



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

December 21, 2015

Via Electronic Submission

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

Re: Comment on the Department of Housing and Urban Development's Notice of Proposed Rulemaking
RIN: 2529-AA94
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 Massachusetts Attorney General's Office ("AGO"), thank you for the opportunity to comment on this Notice of Proposed Rulemaking. This Office applauds the continuing efforts of the U.S. Department of Housing and Urban Development ("HUD") to combat discrimination in the housing market and supports HUD's efforts to promulgate these important regulations.

The Commonwealth of Massachusetts has a long history of promoting and protecting the rights of individuals to be free from discrimination in the housing context. In fact, some sections of the Massachusetts housing antidiscrimination law, contained in various provisions of Mass. Gen. L. c. 151B, § 4, predate the federal Fair Housing Act ("FHA") by nearly a decade. Our state laws, like federal law, prohibit housing providers and professionals from engaging in discrimination, including harassment, and obligate them to work to ensure prompt remediation of discrimination once informed of it. This Office is responsible for enforcing both federal and state housing antidiscrimination laws, and we work in strong partnership with many HUD-funded organizations throughout Massachusetts. From the many cases and complaints of housing discrimination we handle each year, we are keenly aware that discrimination, including harassment, on the basis of membership in a protected class remains a pervasive problem that affects housing choices for many families.



Accordingly, we submit this letter in support of HUD's proposed rule, which this Office believes properly sets forth the standards for direct and vicarious liability in the housing context and also properly defines *quid pro quo* and hostile environment harassment. This Office, however, respectfully requests that HUD expand the proposed regulations to include language clarifying and stating unambiguously that the FHA applies not only to acquiring housing but also to post-acquisition activities.

On the issue of harassment on the basis of membership in a protected class, this Office agrees with HUD's proposed definitions of *quid pro quo* harassment and hostile environment liability. As the proposed rule explains, courts have widely recognized both *quid pro quo* harassment and hostile environment harassment liability in the housing context, and Title VII provides a well-established and workable model for the legal definition of these terms.

This Office also agrees with HUD's position that under the FHA landlords and others providing housing-related services can be directly liable not only for their own discriminatory behavior but also for their failure to take actions to remedy the discriminatory behavior of those whom they control and those whom they can control once they know or should have known of such behavior. As the proposed regulations implicitly recognize, the discriminatory behaviors of a landlord's agents and employees can have a profound effect on a tenant's right to live without discrimination given that agents and employees are often the ones in direct contact with a tenant. Similarly, tenant-on-tenant discrimination, which is widespread in our experience, significantly impacts whether a person can enjoy the right to live peacefully in his or her own home. The proposed regulations are critical, because so much of what occurs in the housing context involves actors more intimately involved in a tenant's housing experience than the landlord.

Indeed, many of the housing discrimination cases and complaints our Office handles involve wrongful actions of individuals other than landlords. We have addressed issues involving realtors' statements constituting familial discrimination, property managers' failure to engage in an interactive dialogue concerning a disability accommodation, and neighbors' bias-motivated slurs and behavior, to name a few examples. In our view, given that landlords have an obligation to ensure tenants' rights to quiet enjoyment and that they generally have the right to take actions against renters and occupants who disturb the quiet enjoyment of others, recognizing that this obligation likewise exists under the FHA does not expand landlord liability. It does, however, put landlords on notice that they must take action to remedy the situation in its early stages. To the extent that federal law is not clear on this point, protected classes of tenants and property buyers remain vulnerable, and the law does not fulfill its intended goal.

Lastly, this Office commends the proposed rule's position that the affirmative defense that the Supreme Court created in the context of vicarious liability of employers for sexual harassment under Title VII should not be extended to the FHA. Based on our experience in this area, HUD correctly recognizes that that judicially-created defense – which permits an employer to avoid liability for bias-motivated harassment by its employees and agents where the employer has exercised reasonable care to prevent and correct harassing behavior and the employee

unreasonably fails to take advantage of preventative or corrective opportunities created by the employer – is inappropriate in the housing context. As HUD acknowledged, harassment in housing can be more impactful and invasive than harassment in employment because one's home is supposed to be a safe haven. HUD's legal position that the procedural differences between filing claims under the FHA and filing claims under Title VII justify not extending Title VII's exemption to vicarious liability is also accurate. Specifically, the lack of an exhaustion requirement under the FHA supports and illustrates the position that tenants should not have to engage in an internal process before being permitted to maintain their claims.

One area of the proposed regulations that this Office believes should be strengthened is a clarification that the FHA applies not only to discrimination that affects acquisition of housing, but also to discrimination and harassment that occurs post-acquisition since both ultimately affect *access*. HUD implicitly takes this position given that a hostile living environment, recognized as actionable in the proposed regulations, can only exist once an individual is already living in a housing unit. Someone cannot be subjected to harassment on the basis of a protected class that "causes the person to vacate a dwelling," proposed § 100.60(b)(7), if the person is not living in the dwelling. Nor can conduct interfere with a person's "use or enjoyment of a dwelling," proposed § 100.600(a)(2), unless the person is living in the dwelling. Nevertheless, we recommend that the regulations explicitly state this position given that some federal courts have rejected the application of the FHA to post-acquisition conduct in some circumstances, *see, e.g., Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004); *Ross v. Midland Mgmt. Co.*, No. 02 C 8190, 2003 WL 21801023, at *4 (N.D. Ill. Aug. 1, 2003), notwithstanding that the existing HUD regulations already suggest that HUD's position is that the FHA applies throughout a tenancy, not just at the initiation of it, *see, e.g., 24 C.F.R. § 100.65(b)(5)* (prohibiting discriminatory delays in maintenance or repairs).

Again, we thank you for this opportunity to weigh in on a very important area of the law. If we can be of any further assistance in your consideration of these regulations, please do not hesitate to contact us.

Sincerely,



Andrea C. Kramer
Chief, Civil Rights Division
Massachusetts Attorney General's Office
(617) 963-2031
andrea.kramer@state.ma.us