December 21, 2015

Regulations Division
Office of General Counsel
451 7th Street, SW, Room 10276
Department of Housing and Urban Development,
Washington, DC

Re: [Docket No. FR-5248-P-01] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act

To Whom It May Concern:

On behalf of the National Association of Housing and Redevelopment Officials (NAHRO), we are pleased to offer the following comments in response to the proposed rule (FR-5248-P-01) entitled “Quid Pro Quo and Hostile Environment Harassment and Liability for Disciminatory Housing Practices under the Fair Housing Act,” published in the Federal Register on October 21, 2015. Formed in 1933, NAHRO represents over 20,000 individual and agency members. Collectively, our membership manages over 970,000 public housing units, or approximately 83 percent of the entire public housing inventory, as well as 1.7 million Housing Choice Vouchers. Many of NAHRO’s members are also involved in the administration of federal funding through Community Planning and Development programs. NAHRO is deeply vested in any regulations that may expose local housing and community development agencies to additional and unnecessary legal liability.

HUD’s proposed rule seeks to codify through regulation the “quid pro quo” and “hostile environment” harassment concepts on the basis of race, color, national origin, religion, sex, disability or familial status (“protected characteristics”). The rule also broadly expands liability standards for violations of one or more provisions of the Fair Housing Act (FHA). While NAHRO commends HUD’s objective to protect individuals who experience harassment in housing by defining “quid pro quo” and “hostile environment” harassment, NAHRO has serious concerns over the proposed rule’s use of “direct liability” and the unintended consequences that may arise.

Applicability of New Liability Standards

NAHRO is concerned about how the proposed liability standards would apply to all FHA claims. Scenarios where tenants may potentially harass other tenants on topics that are not related to the terms of tenancy or where the harassment may not take place on the property are particularly worrisome. There is a great concern that this rule will make PHAs mediators between neighbors who are having disagreements. It is

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also unclear how PHAs would know about harassment by one neighbor toward another neighbor that takes place off the property. Similarly, harassment between neighbors that takes place on the internet would not be known by a PHA, but the PHA may potentially still be held liable. There need to be additional constraints on when liability attaches.

**Direct Liability**

NAHRO believes that the proposed rule’s definition of direct liability is overly broad and is not appropriate for the housing context. The proposed rule states that a person is directly liable for discriminatory housing practices when:

1. The person’s own conduct results in a discriminatory housing practice (§100.7(a)(i)).
2. Failing to take prompt action to correct and end a discriminatory housing practice by that person’s employee or agent, where the person knew or should have known of the discriminatory conduct (§100.7(a)(ii)).
3. Failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party can derive from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium or cooperative), or by federal, state or local law (§100.7(a)(iii)).

This definition of direct liability is overly broad. We do not believe that HUD has fully thought through some of the unforeseen consequences of having such a broad definition of direct liability in the housing context. NAHRO is particularly concerned that a principal may be held directly liable when it fails “to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party.” Our concerns stem from scenarios where the third party is outside the scope of control of the principal.

NAHRO is concerned about voucher scenarios where public housing agencies (PHAs) may be held liable by the behavior of actors that are outside of their scope of control. For example, a PHA, administering a Section 8 voucher program, may be liable in a scenario where a Section 8 voucher recipient encounters a hostile environment created by the participant’s neighbors. The neighbors of the voucher recipient may not be Section 8 voucher holders themselves. They may be in no way affiliated with the PHA. Nonetheless, the PHA, under this expansive view of direct liability may be held liable for their behavior.

A PHA may be liable if it does not “take prompt action to correct and end the discriminatory housing practice” in a way that does not penalize or harm the aggrieved person. The rule states that corrective actions appropriate for a housing provider might include verbal and written warnings; enforcing lease provisions to move, evict, or otherwise sanction tenants who harass or permit guests to harass; issuing no-trespass orders or reporting conduct to the police; and establishing an anti-harassment policy and complaint procedures, depending on the harassment.” It is unclear how helpful these actions may be, since the examples given, with the exception of calling the police, assume that the principal has some control over the neighbors. Even calling the police may be problematic as it brings undue attention to the voucher recipient. In some jurisdictions, voucher recipients may have nuisance statutes invoked against them from repeated phone calls to the police.

Other avenues to avoid liability and to remove a program participant from a hostile environment may be blocked because a potential solution may “penalize or harm the aggrieved person.” For example, helping the voucher recipient find new housing may, under this rule, “penalize or harm the aggrieved person,” even
if the new housing took the voucher recipient out of the hostile environment. Finally, even if moving the voucher recipient was an action that did not “penalize or harm the aggrieved person,” a PHA may not be able to find equally suitable housing. In many jurisdictions, especially those with tight rental markets, it can be difficult to find another willing landlord with a similar unit.

Provide clarification for “should have known”

This definition seeks to codify the traditional principles of liability, but it does not clarify how “should have known” is defined when determining liability. The current definition suggests that housing providers should always be aware of instances of harassment and discrimination even if the housing provider is not in the position or does not have to capability to be aware. The proposed rule’s preamble does provide an example of how “should have known” could be defined in regards to tenant on tenant harassment:

“[A]n apartment owner ‘should have known’ of tenant harassment by another tenant when the owner had knowledge from which a reasonable person would conclude that the harassment was occurring. It is important to note, however, that not every quarrel among neighbors amounts to a violation of the Fair Housing Act.” (Page 25)

However, if the apartment owner does not inform its HUD-assisted housing provider with knowledge of the possible harassment, the liability of the HUD-assisted housing provider under this scenario remains unclear. PHAs often provide Section 8 rental subsidies to private owners throughout the community. A PHA would have no way of knowing if there is harassment occurring with its tenant, unless it is reported by the tenant. The proposed rule’s definition of direct liability suggests that the responsibility of knowledge is placed upon the housing provider, even if the provider had no knowledge of the harassment. This rationale is flawed and housing providers should not be penalized for the actions of other tenants that are unknown to the provider. If this proposed rule moves forward, NAHRO requests that the rule clearly define “should have known” with respect to a housing provider’s duty to correct and end a discriminatory housing practice by a third-party.

Provide clarification for “showing:”

The proposed rule defines “hostile environment harassment” as:

“Unwelcome conduct that is sufficiently severe or pervasive as to interfere with: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.” (§100.600(2))

Whether a hostile environment harassment exists depends upon the “totality of circumstances” (§100.600(2)(i)) which takes into consideration:

1) Factors (not limited to) the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved (§100.600(2)(i)(A))

2) Evidence of psychological or physical harm is relevant, as well as the amount of damages to which an aggrieved person may be entitled. However, neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists (§100.600(2)(i)(B))
According to the rule’s preamble (page 15), to establish a hostile environment harassment claim would require a “showing” of the totality of circumstances. The proposed regulatory language does not specify what constitutes a “showing.” The rule leaves to question whether a verbal or written account from the aggrieved tenant would be enough to comprise a “showing” or whether deeper evidence would be necessary, such as a witness. Additionally, NAHRO is concerned that the test to determine a hostile environment may be too subjective. One reasonable person’s measure of a hostile environment harassment, taking all circumstances into consideration, may be lower or higher than another reasonable person’s measure of hostile environment harassment.

**Housing Providers Lack the Resources to Comply with the Proposed Rule**

The proposed rule would lead to an increase in PHA insurance premiums. Under the proposed rule, housing providers and their employees and agents would be accountable for tenant on tenant harassment, even if the harassment has little to do with the terms of tenancy or whether the harassment occurs on the owner’s premises. Housing providers and their employees and agents would be saddled with the responsibility of exercising due diligence by monitoring and responding to all complaints and potential FHA violations. At a time where there is scarce funding for our federal housing programs, many housing providers would not have the ability to remain diligent to address all harassment claims, leaving them vulnerable to litigation. If the proposed rule were made into regulation, the increase in due diligence would also very likely correspond with an increase in harassment litigation (whether unfounded or not). This scenario may result in an unintended consequence related to PHA insurance premiums, which will likely increase as a result of additional litigation.

**The Proposed Rule Conflicts with Existing HUD Policies**

For HUD’s homelessness programs, like the Continuum of Care Program, the Department has been effectively prioritizing programs that incorporate the Housing First model, particularly under permanent supportive housing (PSH) programs. According to the U.S. Interagency Council on Homelessness (USICH), PSH aims to “reintegrate the chronically homeless and other highly vulnerable homeless families and individuals with psychiatric disabilities or chronic health challenges into the community by addressing their basic needs for housing and providing ongoing support.” Thus, located within HUD’s own homeless housing programs are program participants with reoccurring or ongoing psychological issues with subsequent behaviors that may be difficult to control. According to the proposed rule, if these behaviors result in a “hostile environment” for other tenants, the housing provider and its employees and agents must take corrective actions to stop the harassment. In accordance with the proposed rule, if a tenant’s behavior is uncorrectable, a housing provider’s only course of action may be to evict the tenant, thereby placing the homeless back on the streets. HUD’s rationale in the proposed rule is in direct conflict with the policies promoted in HUD’s homeless program.

HUD’s Public and Indian Housing (PIH) Notice PIH 2015-19, published on November 2, 2015, titled *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, is another example of how the Department continues to promulgate regulations that may potentially conflict with its own policies. The arrest records notice states that PHAs and owners of federally assisted housing may not use arrest records as the sole basis for denying admission, terminating assistance, or evicting tenants. The notice reminds PHAs and owners that HUD does not require the adoption of “one-strike rules” that deny admission to anyone with a criminal record or that require automatic eviction any time a household member engages in criminal activity in violation of their lease. The notice also reiterates that PHAs and owners are obligated to safeguard the due process rights of applicants and tenants.
On the one hand, the proposed rule makes it easier for PHAs to be held liable on the basis of actions taken by tenants against other tenants to create a hostile environment. On the other hand, the guidance on the use of arrest records makes it harder for PHAs to correct situations that may lead to hostile environments. The Department is creating a situation where it is increasing the likelihood of PHAs being held liable for the behavior of their tenants, while removing tools that can be used to correct sub-optimal housing situations. If HUD insists on broadly expanding the liability of PHAs, then it must also give PHAs the concomitant tools to effectively control the spaces where liability may arise.

The proposed rule’s use of direct liability for quid pro quo and hostile environment harassment places undue pressure on housing providers to address discriminatory behavior that is outside of their control. NAHRO recommends that HUD either rethink this rule with changes that are more appropriate for the housing context or, alternatively, allow the case law to continue to develop among the courts in various jurisdictions. If HUD chooses to continue with this rule, then NAHRO recommends that HUD rethink many of its provisions, including its liability provisions, and allow for another 60 day comment period where stakeholders can comment on the changed provisions, so that HUD does not inadvertently create overly broad provisions without understanding the full impact of these provisions in the housing context.

NAHRO appreciates the opportunity to comment on this rulemaking. As always, we remain committed to working in partnership with the Department to ensure that regulations are crafted in such a manner as to create an operating context which allows NAHRO members to efficiently and effectively serve their communities. If we can provide any additional information or clarification regarding our suggestions, please do not hesitate to contact us.

Sincerely,

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