

HUD's Proposed Quid Pro Quo and Hostile Housing Environment Harassment Regulations

On October 21, 2015, HUD published a lengthy proposed rule titled *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 80 FR 63720-63731 (10/21/15). The proposed rule amends 24 CFR part 100 to establish a new subpart H, titled “Quid Pro Quo and Hostile Environment Harassment.” This proposed rule would seem to attack various court decisions across the country that have held that “hostile housing environment” claims are not cognizable under the Fair Housing Act (FHA).

According to HUD, this rule does not add any new forms of liability under the FHA. Rather, it proposes to amend its fair housing regulations to formalize standards for use in investigations and adjudications involving alleged harassment on the basis of race, color, religion, national origin, sex, familial status or disability under the FHA. The proposed standards would specify how HUD would evaluate complaints of *quid pro quo* (“this for that”) harassment and hostile environment harassment and provide for uniform treatment of FHA claims raising such allegations in the federal courts. The proposed rule addresses only *quid pro quo* and hostile environment harassment, and not other forms of harassment that may violate the FHA.

HUD has recognized that courts have often applied standards first adopted under Title VII to evaluate claims of harassment under the Fair Housing Act, but such standards are not always the most suitable for assessing claims of harassment in housing discrimination cases given the differences between harassment in the workplace and harassment in or around one's home. The proposed regulations address specifically harassment in one's home and would make clear the differences between *quid pro quo* and hostile environment harassment in the home and in the work place.

The proposed rule also clarifies when housing providers and other covered entities or individuals may be held directly or vicariously liable under the Act for illegal harassment or other discriminatory housing practices. HUD proposes to set forth by regulation how these traditional liability standards apply in the housing context because, in HUD's experience, there is significant misunderstanding among public and private housing providers as to the circumstances under which they will be subject to liability under the Fair Housing Act for discriminatory housing practices undertaken by others.

The rule clarifies that direct liability for the actions of non-agents occurs only when a person fails to fulfill a duty to take prompt action to correct and end a non-agent's discriminatory conduct, of which the person knew or should have known. In contrast to direct liability for the conduct of another, a person also may be vicariously liable for the conduct of his or her agents, regardless of whether the person knew of or intended the wrongful conduct or was negligent in preventing the conduct from occurring.

HDLI has reported on “hostile housing environment” cases for several years. New 24 CFR 100.600(a)(2) recognizes, and addresses, hostile environment harassment under the Fair Housing Act. It provides that hostile environment harassment occurs when unwelcome conduct because of race, color, national origin, religion, sex, disability or familial status, is sufficiently severe or pervasive as to create an environment that unreasonably interferes with the availability, sale, rental, use, or enjoyment of a dwelling, the provision or enjoyment of facilities or services in connection therewith, or the availability or terms of residential real estate-related transactions.

The rule states that establishing hostile environment harassment requires a showing that: A person was subjected to unwelcome spoken, written or physical conduct; the conduct was because of a protected characteristic; and the conduct was, considering the totality of circumstances, sufficiently severe or pervasive that it unreasonably interfered with or deprived the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act. In considering whether the totality of the circumstances evidences hostile environment harassment, it is particularly important to consider the place where the conduct occurred. Often in a fair housing case the harassment will occur in or around the home, which should be a haven of privacy, safety and security. The Supreme Court has repeatedly recognized that heightened rights exist within the home for, among other things, privacy and freedom from intrusive speech.

Proposed Sec. 100.600(c) provides that a single incident because of race, color, religion, sex, familial status, national origin or disability can constitute an illegal quid pro quo, or, if sufficiently severe, a hostile environment in violation of the Act.

HDLI will be digesting this rule, and we’ll provide a more detailed analysis soon. We’ll also have an in-depth discussion at HDLI’s General Counsel Forum in Tampa in January.

Comments to the proposed rule are due **December 21, 2015**.