (which acts as a vehicle for a private right of action to enforce § 3608, although this appears to be disfavored by the courts, as described above in *supra* note 50). For a discussion of the viability of False Claims Act (FCA) claims, see RELMAN, *supra* note 127; see also *Fair Housing's Third Act*, *supra* note 15, at 59 (discussing the history and viability of such claims and citing sources).

143. See, e.g., *Jorman v. Veteran's Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984) (Veteran's Administration); *City of Camden v. Plotkin*, 466 F. Supp. 44 (D. N.J. 1978) (Census Bureau); *Debolt v. Espy*, 832 F. Supp. 209, 215 (S.D. Ohio 1993) (Farmers Home Administration of Department of Agriculture); *Jones v. Office of Comptroller of Currency*, 983 F. Supp. 197, 202-05 (D.D.C. 1997), *aff'd* 1998 WL 315581 (D.C. Cir. 1998) (Office of the Comptroller of the Currency).

144. See SCHWEMM, *supra* note 1, at § 21:2 (categorizing cases into three fact patterns).

145. *Id.*

146. *NAACP*, 817 F.2d at 155; see also SCHWEMM, *supra* note 1, at § 21:7 (discussing the implications of the precedent and related cases).

147. *NAACP*, 817 F.2d at 157-59.

148. *Id.*

has been “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Doing so, in the context of a claim of serious failure over time to try to further [the Fair Housing Act]’ s goals, need not involve the court in “superintend[ing] economic and managerial decisions,” or in reweighing matters that Congress has asked HUD to balance. Rather, this case seems to call for a more straightforward evaluation of whether agency activity over time has furthered the statutory goal, and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory.<sup>149</sup>

This standard would be applicable to challenges to virtually any agency in challenging its administration of housing and urban development projects. Ultimately, while such litigation may be resource-intensive, it is a tool available to private actors to compel AFFH enforcement.

As with HUD’s enforcement mechanisms, this list is not exhaustive. Through a variety of approaches and tactics, fair housing advocates have spent decades pushing HUD to adopt a substantive AFFH regulation. So too can these tools be used to encourage other agencies to act.

#### IV. A BLUEPRINT

Having reviewed the legal mechanisms available to HUD and private actors to compel other agencies to affirmatively further fair housing, this Part offers a blueprint for implementation.<sup>150</sup> Building on my prior work on the “segregation autopilot” phenomenon, it examines the practical steps that the executive branch as a whole—and agencies individually—can take to implement the AFFH mandate. It begins with a framework to centralize coordination and then proceeds to identify what agencies can do within their own administrative authority. This blueprint builds on foundational efforts made nearly thirty years ago during the Clinton Administration to inform what agencies can do today, among them implementing their recently released “Equity Action Plans” they produced in response to President Biden’s Executive Order 13985. These recommendations fall into three categories: (1) revising and reissuing an executive order that directs each agency to take specific steps to coordinate AFFH enforcement with HUD, (2) operationalizing “Equity Action Plans,” and (3) adopting other administrative tools, such as issuing agency-specific guidance, assessment tools for their grantees, and racial equity scoring.

*Reissue Executive Order 12982.* As a first step, the Biden Administration should revise and reissue Executive Order 12982, originally ordered by President Clinton.<sup>151</sup> The revised executive

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149. *Id.* at 158 (internal citations omitted).

150. *See infra* Part IV.

151. Exec. Order No. 12892, 59 Fed. Reg. 2939. This executive order revised



order would complement and reinforce the Biden Administration's initial racial equity initiatives. Three elements are most critical. The first is the directive that each agency should work with HUD to promulgate its own agency-specific AFFH regulation. The second is the specification of what sanctions agencies may use in response to AFFH non-compliance. The third is a coordinated fair housing leadership structure that elevates fair housing in the national agenda and reinforces the need for interagency coordination.

First, the Biden Administration should reinstitute the directive in Executive Order 12982 that directed "the heads of departments and agencies, including the Federal banking agencies, to cooperate with [the HUD Secretary] to take two immediate actions": (1) identify effective "ways to structure agency programs and activities to affirmatively further fair housing" and (2) "promptly negotiate memoranda of understanding with [the HUD Secretary] to accomplish that goal." The original executive order ("EO") required that each agency promptly "publish proposed regulations providing for the administration of programs and activities relating to housing and urban development in a manner to affirmatively further fair housing, consistent with the [HUD Secretary's] regulations, and with the standards and procedures issue pursuant [to this order]."<sup>152</sup> Moreover, it instructed each agency to issue final AFFH regulations as soon as practicable and formally submit all proposed and final regulations to HUD for review and comment.<sup>153</sup> Built into this structure are clearer instructions to the agencies for how to "cooperate" with HUD, as required in the statutory text of the AFFH mandate. For instance, it sets timelines for an agency's submission of proposed regulations to HUD and HUD's responsive review and comments.

Second, a revised executive order must specify an agency's legal authority to impose sanctions against non-compliant entities—"including any State or local public agency"—that applies for, participates in, is supervised by or regulated under a program or activity of that agency related to housing and urban development. The original EO stated that agencies may impose sanctions, including: (1) cancellation of contracts, (2) refusal to extend further aid under any program or activity, "until it is satisfied that the affected person, entity, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order," (3) refusal to grant supervisory or regulatory approval to such person or agency, and (4) "any other action as may be appropriate under law."<sup>154</sup>

Finally, the revised order should establish a coordinating

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and superseded Executive Order 12259, issued by President Carter in 1981. Exec. Order No. 12259, 3 C.F.R. § 307 (1981).

152. Exec. Order No. 12892, 59 Fed. Reg. 2939, 2939-40 (§ 4-402, 4-403).

153. *Id.* § 4-403.

154. *Id.*

schema. The original order established a cabinet-level interagency coordinating body, *i.e.*, the President's Fair Housing Council, which included the heads of virtually all executive departments.<sup>155</sup> The order directed the Council to conduct a comprehensive review of the "design and delivery" of federal programs to "ensure that they support a coordinated strategy to affirmatively further fair housing" and "propose revisions to existing programs or activities, [and] develop pilot programs and activities" to affirmatively further fair housing.<sup>156</sup> It also instructed HUD to adopt "stronger measures to provide leadership and coordination" to further fair housing in federal programs, and review all its programs to "assure that they contain maximum incentives" to further fair housing and to "eliminate barriers to free choice where they continue to exist."<sup>157</sup>

On his first day in office, President Biden issued Executive Order 13985, which tasked each agency with conducting an "equity assessment" known as an Equity Action Plan.<sup>158</sup> It ordered agencies to prepare plans that addressed "potential barriers that underserved communities and individuals may face" in accessing the agency's programs and identifying the agency's offices, divisions, and resources that are "responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities."<sup>159</sup> In the three years that have passed, agencies have issued Equity Action Plans that identify these barriers, programs, and responsible offices. The question now is what these agencies should do to implement the Equity Action Plans.

President Biden should revise and reissue an updated version of President Clinton's Executive Order 12982 that reflects the next steps required for agencies to implement these Equity Action Plans. In issuing the order, Biden can cite to the duty to AFFH as the legal justification for action. The Clinton-era order offers specific examples of how agencies can collaborate to implement these Plans

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155. *Id.* § 3-301 to 3-304. Regrettably, the President's Housing Council was short-lived. For a more detailed history, see *Don't Blame Stokely Carmichael*, *supra* note 6, at 561-63 (discussing the need for renewed cabinet-level fair housing leadership like the President's Fair Housing Council) (citing Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), [www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law](http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law) [perma.cc/73SV-846R]). Others have called for the renewal of the President's Fair Housing Council, including a bipartisan national commission on fair housing. *See id.*; NAT'L COMM'N ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 51-52 (2008), [nationalfairhousing.org/wp-content/uploads/2017/04/Future\\_of\\_Fair\\_Housing.pdf](http://nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf) [perma.cc/QQ6Q-EYD8].

156. Exec. Order No. 12892, 59 Fed. Reg. 2939, 2940 (§ 3-301 to 3-304).

157. *Id.*

158. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009, 7011 (Jan. 25, 2021).

159. *Id.* at 7010.

in a way that Biden's later-issued order does not. The Biden Administration can draw on the strengths of its order—particularly its use of the Domestic Policy Council as the primary coordinating body—to update and implement its own version of a “President's Fair Housing Council” that aligns with both the current structure of the executive branch and the communication channels within the Biden White House.

One metric for success would be creating a sustainable leadership framework that makes sense for future administrations. The Biden Administration should improve the Clinton-era order by incorporating the equity assessment tools identified in a new EO. One way to achieve this is to incorporate the equity tools identified by OMB in response to the Biden executive order that studied the “methods for assessing whether agency policies and actions create or exacerbate barriers”—with an emphasis on access to housing and housing segregation. OMB responded to the order by issuing a Request for Information on “methods and leading practice for advancing equity and support for underserved communities through government.”<sup>160</sup> A revised executive order should incorporate the results of OMB's research and public comment to inform agency-specific AFFH regulations. Likewise, it should incorporate the recommendations of the Working Group on Equitable Data established by the Biden-era order.<sup>161</sup>

*Implement Equity Action Plans.* At the agency level, the next step is implementing the elements of each agency's Equity Action Plan, which agencies produced in response to Executive Order 13985. The focus of implementation should be any items that identify ways to reduce housing segregation. The following example illustrates how the existing plans would contribute to a whole-of-government effort.

The first example illustrating the point is the U.S. Department of Treasury's Equity Action Plan. Treasury has a considerable segregative footprint—“it shapes segregation in countless ways, from administering tax incentives that support wealthier white households at the expense of poorer Black households to

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160. 86 Fed. Reg. 24029 (May 5, 2021). The public submitted 598 comments. Nonrulemaking Docket ID OMB-2021-0005, [www.regulations.gov/docket/OMB-2021-0005](http://www.regulations.gov/docket/OMB-2021-0005) [perma.cc/7ZA5-AGKY]. Public comments addressed methods and metrics for success and best practices for stakeholder engagement. *See, e.g., EPI Comments on OMB's Methods and Leading Practices for Advancing Equity and Support for Underserved Communities*, ECON. POL'Y INST. (July 6, 2021), [www.epi.org/publication/epi-comments-on-ombs-methods-and-leading-practices-for-advancing-equity-and-support-for-underserved-communities/](http://www.epi.org/publication/epi-comments-on-ombs-methods-and-leading-practices-for-advancing-equity-and-support-for-underserved-communities/) [perma.cc/CG3K-HG84]; Letter from Natalie Davis, Co-Founder, United States of Care, to Hon. Shalanda Young, Acting Dir., Off. Of Mgmt. and Budget (July 2, 2021), available at [unitedstatesofcare.org/wp-content/uploads/2021/07/USofCare-OMB-RFI-Response-to-Equity.pdf](https://www.unitedstatesofcare.org/wp-content/uploads/2021/07/USofCare-OMB-RFI-Response-to-Equity.pdf) [perma.cc/M6XJ-UAQK].

161. *Id.* at 7011.

'misdirected' tax incentives that skew housing opportunities by race."<sup>162</sup> Moreover, it administers the country's largest affordable housing development program. "The low-income housing tax credit ("LIHTC") program is the federal government's primary policy tool for encouraging the development and rehabilitation of affordable rental housing."<sup>163</sup> As such, it is the "largest source of new affordable housing in the United States."<sup>164</sup> Altogether, the LIHTC program has contributed to building or redevelopment over "3.23 million housing units" since its inception.<sup>165</sup> While the program has generated significant housing supply, the problem is *where* LIHTC units are built.<sup>166</sup> Historically, the program has reinforced housing segregation by financing housing in racially or ethnically concentrated areas of poverty, as opposed to a cross-section of neighborhoods.<sup>167</sup> Given its outsize impact on segregation, fair housing advocates have targeted Treasury as an agency with potential to move the segregation needle through how it administers its housing and development programs.<sup>168</sup>

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162. *Segregation Autopilot*, *supra* note 3, at 1996 (citing, for example, TATJANA MESCHÉDE ET AL., MISDIRECTED HOUSING SUPPORTS: WHY THE MORTGAGE INTEREST DEDUCTION UNJUSTLY SUBSIDIZES HIGH-INCOME HOUSEHOLDS AND EXPANDS RACIAL DISPARITIES 5–6 (2021), [nlihc.org/sites/default/files/NLIHC-IERE\\_MID-Report.pdf](https://nlihc.org/sites/default/files/NLIHC-IERE_MID-Report.pdf) [perma.cc/5UCV-ETKF] (explaining how certain tax incentives benefit high-income households and perpetuate racial inequity); Henry Korman, *Biden's Executive Order on Racial Equity: Don't Forget that Federal Regulation of the Financial System Must Affirmatively Further Fair Housing*, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS 27, 31 (Megan Haberle & Sophia House eds., 2021), [www.prrac.org/pdf/racial-justice-in-housing-finance-series-2021.pdf](https://www.prrac.org/pdf/racial-justice-in-housing-finance-series-2021.pdf) [perma.cc/XVJ9-MC2N]).

163. *Segregation Autopilot*, *supra* note 3, at 1996 (citing MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT Summary Page (2021)).

164. *Id.* at 1997 (citing *Low-Income Housing Tax Credits*, NAT'L HOUS. L. PROJECT, [www.nhlp.org/resource-center/low-income-housing-tax-credits](https://www.nhlp.org/resource-center/low-income-housing-tax-credits) [perma.cc/F8Q3-EPFG] (last visited Nov. 28, 2023)).

165. *Id.* (citing *Low-Income Housing Tax Credit (LIHTC)*, HUD USER: OFF. OF POL'Y DEV. & RSCH., [www.huduser.gov/portal/datasets/lihtc.html](https://www.huduser.gov/portal/datasets/lihtc.html) [perma.cc/8TY4-9Y6W] (last visited Nov. 28, 2023)).

166. *Id.*

167. *Id.* (citing sources).

168. *See supra* Part III.B. (advocacy campaigns); *see also Segregation Autopilot*, *supra* note 3, at 1981 n.86, 1998-99 (describing litigation and other advocacy targeting LIHTC program); *id.* at 1999-2000 (describing specific strategies Treasury can employ to improve the program's segregation-related outcomes). One recent study suggests Treasury has made progress since 2015 in affirmatively furthering fair housing through the LIHTC program. *See* Janelle Taylor, Robert Lindsay & Philip Tegeler, *Building Opportunity III: Affirmatively Furthering Fair Housing in the Low Income Housing Tax Credit Program*, POVERTY & RACE RSCH. ACTION COUNCIL (Oct. 2023), [www.prrac.org/pdf/BuildingOpportunityIII.pdf](https://www.prrac.org/pdf/BuildingOpportunityIII.pdf) [perma.cc/G9ZE-SN6P] (describing the program's reduced deference to local opposition to LIHTC projects, increased use of opportunity indices to promote development in lower poverty areas, and enhanced affirmative marketing and tenant protections).

Treasury's Equity Action Plan addresses the department's administration of housing and development programs. It describes Treasury's five-prong strategy to advancing racial equity through its programs, including "fostering an equitable recovery that helps ensure all Americans rebound from the economic consequences of a global pandemic" and "[e]nsuring the tax system promotes a fair economy and all Americans receive the benefits for which they are eligible." Treasury's One Year Progress Report to its Equity Action Plan addresses housing under each of its five strategic goals, but without explicit reference to how it administers the LIHTC program or its legal duty to affirmatively further fair housing. Treasury has not issued an AFFH-specific regulation, but it has referenced its statutory duty to further fair housing in an IRS Revenue Ruling related to the LIHTC program.<sup>169</sup>

The Equity Action Plan sets forth an actionable agency ripe for specific program-related goals, metrics, and accountability mechanisms. For instance, under strategic goal #1 (equitable pandemic recovery) and goal #3 (equitable tax system), Treasury could set forth a specific set of program-related goals to affirmatively further fair housing, including issuing an AFFH regulation that obligates both Treasury itself and state and local grantees that administer or otherwise receive LIHTC funds to take specific steps to demonstrate how they are affirmatively furthering fair housing. Similarly to HUD's proposed regulation, Treasury's AFFH regulation should acknowledge the historic inequities in housing, including the LIHTC program's role in perpetuating segregation.

The regulation should define key terms, establish grantee reporting requirements, offer technical assistance to grantees, and create an accountability structure that allows the public to comment and file a complaint if grantees fail to affirmatively further fair housing. Additionally, the regulation and any administrative guidance should underscore Treasury's authority to sanction grantees and other regulated entities that fail to comply with their AFFH duty, detailing the sanctions available to Treasury under the law. A grantee or regulated entity's plans and any progress reports should be publicly available. Concurrently, other agencies should actualize their Equity Action Plans to carry out their AFFH obligations.

*Other Administrative Law Tools.* Agencies have an assortment of other tools available to operationalize the AFFH mandate. Among them are: internal agency audits that trace funding streams and evaluate how those funds affect segregation, agency-specific regulations and guidance, MOUs, racial equity impact studies,

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169. See Rev. Rul. 2016-29, 2016-52 I.R.B. 875 (describing the "firmly established" federal policy to affirmatively further fair housing). Treasury has otherwise not taken formal steps to acknowledge its duty to affirmatively further fair housing.

“scoring” tools for racial equity, the OIRA rulemaking review process, and strategic data collection and intra- and interagency data sharing.<sup>170</sup> Through these tools, agencies have a variety of options to customize how, in consultation and coordination with HUD, they will carry out their AFFH duties. These tools should be used to complement and carry out their Equity Action Plans.

## V. CONCLUSION

In the Fair Housing Act, Congress cast HUD as the coordinating agency to enforce a government-wide obligation to affirmatively further fair housing in how the government administers housing-related programs. Working alone, HUD stands little chance against the cumulative segregative effect of the federal government’s many agencies. But altogether, executive agencies can unleash the AFFH mandate’s unleashed potential as the government’s most promising legal tool to reduce housing segregation. Following a blueprint for coordination, and taking strategic steps that target the programs with the greatest segregative effect, the government has the opportunity to reverse its legacy of perpetuating segregation.

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170. I examine these tools in more depth in *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*. See *Segregation Autopilot*, *supra* note 3, at 2014-19.

