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VIA E-MAIL (www.regulations.gov)
Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Comments on HUD's Proposed Rule "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act," Docket No. FR-5248-P-01

Dear Sir or Madam:

The comments are submitted to the U.S. Department of Housing and Urban Development ("HUD") on behalf of the Council for Affordable and Rural Housing ("CARH"), the National Leased Housing Association ("NLHA"), the National Multifamily Housing Council ("NMHC) and the National Apartment Association ("NAA") (jointly CARH, NLHA, NMHC, and NAA are referred to as the "Commenters"). CARH represents owners of properties that receive mortgage insurance and/or rental assistance from the U.S. Department of Agriculture's Rural Development office, low income housing tax credits, and other federal and state affordable housing programs. NLHA represents owners of properties that participate in the Section 8 rental assistance and other federally assisted housing programs. NMHC and the NAA are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry's largest and most prominent firms. As a federation of nearly 170 state and local affiliates, NAA encompasses over 69,000 members representing more than 8.1 million apartment homes throughout the United States and Canada.

Together, the Commenters, speaking on behalf owners of tens of thousands of multifamily housing units across the United States, all of whom deal with issues related to the Fair Housing Act (the "FHAct") on a daily basis, submit the following comments concerning the above-referenced proposal to establish new Federal regulations defining certain types of harassment that violate the Fair Housing Act, 42 U.S.C. §3601-3619 (the "FHAct") and to codify theories of direct and vicarious liability under the FHAct. 80 Fed. Reg. 63720 (October 21, 2015) (the "Proposed Rule"). As explained below, the Commenters believe the Proposed Rule would impose liability on public and private housing providers that Congress did not intend. If it is

appropriate for HUD to make such rules in the first place, HUD must also identify safe harbors and affirmative defenses that will prevent housing providers from being held accountable for acts that they did not intend, had no knowledge about, and were not personally involved in.

Summary

The Commenters commend HUD for its attempt to provide guidance with respect to the FHAct – something it has regrettably refused to do in other important contexts. Nevertheless, when the new definitions of discriminatory harassment conduct in the Proposed Rule are married to the extensive theories of direct and vicarious liability it proposes, the proposal goes far beyond traditional notions of accountability under the FHAct. Rather than hold housing providers liable for their own intentional misconduct, the Proposed Rule broadly extends liability to persons who neither had intent nor knowledge of discriminatory conduct by third parties, effectively making them guarantors against misconduct by others. In some respects, the Proposed Rule may be seen as a worrisome extension of the notions of liability without intent that are now codified in HUD's disparate effect regulation, 24 CFR §100.500. To the extent that HUD intends to make housing providers, without evidence of intent, knowledge or personal participation, broadly liable for misconduct of others, the Proposed Rule goes beyond what the FHAct allows. If HUD feels compelled to codify rules concerning discriminatory harassment conduct and theories of liability, it should provide some protections to prevent holding housing providers liable in situations that Congress, in enacting the FHAct, did not intend. HUD should also limit the new regulation to its own investigatory and administrative proceedings in the absence of evidence that Congress intended to establish rules of liability that would be binding on Federal courts.

The Proposed Rule

The Proposed Rule includes two primary components. First, it purports to codify the elements of two types of harassment that violate the FHAct. These include (1) so-called "quid pro quo" ("QPQ") harassment, in which "a person is subjected to an unwelcomed request or demand" because of the person's protected characteristic and "submission to the request or demand is, either explicitly or implicitly, made a condition related to the person's housing" and (2) "hostile environment harassment," where a person, on the basis of a protected characteristic, "is subjected to unwelcome conduct that is sufficiently severe or pervasive that it interferes with or deprives the victim" of housing rights protected under the FHAct. 80 Fed. Reg. at 63721. The Proposed Regulation explains that QPQ harassment "has most typically been associated" with sex-based harassment, where for example "a housing provider conditions a tenant's continued housing on the tenant's submission to unwelcome requests for sexual favors." *Id.* at 63723. QPQ harassment may be found even where there is evidence of acquiescence by the tenant. *Id.* at 63721. Hostile environment harassment may arise in a variety of situations, according to the Proposed Rule, and may include both acts by a housing provider and its agents and employees, as well as misconduct by other tenants. *Id.* at 63726. According to HUD, the "totality of the circumstances," such as the nature of the conduct alleged, the context in which it occurred, and the severity, scope and frequency of the conduct, among other factors, must be considered in assessing hostile environment harassment claims. *Id.* at 63724.

The Proposed Rule also proposes to codify rules concerning direct and vicarious liability under the FHAct. According to the Proposed Rule, following theories of negligence, a person "is directly liable for failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, whether the person knew or should have known of the discriminatory conduct." *Id.* at 63276. The proposal also extends direct liability with respect to conduct of non-agents – such as misconduct by tenants – "if the person knew or should have known of harassment, had a duty to take prompt action to correct and end the harassment, and failed to do so or took action that he or she knew or should have known would be unsuccessful in ending the liability." *Id.* Vicarious liability exists "for the actions of [a housing provider's] agents taken within the scope of their relationship or employment as well as for actions committed outside the scope of the relationship or employment when the agent is aided in the commission of such acts by the existence of the agency relationship." *Id.* at 63727. Vicarious liability exists "regardless of whether the person knew of or intended the wrongful conduct or was negligent in preventing it from occurring." *Id.*

Although applicable to the context of harassment claims, the direct and vicarious liability rules are applicable to "all violations under the [FHAct]," regardless of the type of discriminatory conduct involved. *Id.* at 63721.

Comments on the Proposed Rule

1. **Taken together, the Proposed Rule's definition of discriminatory harassment and direct and vicarious liability make housing providers guarantors against alleged FHAct violations.** The Commenters recognize that the FHAct is essentially a Federal statutory tort and that courts have applied general notions of tort liability to FHAct claims. *See Meyer v. Holley*, 537 U.S. 280, 282, 287 (2003). Nevertheless, tort law does not generally make persons liable for actions of other persons, except in limited situations, such as where there is a clear duty to act, knowledge or reasonable notice of the alleged misconduct by the third person, and some relationship to the third person that establishes control or authority over that third person. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7, §37- 44; Restatement of Agency, § 219. In other words, while tort law may in some cases make one person liable for the misconduct of third persons, with rare exceptions, people are generally not held liable as the guarantor against misconduct by third person.

Unfortunately, in spite of its avowed claim to follow traditional tort principles (80 Fed. Reg. at 63720), the Proposed Rule significantly extends liability beyond traditional tort concepts. Indeed, the Proposed Rule's combination of broad definitions of QPQ and hostile environment harassment, when married to the extensive theories of direct and vicarious liability it contains, may result in housing providers becoming guarantors against discrimination claims. For example, according to the Propose Rule's direct liability theory, a housing provider may be held liable for hostile environment claims, including so-called tenant-on-tenant harassment claims, if the provider should have known of the alleged harassment, and even if it took steps to prevent the harassment that the provider "knew or should have known would be unsuccessful in ending the harassment" – in other words when someone else, after the fact, determines that the response was unlikely to succeed. *See id.* at 63726. In many cases, owners of large multifamily housing

portfolios may own properties located in different areas of the country, and employ third party property management companies to operate their properties. HUD should take practical realities of a national rental market into account in defining what is or is not sufficient to establish liability under the FHAct. Simply put, if HUD wishes to impose a rule that makes a housing provider liable for misconduct of third-parties, including tenants – even where the housing provider institutes good faith practices to prevent or terminate such misconduct – the rule should recognize that the less knowledge of misconduct and the less control the housing provider has, the higher the bar should be for imposing liability for third party misconduct.

Similarly, according to the Proposed Rule, a housing provider may be liable not only for its actions, but also vicariously liable, regardless of knowledge or intent to violate the FHAct, for actions of its agents committed in the scope of the agents act, such as in *Meyer v. Holley,* where a real estate corporation was held liable for misconduct by its agents. See 537 U.S. at 283. But the Proposed Rule goes further, adopting the most extensive theory of vicarious liability identified by some courts, and adopts the so-called "aided in agency" rule, to also hold a provider liable for actions committed by an agent "when the agent is aided in the commission of such acts by the existence of the agency relationship." 80 Fed. Reg. at 63727. This goes well beyond traditional tort concepts and does not reflect the limited concepts of vicarious liability endorsed by the Supreme Court's *Meyer* decision. *See, e.g., Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742, 763 (1998) (in a Title VII case, declining to adopt "aided in agency" standard, which is "a developing feature of agency law," explaining that "we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment"). On the contrary, tort law traditionally focuses on misconduct committed by an agent within the scope of the agent's authority (Restatement of Agency § 219(2)), in recognition of the fact that a principal should not be held liable for conduct outside the scope of the agent's duty, simply because the wrong-doer was the principal's agent. It is one thing to hold a real estate company liable for discriminatory acts or statements made by its brokers in the scope of their agency; it is another thing to hold a housing provider liable for misconduct of a janitorial employee outside the scope of that employee's duty, simply because he wore a badged uniform or possessed keys or passes to tenants' premises.

These are examples that directly reflect concepts of liability embodied in the Proposed Rule. It is likely that if adopted, the principles announced in the Proposed Rule would be used to find liability in even more unlikely and improper situations. There is no indication that in enacting the FHAct, Congress intended to adopt such wide-ranging notions of liability and essentially make housing provider guarantors for the conduct of third parties. If HUD is going to formally codify standards concerning direct and vicarious liability, and for liability for actions of third parties, it should more clearly evaluate the full extent of the courts' holdings on these issues and the consequences of adopting broad rules of liability on housing providers. Moreover, to the extent that it adopts more expansive rules of liability, it should take steps to define safe harbors and affirmative defenses to protect housing providers from liability that Congress did not intend to impose.

2. <u>Before adopting harassment and direct and vicarious liability rules, HUD should discuss contradictory and inconsistent authorities.</u> The Proposed Rule is studded with legal citations that support its expansive notions of liability. But it is unfair and incorrect to say that federal courts interpreting the FHAct unanimously agree with its interpretations. For example, with respect to the issue of hostile environment harassment alone, some federal courts have taken a much more skeptical and limited approach than HUD. *See, e.g.*, *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1146 n.8 (S.D. Fla. 2004) (noting circuit split over the existence over "hostile housing environment" cause of action based on the conduct of non-agents or employees); *see also Elliot v. Plaza Properties, Inc.*, 2010 WL 2541020, at *6 (S.D. Ohio 2010) (stating that there was "some scant authority" for holding a landlord liable for tenant on tenant harassment).

To the extent that HUD proposes to "codify" current jurisprudence, it needs to identify inconsistent or contradictory authorities. Doing so may dissuade HUD from adopting some of the more expansive liability theories in the Proposed Rule or suggest limits that would alleviate many of the concerns raised in these comments. Moreover, to the extent that there is inconsistent or contradictory authority, a forthright and candid discussion of those cases would strengthen the argument that HUD's final decision was reached after careful deliberation and assessment of the law developed over almost 50 years of judicial interpretation of the FHAct. Certainly, to the extent that the Proposed Rule purports to be based on current FHAct jurisprudence but does not identify and address such contrary authorities, HUD is open to criticism that the Proposed Rule lacks a reasonable basis in law and simply reflects the agency's "best case" position, rather than actually codifying existing legal principals.

3. <u>HUD should identify safe harbors involving claims of harassment or third-party liability.</u> Moreover, to the extent that HUD offers the Proposed Rule to provide "guidance" to housing providers, it does much to expand their possible liability without offering practical advice about how to avoid claims of harassment and direct or vicarious liability. In *Property Casualty Insurance Assn. v. Donovan*, Civ. No. 13-8564, 2014 WL 4377570 (N.D. Ill. Sept. 3, 2014), a Federal district court remanded HUD's disparate impact regulation to the agency because it failed to consider requested safe harbors from disparate impact claims against insurers. Having recognized a duty to provide additional guidance to housing providers with respect to harassment claims and liability issues, HUD should analyze existing legal authorities and offer specific safe harbors and make other refinements to the proposal. For example, to the extent that HUD believes housing providers should be made liable for unknown and unintended actions by their agents and third parties, HUD should confirm that liability for harassment claims will not be imposed on a housing provider where the housing provider:

a) Provides periodic mandatory fair housing training for its employees and agents (including training related to harassment claims);

b) Requires unaffiliated management companies to conduct similar training of their employees, to report to the property owner on a regular basis about the steps it is taking to avoid fair housing claims generally and to promptly report any potential fair housing claim to a designated official at the housing provider; and

c) Implements and publicizes a hot line or other secure communications mechanism whereby a tenant can confidentially notify the housing provider about possible harassment by employees or other tenants.

4. **HUD should not eliminate affirmative defenses for housing providers under the FHAct that are available in Title VII cases.** In addition to identifying the elements of fair housing claims specifying safe harbors, HUD should also identify – or at least not eliminate – affirmative defenses that may relieve or at least mitigate liability of housing providers. In the Proposed Rule, HUD fails to identify a single affirmative defense that housing providers may assert, and goes to great lengths to explain why affirmative defenses typically available in Title VII employment discrimination claims to vicarious liability claims, where an owner takes action to prevent or correct harassing behavior, should not be available to housing providers in FHAct cases. *See* 80 Fed. Reg. at 63727. The analysis is not convincing.

To justify eliminating such affirmative defenses, HUD argues that there are fundamental differences between employee misconduct in the workplace and employee misconduct in housing situations that argue against the Title VII affirmative defense in the FHAct context. While we do not disagree that there are important differences between the home and workplace environments, HUD errs in relying on those differences to eliminate important affirmative defenses solely on the grounds that harassment at home is different from harassment at work. The Title VII affirmative defenses are rooted in basic concepts of principal-agent relationships, and those considerations do not change simply because the agent involved is an employee of a housing provider, as opposed to some other employer. To categorically eliminate established affirmative defenses because the home is more private than the workplace ignores exactly the traditional rules of tort liability that HUD claims to follow and is not a justifiable argument.

5. **HUD fails to clarify when otherwise protected speech becomes actionable under the FHAct.** As the Proposed Rule points out, not all harsh statements constitutes harassment. Thus, while it recognizes that "not every quarrel among neighbors amounts to a violation" of the FHAct (*id.* at 63727), the Proposed Rule provides no guidance for how to distinguish mere quarrels from actual harassment. Indeed, a quarrel is not harassment. Likewise, HUD fails to candidly address possible First Amendment aspects of the harassment rules it proposes. Almost 20 years ago, HUD itself was accused of violating the First Amendment rights of persons who organized to prevent development of a group home. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). It is not clear whether HUD has evaluated how forms of conduct that allegedly constitute harassment may be separated on a principled basis from other forms of speech or conduct that is constitutionally protected or so trivial as to not qualify as harassment in the first place. Certainly, in the absence of clear guidance, adjudicators are likely to assume that any harsh words constitute harassment unless proven otherwise, effectively shifting the burden of proof onto the housing provider. Especially where the Proposed Rule purports to hold housing providers liable for possible tenant-on-tenant harassment of which they had no knowledge or notice, it is imperative for HUD to make clear precisely what sort of conduct a housing provider may become liable for. At a minimum, HUD should clarify the "totality of circumstances" definition in proposed §100.600(a)(2)(i) to provide additional guidance on these topics.

6. **<u>HUD should provide examples of when housing providers will not be held liable for harassment or conduct of third-parties.</u>** HUD asserts that the Proposed Rule formalizes standards determined to be appropriate for evaluating claims of quid pro quo and hostile environment harassment in the housing context, and promises to provide some examples of their application. *Id.* at 63720. HUD additionally claims to clarify when housing providers and other covered entities or individuals may be held directly or vicariously liable under the Act for illegal harassment and other discriminatory housing practices. *Id.* While HUD does in fact provide some examples that describe the types of conduct that establish a claim of harassment and/or create a hostile environment, it falls short of providing a complete picture. Specifically, while HUD offers some "examples" of action that allegedly may constitute forms of harassment (*see id.* at 63730), it fails to offer contrasting examples of conduct that would ***not*** constitute harassment, which would be useful to explain to owners what sort of conduct would prevent them from transgressing the law. HUD has provided such useful illustrations in other fair housing contexts, and should do the same here. *See, e.g.*, 24 CFR §100.205(b) (containing examples of both situations that would and would not require accessible design features).

7. **<u>Before adopting a final rule, HUD should expressly address principles of agency law raised in the Proposed Rule</u>.** Clearly, many of the issues raised in these comments focus on issues of the relationships between a housing provider and persons it employees to operate its properties. Such issues of agency are at the heart of concepts of direct and vicarious liability and of harassment claims addressed in the Proposed Rule. Yet amazingly, the Proposed Rule refuses to provide a definition of what constitutes an agency relationship. *Id.* at 63721, fn. 2. Ultimately if the proposed rule, as written, is instituted, housing providers will be fair game for claims relating to the actions of third parties. HUD cannot purport to establish rules holding housing providers liable for actions of third parties without in the first instance explaining what sort of agency principles it is relying upon. Failing to do so leaves housing providers unable to determine what persons will be regulated, what conduct is prohibited, and when liability will attach. At a minimum, HUD owes housing providers the duty to clearly articulate the principles of agency law on which its harassment and liability rules are based. Absent such rule, HUD's Proposed Rule is open to challenge for being based on a legal theory that lacks an articulable basis in law.

8. **<u>HUD should apply these rules only to its own investigative and administrative actions and should not purport to preempt court-established rules.</u>** To be sure, Congress directed HUD to oversee the administration of the FHAct, to investigate, conciliate and adjudicate fair housing claims, and to promulgate regulations implementing the FHAct. Certainly, within the scope of its own activities to investigate, conciliate and adjudicate fair housing claims, it is appropriate for HUD to set rules defining the elements of and defenses to fair housing violations and the processes to adjudicate such claims. It is less clear that a federal agency has the constitutional authority to tell federal courts how to adjudicate those claims. In some instances, it may be appropriate for Federal courts to defer to agency rules. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). This is not a case where *Chevron* deference is appropriate, however, because HUD is not basing its expertise here on its own experience, but largely on interpretations of federal court decisions. Moreover, HUD

cannot claim any particular expertise in tort law. HUD is not the federal agency delegated by Congress to enforce or interpret tort laws, and when doing so, is decidedly outside of its main competence and is owed no deference in its interpretations. As one commentator observes, "the Supreme Court . . . generally gives precedence to prior judicial interpretations" over agency interpretations of statutes, and "lower courts follow suit." Koch, *Administrative Law and Practice* (3rd. Ed.) at 11:34. While as noted HUD has not candidly discussed inconsistent or contradictory judicial decisions, it is also clear that at best, HUD is reading federal case law to distill the holdings of those cases. But deciding what the law is manifestly is the duty of the courts, and HUD is hardly in a more expert position than the courts to synthesize their holdings.

Certainly, HUD has the power, within the constraints of the Constitution, prevailing administrative law, and the FHAct, to identify the elements of fair housing claims, to establish burdens of proof, and to fix the rules for establishing liability with respect to its own investigation, conciliation and adjudication of those claims. It is far less clear to what extent those rules should be deemed binding on federal courts. In an exercise of regulatory restraint, HUD should make clear that any final rule addressing harassment and direct and vicarious liability should apply solely to HUD proceedings and administrative conduct.

Conclusion

As noted above, we welcome HUD's effort to provide guidance in the area of harassment claims and theories of direct and vicarious liability under the FHAct, although we regret HUD's refusal to provide exactly the same sort of guidance in areas where it is even more urgently needed, such as with respect to disparate impact claims. *See, e.g.*, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11475, 11477 (Feb. 15, 2013) (declining to establish safe harbors in insurance and housing preservation cases). To the extent that HUD does believe that regulations concerning harassment and direct and vicarious liability are needed, HUD should recognize the significant harmful consequences posed by extending liability to the maximum extreme proposed by the Proposed Rule. If it is going to adopt such regulations, it should provide additional guidance, including identifying safe harbors and affirmative defenses that may eliminate or at least alleviate liability for such claims, as well as guidance reflecting the properly limited scope of any such regulations to HUD-conducted administrative proceedings. We look forward to participating with HUD in further attempts to refine these concepts to assure that, if a final rule is adopted, it reflects an equitable approach that is rooted in well-accepted legal doctrines and promotes a fair approach to reducing fair housing claims generally.

Please feel free to contact me if you have any questions.

Very truly yours,

Harry J. Kelly, Esq.