community
ASSOCIATIONS INSTITUTE

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

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

Dear Ms. Kanovsky:

On behalf of the Community Associations Institute[1], I am pleased to submit the following comments regarding the Department's proposed rule concerning discriminatory activity and liability under the Fair Housing Act.

Summary of Comments

- CAI members support the proposed rule's incorporation of traditional common law concepts of direct liability and vicarious liability for Fair Housing Act violations.
- CAI members urge the proposed rule's extension of direct liability and vicarious liability for the discriminatory actions of non-agents to community associations be removed or revised.
- CAI members urge additional clarity on single incident conduct sufficient to create a hostile environment.

[1] CAI is the only international organization dedicated to fostering competent, well-governed community associations: planned communities, condominiums and housing cooperatives. For more than 40 years, CAI has been the leader in providing education and resources to the volunteer homeowner leaders who govern community associations and the professionals who support them. CAI's more than 33,500 members include homeowners, community managers, community management firms, and other professionals and companies that provide products and services to community associations.

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Community Association Model of Housing

Community associations, also known as condominiums, homeowner associations and housing cooperatives, are not-for-profit corporations organized under state law and established pursuant to a declaration of covenants. Community association membership is typically mandatory and automatic, based on a person's ownership of real property subject to a declaration of covenants.

Community associations are governed by a volunteer board of directors elected by members of the association to manage the association's affairs pursuant to state law and the declaration of covenants. The responsibilities of a community association board may vary according to housing type (i.e. high-rise condominium or planned community) and if the community is organized as a singular association or a series of semi-autonomous sub-associations within a master association.

In general, a community association board acts to maintain common community infrastructure such as a community's roads, sidewalks, bridges, culverts, and street lighting. It is also common for community associations to contract for refuse collection and snow removal services. In a condominium or a cooperative, the association is additionally responsible for maintenance of the roofs, hallways, stairwells, balconies, and other critical building infrastructure while homeowners are typically responsible for interior maintenance of their units.

Despite providing municipal-type services for owners and residents, community associations are not units of government. Community associations are neither vested with nor exercise authorities typically and routinely associated with state and local government. Additionally, community associations do not act as landlords[2] and except in the most limited of circumstances may not, by law, evict a property owner or deny an owner access to their unit or land parcel.[3] Rather, most community association boards have a keen focus on stability of the association's finances, maintenance of common property, and enforcement of the association's covenants, conditions, and restrictions (CC&Rs).

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[2] A community association may act as landlord in the rare circumstance the association takes possession of a unit of housing. Generally, association possession of a unit terminates when a first mortgage holder completes a foreclosure, taking title to the unit.

[3] See Uniform Common Interest Ownership Act (2008 Amendments) § 3-102(a)(19)
Section 3-102. Powers and Duties of Unit Owners Association.
(a) Except as otherwise provided in subsection (b) and other provisions of this [Act], the association:
(19) may suspend any right or privilege of a unit owner that fails to pay an assessment, but may not:
(A) deny a unit owner or other occupant access to the owner's unit;
(B) suspend a unit owner's right to vote;
(C) prevent a unit owner from seeking election as a director or officer of the association; or
(D) withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person.

The community association model of housing has expanded in the United States over the past decades. In 2014, the Foundation for Community Association Research[4] estimated there are as many as 330,000 community associations nationwide, which account for more than 26 million housing units. More than 66 million Americans, almost 1 in 5 households, live in a community association.[5]

Direct Liability for Violations of a Person or Agent

In general, CAI members support the Department's proposed standard for direct liability as such proposed standard pertains to the actions of a person[6] or a person's agent. Liability for discriminatory acts in violation of the Fair Housing Act (the Act) should attach to the perpetrator of such illegal acts, be they an individual, a corporation or an agent.

CAI members support the proposed rule's reliance on traditional standards of negligence concerning liability for the illegal acts of a person's agent. Under the traditional common law approach endorsed by the proposed rule, a person who exercises diligence in selecting, training, supervising, or controlling an agent will have a defense against liability for the illegal actions of an agent.

CAI members support the proposed rule's codification of *Meyer v Holley*[7], in which the Court held the Fair Housing Act does not create a special liability beyond that in common law. In *Meyer*, the Court rejected the theory that the Fair Housing Act imposes a more stringent vicarious liability standard than traditional tort law requires.[8] The proposed rule's reference to traditional principles of agency law as expressed in the Restatement (Third) of Agency appear consistent with the principles established by *Meyer* and achieve the Department's stated goal of correcting misunderstandings of when housing providers may be held directly or vicariously liable for the actions of an agent.

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[4] The Foundation for Community Association Research is the driving force for community association research, development, and scholarship, providing authoritative analysis on community association trends, issues, and operations.
[5] Foundation for Community Association Research: *National and State Statistical Review for 2014*
[6] The term "person" is defined at 24 CFR 100.20 as "…one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 U.S.C., receivers, and fiduciaries."
[7] Meyer v. Holley, 537 U.S. 280, 285-289 (2003)
[8] In Meyer, the Court wrote: "The Ninth Circuit held that the Fair Housing Act imposed more extensive vicarious liability—that the Act went well beyond traditional principles...We do not agree with the Ninth Circuit that the Act extended traditional vicarious liability rules in any way."

Liability for Violations of a Non-Agent

CAI members have expressed concern over the proposed rule's establishment of a liability standard for community associations for the illegal acts of third parties (non-agents). CAI members believe the proposed new § 100.7(a)(iii) ascribes to community associations a liability for the actions of individuals over whom they have no control. CAI members strongly believe such a new liability standard exposes community associations to unknowable and unmanageable risks.

Duty to End Discriminatory Acts of Third-Party Undefined

Proposed § 100.7(a)(iii) purports to limit liability for the illegal acts of non-agents by noting that a community association must have a "duty to take prompt action to correct and end a discriminatory housing practice by a third-party". Regrettably, the Department's proposed rule is vague and unclear as to what could constitute such a duty on the part of an association to enjoin non-agents from engaging in discriminatory acts in violation of the Fair Housing Act.

Proposed § 100.7(a)(iii) indicates such a duty may be imposed on an association "...from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium or cooperative)…"[9] Regrettably, this standard does not offer any clarity for aggrieved persons or community associations as what actually constitutes a duty "...take prompt action to correct and end a discriminatory housing practice by a third-party..."[10]

If an association board member, acting in their capacity as a board member, engages in discriminatory activities in violation of the Fair Housing Act and other members of the board knew of or should have known of such discriminatory activities and failed to take corrective action, the board members and the association are appropriately exposed to liability under the Act. Proposed § 100.7(a) and (b) would clearly apply in this instance. CAI members believe proposed § 100.7(a) and (b) would also apply if discriminatory actions were taken by an association employee or other agent and where the association board knew of or should have known of the discriminatory activities and failed to take corrective action.

If the offending party is neither an officer nor an agent of the association, it is unclear what duty, if any, an association board or agent would have to intervene

[9] Proposed § 100.7(a)(iii)
[10] Ibid.

and halt a dispute between residents. Even if an aggrieved individual were to report alleged discriminatory activity of a resident, the association or an association's agent will not likely construe the association's CC&Rs or the agent's contract as imposing a duty to investigate and otherwise intervene in such a dispute. It is highly unlikely any community association board or an association's agent has any legal authority to investigate, make findings of fact, reach a determination that violations of federal law have occurred or are likely to occur, and impose penalties against a resident on the basis of such determinations.

CAI members believe it unwise to imply the existence of, or to impose such a duty on community association boards or association agents through federal regulation. Most community association homeowners would react with horror to the notion that association board members, employees, or agents would inject themselves into the interpersonal relationships of homeowners and residents to investigate these interactions and relationships for discriminatory elements.

Proposed Rule Requires Associations to Determine Discriminatory Intent

In *Bloch v. Frischholz*[11], the 7th Circuit established a four-part test for determining a § 3617[12] claim that a plaintiff's right to exercise or enjoy rights under the Act have been illegally constrained. The Court noted that to prevail on a claim a plaintiff must show (1) they are a member of a protected class under the Act, (2) they were engaged in the exercise or enjoyment of their rights under the Act, (3) defendant(s) coerced, threatened, intimidated, or interfered with the plaintiff's rights under the Act, and (4) defendant(s) were motivated by an intent to discriminate.

CAI members question the wisdom of charging community association boards and association agents with investigating allegations of illegal housing practices of individual residents for potential claims under § 3617 or other violations of the Act. In *Bloch,* the 7th Circuit confirmed that interference in the exercise or enjoyment of rights under the Act is more than a dispute among residents and that an isolated incident of discrimination is insufficient for a claim to prevail. Rather, a plaintiff must show a "pattern of harassment, invidiously motivated."[13]

As the Department acknowledges in the preamble to the proposed rule, not every resident interaction constitutes discrimination under the Act. Multiple courts have

[11] *Bloch v. Frischholz*, 587 F. 3d 771, 787 (7th Cir. 2009)
[12] 42 USC § 3617
[13] *Bloch*, quoting Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n., 388 F. 3d (7th Cir. 2004)

opined that resident-to-resident disputes do not rise to the level of an illegal, discriminatory housing practice.[14]

Even if the Department believes it wise to incentivize community association boards and agents to investigate resident-to-resident disputes where there are allegations of discrimination to determine invidious, discriminatory intent, how does the Department propose associations respond to the outcome of such investigations?

Community associations generally lack the legal authority to mandate that residents attend anti-discrimination educational sessions or to take other actions described by the Department in the preamble to the proposed regulation. Housing discrimination is repugnant and illegal, but the offensive and illegal nature of such conduct does not empower a community association to evict a homeowner from their property, deny a homeowner access to their property, or otherwise impose conditions on homeowners that are not specifically authorized by the association's CC&Rs or state law.

An association may fine a resident, but only for violations of a community's CC&Rs. Such fines would not be imposed on the basis of a finding that a resident has engaged in illegal discriminatory housing practices—the fine would be imposed pursuant to the resident having violated the association's CC&Rs. Further, if a resident-to-resident dispute with racial or other prejudicial aspects leads both parties to violate the association's CC&Rs, a party that is a member of a protected class under the Act would also be subject to sanction by the association on the same basis.

The association would have no authority to interrogate the offending parties to determine discriminatory intent and neither would discriminatory intent be the basis of any association fine. The association would simply enforce the community's rules as such rules exist and impose only those sanctions available to the association for the violation that has occurred. If no rule has been violated, how can the association

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[14] *Sporn v. Ocean Colony Condominium Ass'n,* 173 F. Supp. at 251-52. "Simply put, § 3617 does not require that neighbors smile, say hello or hold the door for each other. To hold otherwise would be to extend § 3617 to conduct it was never intended to address and would have the effect of demeaning the aims of the Act and the legitimate claims of plaintiffs who have been subjected to invidious and hurtful discrimination and retaliation in the housing market."

*United States v. Weisz 914 F. Supp. 1050 (S.D.N.Y. 1996)***,** where the Court concluded that a defendant's behavior was not motivated by plaintiff's religion but by the defendant's own conduct. The Court found the defendant's behavior reflected "...nothing more than the defendant's method of making life miserable for the Cronins..."

Halprin, 388 F. 3d (7th Cir. 2004).

take any action against a homeowner or compel a homeowner to undertake certain remedial actions?

Recommendation

CAI recommends the Department remove "*(including bylaws or other rules of a homeowners association, condominium or cooperative)*" from proposed § 100.7(a)(iii). If the Department continues to believe a public good can be reasonably accomplished by retaining this language, CAI recommends the language be modified to clearly state the Department's view as to the terms and conditions in association bylaws and regulations that constitute an actual duty on the part of an association or its agents to investigate and punish residents for illegal discriminatory housing practices.

Hostile Environment Standard

CAI members appreciate the Department's attempts to seemingly narrow the scope of proposed § 100.7(a)(iii) by describing standards necessary to make a determination of a hostile environment in violation of the Act. Courts and the Department have held that fair housing violations can occur post-purchase and may involve the provision of services that attach to the purchase or leasing of real property. CAI members strive to foster and sustain welcoming communities that are preferred neighborhoods in which to make a home.

Totality of Circumstances Standard and the Relationship of Parties

CAI members support concepts in proposed § 100.600(a)(2) that describe conduct creating a hostile environment as being "sufficiently severe or pervasive as to interfere" with the fair housing rights enjoyed by protected classes under the Act. Additionally, CAI members support concepts in the Department's approach of examining the totality of circumstances to establish that a hostile environment exists. According to proposed
§ 100.600(a)(2)(i)(A), numerous factors including the nature of the conduct and the context in which the offending conduct occurred must be considered.

CAI also notes that the relationship of the persons involved is a factor under the totality of circumstances concept. This is an important concept and can be further refined.

There is a substantive difference in the legal relationship between a community association resident and their association than exists between a landlord and a tenant. A landlord assumes substantially different duties to tenants than an

association assumes to homeowners. While a landlord may, pursuant to a lease, evict a tenant engaged in discriminatory practices, associations may not deprive owners of their property or access to their property as a penalty for engaging in a discriminatory practice.[15] It is also questionable if associations have authority to impose on any resident unique rules and conditions that do not apply to all other residents.

However, if an association board member or other association agent is using their position or authority to create a hostile environment in contravention of the association's CC&Rs, it is reasonably expected that the association should take prompt action to correct and end the discrimination. The relationship of resident association board member to another resident has significantly different implications than the relationship of resident to resident where the board's authority is not involved or implied. CAI believes that a board member using their authority or position to discriminate against another board member or non-board member resident is already addressed under the proposed rule and in existing jurisprudence.

Single Incident Sufficient to Create Hostile Environment

Courts have determined that a pattern of behavior must be established for certain fair housing claims to be successful, which the Department appears to address in its proposed totality of circumstances hostile environment standard.[16] The Department additionally seeks to codify that a single incident of discrimination may create a hostile environment. CAI urges the Department to consider more descriptive language to determine existence of a hostile environment on the basis of a totality of circumstances or a single incident.

The Department proposes to use the same standard of "severe" to describe both a totality of circumstances giving rise to a discriminatory housing practice and a single instance of behavior constituting a discriminatory housing practice. From a practical standpoint, it will be difficult for community associations to understand the difference between the two standards if the same word is used to describe both requirements under the regulation. This is particularly the case if an association may be held liable for the discriminatory actions of non-agents.

It stands to reason that if "severe" conduct is sufficient to create a hostile environment, a single statement to that effect would meet the Department's public

[15] See footnote 3.
[16] See *Bloch and Halprin*

policy goal. However, as the Department proposed both a totality of circumstances standard and a single incident standard, it is reasonable to infer the Department has a different intent as repetition of a term in regulation does not necessarily imply that usage of the term is superfluous. Rather, it is reasonable to infer the Department is addressing in its single incident standard a different type of conduct from that contemplated in the totality of circumstances standard. Namely conduct that is so severe and harmful that by itself carries the same weight as a pattern of severe behavior that over time creates a hostile environment.

Accordingly, CAI urges the Department to clarify or offer examples of single incidents of discriminatory practices by non-agents that will or may create a hostile environment for which an association may be liable under the Act.

If you have any questions regarding this letter or if CAI may be of any service, do not hesitate to contact me at (703) 970-9224.

Sincerely,

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Community Associations Institute