



## A SHARED FUTURE

Fostering Communities of  
Inclusion in an Era of Inequality

# The Potential for HUD's Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion

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This paper was presented as part of Panel 4 at the symposium, entitled “What would it take... For the HUD AFFH rule to meaningfully increase inclusion?”

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## **Introduction**

The United States was founded on the rights to life, liberty, and the pursuit of happiness, yet its citizens have had unequal opportunities to enjoy these rights. Rather, as borne out by the experiences of previous generations as well as by empirical research, certain groups have been largely excluded from this promise of America.<sup>1</sup>

Opportunity is intimately linked with place. For individuals to have equal opportunity, they must have equal access to neighborhoods with a wide range of amenities that they can leverage to live out their preferences. Recent research provides striking evidence about what happens when this does not occur: children raised in lower-income, amenity-poor neighborhoods fare far worse in terms of wages in adulthood than children who grow up in more affluent areas.<sup>2</sup>

The structure of the US housing market does not grant equal access to housing opportunity for many reasons. Persistent barriers, including overt and subtle forms of discrimination, legal structures such as Jim Crow, and private and public institutional practices, have limited and continue to limit equal access.

The Fair Housing Act of 1968 was one of a series of laws enacted to address these barriers. The law established two mandates for the US Department of Housing and Urban Development (HUD): eliminate illegal discrimination in housing-related activities, and affirmatively further fair housing. Much energy has been devoted to executing the Act's prohibitions against discrimination based on race, color, national origin, religion, sex, familial status, or disability status.<sup>3</sup> This effort has resulted in the emergence of an ecosystem of public, nonprofit, and private institutions that conduct audits, litigate, and provide support to fight discriminatory behaviors. This ecosystem has produced significant changes in laws and practices.<sup>4</sup>

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<sup>1</sup> See, for example, Massey (2015).

<sup>2</sup> Chetty et al. (2014).

<sup>3</sup> Sex was added as a protected class through the 1974 Housing and Community Development Act. Familial situation and disabilities were added as part of the 1988 Fair Housing Amendments Act.

<sup>4</sup> See for example US Supreme Court (2015), a case in which the court ruled that disparate impact forms of discrimination are covered by the Fair Housing Act.

Nonetheless, individuals belonging to protected classes continue to have unequal access to certain housing types and neighborhoods.<sup>5</sup>

The second mandate—affirmatively furthering fair housing (AFFH)—differs in important ways from the mandate to eliminate illegal discrimination. Instead of stopping behaviors that make access to housing unequal, the AFFH mandate seeks to promote behaviors that make access more equal. Historically, AFFH has been much harder to implement and enforce than anti-discrimination. Few, if any, organizations have AFFH as their primary mission, jurisdictional engagement and regulatory monitoring has been uneven, and the scope of the mandate has often not been well-defined.

In 2015, in part in response to that rocky history, HUD released a revised AFFH rule. The new regulatory approach changes the scope of the mandate in substantial ways, and provides incentives and tools to help communities act on it. In this chapter, we discuss the potential of the new rule to produce meaningful change and the things needed in the next five to ten years to maximize its effectiveness in producing true access to opportunity for all. We begin with a brief description of residential segregation in the US. In the second section, we discuss how the new AFFH rule differs from and improves upon its predecessor rule. Finally, we provide a series of “musts” that need to occur over the next five to ten years if the rule is to meaningfully increase inclusion.

### **Residential Inclusion: An Elusive Goal**

The US remains characterized by high levels of segregation due, in part, to a long history of structural and individual discrimination based on personal characteristics such as race, ethnicity and disability.<sup>6</sup> Segregation is an embodiment of the barriers faced by certain groups to inclusion in general and to equal access to housing in particular. It was one of the main motivating factors driving the Civil Rights movement and remains a major barrier to equal access to opportunity.<sup>7</sup> Residential racial segregation, particularly against African Americans, peaked between the 1960s and 1970s. Though it declined substantially after that, leading

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<sup>5</sup> Bostic and Acolin (forthcoming).

<sup>6</sup> Ibid.

<sup>7</sup> Massey and Denton (1993); Massey (2015).

Glaeser and Vigdor to controversially declare “the end of the segregated century,”<sup>8</sup> segregation by race and ethnicity remains high.<sup>9</sup> In addition, socioeconomic segregation has increased, resulting in a complex interaction of sorting by ethnicity and social class.<sup>10</sup>

Some have argued that individual preferences are an important contributor to the residential sorting and concentration of individuals by race, ethnicity, or other characteristics.<sup>11</sup> Indeed, there is a large literature on racial and ethnic enclaves and the benefits they afford that suggests that such preferences exist and are acted upon.<sup>12</sup> The question that remains, however, is how important this driver of sorting is relative to other factors that constrain choices. Research on this question suggests self-sorting is only a secondary factor.<sup>13</sup>

Segregation is only one manifestation of the barriers to access to opportunity faced by members of protected classes. A key driver of segregation, discrimination remains persistent in housing markets and influences the ability of minority families to rent housing units, purchase homes, and obtain mortgages. As reviewed by Oh and Yinger, the first audit studies that estimated the prevalence of discriminatory practices in housing markets found large levels of discrimination against black applicants.<sup>14</sup> Subsequent studies sought to identify explanatory mechanisms and also consider the extent of discrimination against other groups, including Hispanics, single-headed families with children, individuals with disabilities, same-sex couples, and housing voucher recipients.<sup>15</sup> The studies consistently find differences in treatment of members of protected classes by real estate agents, landlords, and mortgage lenders. These differences in treatment contribute to limits on equal access to opportunity.

The findings of these studies and others strongly suggest that effective progress towards truly inclusive communities will require purposeful attention. In short, the AFFH mandate

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<sup>8</sup> Glaeser and Vigdor (2012).

<sup>9</sup> JCHS (2017).

<sup>10</sup> Massey, Rothwell, and Domina (2009).

<sup>11</sup> For discussion of these arguments, see JCHS (2017).

<sup>12</sup> Krysan and Farley (2002); Edin, Fredriksson, and Åslund (2003); Cutler, Glaeser, and Vigdor (2008).

<sup>13</sup> Kain (1968); Cutler, Glaeser and Vigdor (1999); Bayer, Ferreira, and McMillan (2007); Gobillon, Selod, and Zenou (2007).

<sup>14</sup> Oh and Yinger (2015).

<sup>15</sup> Friedman et al. (2013); Aranda (2015); Friedman (2015); Oh and Yinger (2015); Phillips (2017).

remains as relevant as ever. We now turn to a brief history of AFFH to provide context for the 2015 revisions.

### **Implementing AFFH through 2015**

HUD took limited actions to implement the AFFH mandate in the years immediately following the adoption of the Fair Housing Act.<sup>16</sup> Under Secretary George Romney, HUD initially took an aggressive AFFH stance, and proposed using coercive measures to push state and local governments to implement changes to decrease segregation and increase inclusion by creating “stable, racially diverse neighborhoods.”<sup>17</sup> However, these early actions were vigorously opposed by the White House and local governments, and HUD subsequently retreated.<sup>18</sup>

In the 1980s, HUD required Community Development Block Grant recipients for some of its programs to certify that they would affirmatively further fair housing. In 1992, the requirement to meet Fair Housing Review Criteria was expanded to all community planning and development programs managed by HUD, and in 1995, the certification criteria were combined into a Consolidated Plan that required local communities to perform an Analysis of Impediments (AI) and to identify actions to affirmatively further fair housing.<sup>19</sup> The AI components were further clarified in 1996 in the “Fair Housing Planning Guide,” and included analyzing local barriers to housing access for members of protected classes as well as proposing actions to overcome these barriers.<sup>20</sup>

The AIs were expected to be updated every five years and communicated to HUD, and thus to spur actions that would promote inclusion. However, their impact was limited because HUD did not provide resources or incentives to conduct the AIs and did not effectively review them or monitor the implementation of proposed actions, limiting the accountability of grantees and creating little commitment to furthering fair housing.<sup>21</sup> A Government Accountability Office

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<sup>16</sup> Galster (1999); Bostic and Acolin (forthcoming).

<sup>17</sup> Galster (1999), 123.

<sup>18</sup> In some cases, HUD did more than retreat. Instead, the department supported local authorities that were sued for furthering segregation; see Massey (2015).

<sup>19</sup> Bostic and Acolin (forthcoming).

<sup>20</sup> HUD (1996).

<sup>21</sup> GAO (2010); Opportunity Agenda (2010).

report found that among 441 AIs it surveyed in 2010, 29 percent were prepared before 2004 and 11 before 2000 despite HUD's guideline that they should be updated every five years.<sup>22</sup> In addition, reports pointed out that many actions proposed in AIs did not include timeframes for implementation.<sup>23</sup>

### **The 2015 Revised AFHH Rule**

Up to 2015, the actions taken by HUD to implement the AFFH mandate largely failed to produce meaningful results. Housing advocacy groups and government agencies pointed to serious flaws in the approach to implementing AFFH through the AIs<sup>24</sup> and to the limits of piecemeal actions at the local level in response to court cases.<sup>25</sup> Spurred in part by the 2010 GAO report, HUD, under the Obama administration, embarked on a multi-year revision process that culminated with the announcement in 2015 of a new rule for implementing the AFFH mandate.<sup>26</sup>

The new rule's focus is to help local and state institutions covered by the rule actively work to increase access to opportunity for minorities and other underrepresented groups. Its defining feature is the Assessment of Fair Housing (AFH), which replaces the AI and provides a structure designed to focus jurisdictions on a relatively small set of explicit metrics for assessing success in furthering fair housing and providing access to opportunity. Like the AI, the AFH must be completed every five years. It contains six elements (see Table 1). The AFH is a roadmap designed to help local jurisdictions achieve the goals of the AFFH regulation. First and foremost, the AFFH is a community planning process intended to ensure that considerations of fair housing and equal access to opportunity inform each jurisdiction's consolidated plan. Hence, the jurisdiction's priorities and strategies are important results of the AFH process. Another critical element, discussed further below, is the democratizing of information on local housing and market conditions so that a broader range of stakeholders can participate in the process on equal footing.

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<sup>22</sup> Opportunity Agenda (2010).

<sup>23</sup> GAO (2010); Opportunity Agenda (2010).

<sup>24</sup> GAO (2010); Opportunity Agenda (2010).

<sup>25</sup> Massey (2015).

<sup>26</sup> HUD (2015a); HUD (2015b).

**Table 1. The Elements of the Assessment of Fair Housing (AFH)**

Element	Substance
Summary of fair housing issues and institutional capacity	Details whether there have been compliance and enforcement actions in the community during the period of analysis, as well as the allocation of resources devoted to enforcing fair housing laws and regulations.
Data Analysis	<p>Reports, using data provided by HUD via a geospatial data tool, on where the jurisdiction currently stands, and how it has evolved, along three “community performance metrics”:</p> <ol style="list-style-type: none"> <li>1. the persistence of segregated communities, particularly racially and ethnically concentrated areas of poverty that result in worse outcomes for their residents and impose costs on the overall community;</li> <li>2. the existence of disparities in access to amenities that contribute to inequality of opportunity for people in protected groups;</li> <li>3. acute shortfalls in meeting the housing needs of individuals belonging to protected classes, and the trajectory of these shortfalls (increasing, static, or decreasing).</li> </ol>
Assessment of fair housing issues	Describes the local and other forces, such as historic patterns of discrimination, poor public schools, or exclusionary zoning, that underlie the persistence of segregation and disparities in access.
Identification of local fair housing priorities and goals	Develops goals and strategies for addressing the barriers to opportunity that are faced by the local jurisdiction, and metrics to assess progress, based on the results of the data analysis and assessment of fair housing issues.
Summary of efforts directed toward ensuring broad community participation	Reports on the procedures followed to ensure broad inclusion of the entire community, including efforts to get input from members of protected classes in the process of developing the AFH.
Review of progress since the submission of the previous AFH	To be completed in follow-up AFHs; explains and evaluates the progress made in achieving the goals and strategies adopted in previous AFHs, using the submitted metrics and a consideration of factors that affected the extent of success.

The revised rule has several significant features that distinguish it from its predecessor. First, the rule explicitly defines a primary goal of fair housing as equal access to opportunity, and so returns to the origins of the Fair Housing Act, which was enacted in part because of the



existence of disparities in access to opportunity. This emphasis clarifies the metrics for success, so that jurisdictions will have a better understanding of how HUD and others are assessing their investment decisions. Moreover, the metrics established provide clarity regarding the language of opportunity, and so jurisdictions should be less unsure about whether proposed strategies fit into the AFFH framework. Significantly, the opportunity lens is agnostic about the question of whether it is better to promote equal access through mobility or community development vehicles; it leaves that decision to local communities. It is not agnostic, though, on whether strategies need to promote equal access itself.

Second, the new rule seeks to focus jurisdictions' attention on racially and ethnically concentrated areas of poverty. These areas are particularly debilitating for their residents. The combination of racial concentration and poverty concentration creates far higher levels of economic isolation and social chaos than does either racial or economic concentration alone. Therefore, people living in areas with both racial and poverty concentrations face barriers that are considerably more difficult to overcome.<sup>27</sup> Moreover, these are areas to which local governments often devote disproportionate amounts of police, emergency response, and other resources.<sup>28</sup> Thus, they are quite expensive to manage. Both facts suggest that "solving" these areas can produce increasing returns, making more resources available in the long run to address other local priorities. The new rule thus can potentially help focus localities on approaches to housing that will deliver higher returns on investment.

Third, depending on implementation (see below), the new rule could introduce a new mindset regarding the pursuit of fair housing at the local level. Few jurisdictions cherish the opportunity to engage in fair housing issues. In part, this is because their only experiences with fair housing involve threats of litigation or actual lawsuits. As a consequence, there is distressingly little proactive pursuit of fair housing strategies, even though evidence makes clear that more diverse communities are more productive and more resilient.<sup>29</sup> The new rule could potentially change this, as it envisions local governments engaging in the AFFH process with HUD as a partner rather than as an enforcer. If this partnership takes hold—a big if (see

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<sup>27</sup> Sampson, Sharkey, and Raudenbush (2008).

<sup>28</sup> Galster (2002).

<sup>29</sup> Alesina and La Ferrara (2005).

below)—and strategies bear fruit, then many more jurisdictions may start to view fair housing as something that can provide benefits, not just litigation-based costs. AFFH could be the “carrot” to the enforcement infrastructure’s “stick.”

Underlying this possibility is a hypothesis about whether jurisdictions will truly try to find feasible fair housing strategies.<sup>30</sup> There is broad consensus that, at the extremes, some jurisdictions will embrace the rule’s processes with gusto and will have the capacity to produce high quality plans, while other jurisdictions will rebuff any and all efforts to engage in the process. Less certain is the behavior of the large number of jurisdictions between these extremes. In particular, it could be that a majority of those in the middle would like to pursue AFFH strategizing in good faith but have not yet done so mainly because they lack capacity and in-house expertise. These would correspond to Julian’s jurisdictions in category 2, demonstrating an “acceptance of both the letter and spirit of the Rule, but a limited capacity to use the Tool and the Rule’s requirements.”<sup>31</sup> Alternatively, it could be that most in the middle have no interest in engaging in fair housing exercises and would shirk at the first opportunity, falling into Julian’s category 3 of jurisdictions that show an “acceptance of the need to comply with the specific requirements of the Rule to get federal funds,” but also demonstrate “a lack of understanding or willingness to develop a plan to actually address the problems.”<sup>32</sup>

In an important way, the revised AFFH rule embraces the first view of the broad middle group of jurisdictions. Via the new rule, HUD provides local jurisdictions with a new geospatial data tool that can generate many of the reports and initial maps on which to base community engagement and dialogue. This new tool reduces the capacity demands placed on local jurisdictions and so makes it easier for them to complete the AFH. While there is some debate as to how much the tool reduces the administrative burden, early experiences will provide some insights in this regard. Either way, the new tool is a strong signal of HUD’s intent to work constructively with local communities. And it assumes they will take HUD up on this offer.

There are other important benefits to the tool. For example, it helps to level the playing field within communities across groups with varying levels of sophistication in analyzing data

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<sup>30</sup> Julian (2017).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

and planning. The publicly available data can empower local organizations to develop their own analyses based on alternative sets of priorities. The information in the maps and tables of the data tool can also be used by advocates and by the press to see that public officials do not forget, ignore, or overlook challenges faced by those in their communities whom the Fair Housing Act was enacted to protect.

The 2015 AFFH rule also addresses some of the previous flaws in the mandate's implementation. The new data tool is designed to lower the burden of producing the foundational AFFH report (i.e., the AI or AFH). The rule's guidance and partnership structure are intended to make it easier for local jurisdictions to develop feasible strategies for improving equal access to opportunity. It establishes a regime for HUD review of the AFH with deadlines that create a clear framework for accountability, thus limiting a jurisdiction's uncertainty regarding litigation risk.

### **What Can Be Done Going Forward to Ensure the AFFH Rule's Impact?**

The new AFFH rule was adopted in 2015.<sup>33</sup> A number of jurisdictions have started the process of developing their AFH or even submitted it to HUD. However, it will take time for it to produce effects, and the next few years will be crucial in determining its success. Actions by a set of public, nonprofit and private actors at the national and local levels will determine these outcomes. This section identifies a list of eight conditions that will impact the rule's success:

#### **1. HUD must build and maintain an internal capacity so the agency can be a true partner.**

This rule works only if HUD can effectively provide leadership and guidance about it, and there are legitimate questions about whether HUD has the necessary capacity. HUD must conduct an assessment of its existing capacity to determine whether its current level of staffing and the subject matter expertise of its staff members are sufficient to provide high quality consulting to jurisdictions about developing effective housing policies to address barriers to opportunity. Once this assessment is completed, HUD needs to then find resources to address any shortcomings identified. While the Office of Fair Housing and Equal Opportunity (FHEO) and its regional offices should be emphasized in this assessment, HUD should also examine the

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<sup>33</sup> HUD (2015b).

Offices of Community Planning and Development and Policy Development and Research, as they will also play critical roles. HUD must have this capacity if it is to be a true partner for jurisdictions as they go through the AFH and subsequent strategy implementation process.

**2. HUD must build an infrastructure to help increase local capacity to engage in these issues.**

Resources must be allocated to build an infrastructure that will makes it easy for jurisdictions to fulfill their AFFH responsibilities. The vast majority of jurisdictions do not have the staff and capacity to conduct a thorough technical analysis to identify barriers and strategies to overcome them. They will need technical support and examples of best practices, which can be provided either directly by HUD or through HUD-supported third party providers with the topic expertise. An example of such a structure is the National Resource Network, a consortium of public and private organizations formed and financed by HUD as part of the Strong Cities, Strong Communities initiative.<sup>34</sup>

A first element of this infrastructure is the online mapping and data tool, a powerful resource that allows local government to quickly produce information that will facilitate meaningful conversations. We also view the regional training symposia offered by FHEO in the context of the anti-discrimination efforts as a model worthy of examination. We encourage HUD to think hard about what other types of resources might make them a strong partner to jurisdictions striving to fulfill the AFFH mandate.

**3. In building strategies to address local access to opportunity challenges, all parties must affirm the principle of local primacy.**

One source of resistance to this regulation at the local level is a concern that HUD will mandate certain strategies. This concern arises out of a history of local plans and actions being challenged and sometimes vetoed by the federal government. In some instances, these challenges are fully appropriate. Other challenges, however, have been perceived as driven by individual staff with specific views about best practices. The mistrust and resentment arising from this latter set of cases must be overcome if the new AFFH rule is to succeed

Therefore, especially in the early years of the new rule, HUD officials should err on the side of permissiveness regarding locally proposed priorities strategies, provided there is some

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<sup>34</sup> HUD (2017).

legitimate basis for them; they should do so even if these strategies differ from what individuals (or even a majority of staff) at HUD might prefer. This tension will likely arise in discussions about whether mobility strategies or redevelopment approaches are preferable for improving access to opportunity.<sup>35</sup>

Different approaches have been proposed with regards to ensuring compliance while respecting local jurisdictions' primacy. One enforcement strategy would define a set of components to the AFH that, if met by jurisdictions, would provide them a "safe harbor." This approach would have the benefit for jurisdictions of limiting litigation risks with regard to compliance with the FHA; a downside is that jurisdictions might revert to a "check the box" strategy to meet the "safe harbor" criteria rather than engaging in creative solutions. Another approach favors granting HUD officials discretion in determining what plans meet the rules requirements. While this approach would leave jurisdictions with a degree of uncertainty about what constitutes compliance, it would also provide them more incentive to develop new solutions to furthering access to opportunity. There are pros and cons to either approach; policymakers need to give substantial attention to how HUD plays its enforcement role, as this will affect how willing communities will be to engage in the process.

#### **4. Local jurisdictions must make a good faith effort.**

In the deliberations that led to the development of the final rule, concerns were routinely raised about the potential response of bad actors to rule provisions. While these concerns are appropriate, the belief that prevailed ultimately was that the vast majority of jurisdictions would try to fulfill their responsibilities in good faith. This belief was born out of field-testing of the AFH with local government officials during its development. If it proves incorrect, then broad success will be difficult to achieve.

HUD must therefore consider the spirit in which an AFH is produced when assessing its details. The deference we recommended in the previous section should definitely be afforded to those jurisdictions whose AFH product emerges from a good faith effort that features an inclusive local process and a genuine willingness to improve access to fair housing and opportunity. But we do not believe such deference should be absolute. Indeed, HUD is not only

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<sup>35</sup> Goetz (2010); Bostic and Acolin (forthcoming).

a partner in the AFH process; as a regulator, it has a responsibility to ensure compliance. This tension between its roles as partner and as regulator, mentioned in other chapters of this volume,<sup>36</sup> is something that HUD will have to grapple with continuously.

#### **5. All must think regionally and beyond housing provision.**

The renewed focus on opportunity included in the rule requires strategies broader than housing provision. Achieving the American ideal of equal opportunity requires more than a roof over one's head: it requires access to a home in neighborhoods with quality schools, access to jobs, investments in public services (e.g., safety, parks and recreation). But these elements of opportunity rarely respect jurisdiction boundaries. Rather, effectively reducing local barriers to opportunity often entails cooperation across jurisdictions.

The new rule encourages such cooperation by making it possible to produce regional AFHs. The advantages for jurisdictions of adopting a regional approach include the ability to share staff resources, consulting services, and elements of the public input process. The hope is that the reduced cost of producing a regional AFH will incentivize jurisdictions to develop an AFH and strategies that better align with the regional nature of opportunity. Such plans should be more impactful in achieving desired goals.

#### **6. Local jurisdictions, foundations and nonprofit organizations must leverage data to empower those without voice during the planning process.**

The ability of information to change housing market practices has been demonstrated by the changes to the mortgage lending practices that arose from the availability of data through the Home Mortgage Disclosure Act (HMDA). In this case, consumer and community activists analyzed the HMDA data intensively and used patterns they found to raise issues and ultimately create opportunities for dialogue that generated change.

The HMDA experience could be a template for the promise of the AFFH data tool. But this will occur only if the fair housing counterparts to the consumer and community advocates in the HMDA case are engaged and working to identify patterns, raise issues, and drive change. All of the parties at the local level, including public sector players, can play this role. We believe

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<sup>36</sup> For example, Julian (2017).

the extent of HMDA-type engagement by local parties using the data tool will significantly determine the scope of the new rule's success in expanding equal opportunity.

### **7. Foundations and nonprofit and fair housing organizations must be monitors and partners for local governments during the AFH process and strategy implementation.**

Foundations and local nonprofit and fair housing organizations have long played an important role in advancing inclusion and fair housing objectives, and they will need to play a similar role under the new regulation. They can be a source of external discipline to help local jurisdictions engage in the process in good faith by ensuring that all segments of the community—particularly those who have historically not had a voice—have access to the data tool, know how to use the tool, are aware of public meetings, and are sufficiently organized to meaningfully engage in the process. Moreover, their experience in fighting discrimination will provide insight about strategies to further inclusion and increased opportunity for all.

In addition, these organizations can be important players in the AFFH implementation process in at least two ways. First, because these organizations have missions that align with the AFFH objectives, they could provide direct support in executing whatever strategy the jurisdiction has decided to pursue. Such support might include funding and operating mobility counseling programs, funding the acquisition of affordable housing in opportunity communities, and recruiting mission-driven property managers for that housing. Second, they can monitor jurisdictions' progress towards strategic goals, particularly in terms of ensuring that strategies are not prematurely abandoned or undermined. A useful model for this role has been given by the community groups involved in monitoring banking institution compliance with the Community Reinvestment Act (CRA). Pressure from these groups pushed banks to take questions of equality in access to credit more seriously, resulting in the establishment of CRA agreements that have effectively increased access to credit in underserved communities.<sup>37</sup>

### **8. AFFH must survive political risk.**

For AFFH to thrive, it needs to retain resources and authorized legitimacy. There are two political risks in this regard. First, deficit concerns and beliefs that some domestic programs should have lower priority have led some policymakers to seek significant reductions in the

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<sup>37</sup> Bostic and Robinson (2003).

funding for HUD. In the wake of the 2016 election, many of these policymakers are ascendant, raising questions as to the level of future funding for HUD. If there are steep cuts, HUD will not be able to make the investments in itself and in a supporting infrastructure required to make AFFH implementation effective. Here, foundations may have a critical role to play: they can support high-quality assistance to jurisdictions, presenting examples of best practices in assessing and overcoming barriers to fair housing so as to inspire creative strategic thinking.

Second, anti-discrimination policy generally, and fair housing policy specifically, have always been sensitive political topics, with some not believing that federal resources should be devoted to such policies. Indeed, in January 2017, early in the 115th Congress, the “Local Zoning Decisions Protection Act of 2017” was introduced as a bill in both the House and Senate.<sup>38</sup> If adopted, these bills would nullify the 2015 AFFH rule and the assessment tools developed by HUD and made available to jurisdictions to conduct the AFH. The bills would also prohibit federal funds from being “used to design, build, maintain, utilize, or provide access to a Federal database of geospatial information on community racial disparities or disparities in access to affordable housing.” HUD would be charged with leading a consultation to replace the rule in order to respect the mandate of the FHA as upheld by the Supreme Court, but it could make recommendation for a replacement rule only if a consensus is reached between “the Secretary, the State officials, local government officials, and officials of public housing agencies consulted.” If no consensus is found, the AFFH rule would be rescinded with no immediate replacement. Bills such as this have been proposed in the past without much traction. However, with the new political makeup of Congress, they may have a higher likelihood of being adopted.

These provisions would weaken the mandatory nature of AFFH. Combined with statements by HUD Secretary Ben Carson opposing the AFFH rule before he was nominated to head the agency, the introduction of the new bills creates substantial uncertainty with regard to future efforts at the federal level to implement the mandate given by HUD.<sup>39</sup> Even if the rule ultimately stays in place, it is possible that for the coming years, local initiatives by public

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<sup>38</sup> H.R. 482; S. 103. For the text of the House bill, see <https://www.congress.gov/bill/115th-congress/house-bill/482/text?q=%7B%22search%22%3A%5B%22Gosar%22%5D%7D&r=1>.

<sup>39</sup> Greenberg (2017); Misra (2017).



officials, nonprofits, and foundations will be the main drivers of innovative practices to increase inclusion and access to opportunity.

For the AFFH rule to be successful, government, advocates, and citizens need to embrace the framework put forth by the rule and support actions to overcome the barriers to opportunity. Whether the rule remains in place and HUD allocates sufficient resources to its implementation in the coming years is currently in question. Even if the rule relies on local jurisdictions to develop the assessment and identify and implement strategies, HUD needs to be a partner for them, providing consistent guidance and support. Without a commitment of resources by HUD, the impact of the rule is likely to be limited to a few high-capacity jurisdictions with the resources and local community of fair housing groups to develop and implement creative strategies to AFFH.

### **Conclusion**

Almost fifty years after the adoption of the 1968 Fair Housing Act, the structural forces at work in the US housing market that led to residential segregation and disparities in opportunity are still operative. Much remains to be done to ensure that all families have access to neighborhoods with amenities that afford them the opportunity to pursue their dreams. HUD's 2015 Affirmatively Furthering Fair Housing rule is an important step towards increasing residential inclusion and meeting the mandate given to the department by the Fair Housing Act. However, the full impact of the rule will depend on HUD's commitment to the rule's philosophy and its devotion of resources to the implementation of the law. The rule's impact will also depend critically upon decisions by local governments, community organizations, and individuals to use the resources they have, through the rule and from other sources, to effectively remove barriers to fair housing in their communities.

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