**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 100**

**[Docket No. FR–5248–P–01]**

**RIN 2529–AA94**

## Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act

**AGENCY:** Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** Through this rule, HUD 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 Fair Housing Act. 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 Fair Housing Act claims raising such allegations in the federal courts. This proposed rule defines ''quid pro quo'' and ''hostile environment harassment,'' as prohibited under the Fair Housing Act, and adds illustrations of discriminatory housing practices that constitute such harassment. In addition, the proposed rule clarifies the operation of traditional principles of direct and vicarious liability under the Fair Housing Act.

**DATES:** *Comment Due Date:* December 21, 2015.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, 451 7th Street SW., Room 10276, Department of Housing and Urban Development, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (fax) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals who are deaf, are hard of hearing, or have speech impairments may access this number through TTY by calling the Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lynn Grosso, Acting Deputy Assistant Secretary for Enforcement and Programs, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street SW., Room 5204, Washington, DC 20410–2000; telephone number 202–402–5361 (this is not a toll-free number). Persons with hearing or speech impairments may contact this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary

### *A. Purpose of the Regulatory Action*

*Need for the Regulation.* A regulation is needed to formalize the standards for investigations and adjudications under the Fair Housing Act (Fair Housing Act or Act) involving alleged harassment. Both HUD and the courts have long recognized that the Fair Housing Act prohibits harassment in housing and housing-related transactions because of race, color, religion, sex, national origin, disability [1] and familial status, just as Title VII of the Civil Rights Act (42 U.S.C. 2000e *et se.*) prohibits such harassment in employment. However, to date, no standards have been formalized for assessing claims of harassment under the Fair Housing Act. 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. Therefore, this rule proposes to formalize standards determined to be appropriate for evaluating claims of quid pro quo and hostile environment harassment in the housing context and provides some examples of their application.

In addition to formalizing standards for assessing claims of harassment under the Fair Housing Act, a regulation is needed to clarify 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.

*How the Rule Meets the Need.* This proposed rule meets the need described above by formalizing and providing uniform standards for evaluating complaints of quid pro quo and hostile environment harassment under the Fair Housing Act. The rule does so by defining ''quid pro quo'' and ''hostile environment harassment'' as conduct prohibited under the Act, describing the types of conduct that may establish a claim of either type of harassment, and specifying the factors to be considered when evaluating whether particular conduct creates a hostile environment in violation of the Act. Such standards would apply both in administrative adjudications under the Act and in Fair Housing Act cases brought in federal and state courts. This proposed rule also

[1] This rule uses the term ''disability'' to refer to what the Fair Housing Act and its implementing regulations refer to as a ''handicap.'' Both terms have the same legal meaning. *See Bragdon* v. *Abbott,* 524 U.S. 624, 631 (1998).

meets the need for regulatory action by adding to HUD's existing Fair Housing Act regulations illustrations of discriminatory housing practices that constitute illegal quid pro quo and hostile environment harassment. By establishing consistent standards for evaluating claims of quid pro quo and hostile environment harassment, this proposed rule would provide guidance to providers of housing or housing-related services seeking to ensure that their properties or businesses are free of unlawful harassment. The rule also strives to provide clarity to victims of harassment and their representatives as to how to assess potential claims of illegal harassment under the Act. Finally, this proposed regulation describes direct and vicarious liability under the Fair Housing Act, thereby providing both aggrieved persons and housing providers with guidance as to when a party may be held liable for specific discriminatory acts or practices.

*Legal Authority for the Regulation.* The legal authority for this regulation is found in the Fair Housing Act. Specifically, section 808(a) of the Act gives the Secretary of HUD the ''authority and responsibility for administering this Act.'' 42 U.S.C. 3608(a). In addition, section 815 of the Act provides that ''[t]he Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.'' 42 U.S.C. 3614a. HUD also has general rulemaking authority, under the Department of Housing and Urban Development Act, to make such rules and regulations as may be necessary to carry out its functions, powers, and duties. See 42 U.S.C. 3535(d).

*B. Summary of Major Provisions*

This rule proposes to codify through regulation the principles that quid pro quo and hostile environment harassment on the basis of race, color, national origin, religion, sex, disability or familial status (''protected characteristic'') violate one or more provisions of the Fair Housing Act. As noted above, the proposed rule would define ''quid pro quo'' and ''hostile environment'' harassment under the Fair Housing Act, add illustrations of prohibited ''quid pro quo'' and ''hostile environment'' harassment, and address how the traditional standards for direct and vicarious liability operate in the Fair Housing Act context, including for claims of harassment.

As proposed to be defined, ''quid pro quo harassment'' occurs when a person is subjected to an unwelcome 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. A person's conduct may constitute quid pro quo harassment even where the victim acquiesces or submits to the unwelcome request or demand.

As proposed to be defined, ''hostile environment harassment'' occurs when, because of a protected characteristic, a person is subjected to unwelcome conduct that is sufficiently severe or pervasive such that it interferes with or deprives the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act. The proposed rule further explains that whether a hostile environment has been created requires an assessment of the totality of the circumstances, which includes, but is not limited to, the nature of the conduct; the context in which the conduct occurred; the severity, scope, frequency, duration, and location of the incident(s); and the relationships of the persons involved.

For purposes of clarity and guidance, the proposed rule would add to HUD's existing Fair Housing Act regulations examples of prohibited quid pro quo and hostile environment harassment under the Act.

The proposed rule also would describe ''direct liability'' and ''vicarious liability'' as applied to all violations under the Act, not solely harassment. The standards for both types of liability incorporated into the proposed rule follow well-established common law tort and agency principles and do not subject respondents or defendants to enhanced liability for violations of the Act. Under such standards, a person is directly liable for his or her own discriminatory housing practices and, in certain circumstances, is directly liable for actions taken by others, including agents, when the person knew or should have known of the discriminatory conduct and failed to take prompt corrective action that ends it. The proposed rule would also clarify 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 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.[2] Vicarious liability occurs when the discriminatory actions of the agent are taken within the scope of the agency relationship, or are committed outside the scope of the agency relationship but the agent was aided in the commission of such acts by the existence of the agency relationship. To clarify the distinction between these two forms of liability—direct and vicarious—without codifying specific common law liability standards, the proposed rule simply adds a provision stating that a person may be vicariously liable for the discriminatory acts of his or her agent. This provision is consistent with the holding of *Meyer* v. *Holley,* 537 U.S. 280, 285–289 (2003) that traditional principles of agency law apply in fair housing cases.[3]

*C. Costs and Benefits*

Because the rule does not add any new forms of liability under the Act, but rather formalizes clear, consistent, nationwide standards for evaluating harassment cases under the Fair Housing Act, the rule adds no additional costs to housing providers and others engaged in housing transactions. Rather, the rule will assist in ensuring compliance with the Act by defining quid pro quo and hostile environment harassment that violates the Act and by specifying traditional tort and agency law standards for assessing direct and vicarious liability, consistent with Supreme Court precedent. Articulating clear standards enables entities subject to the Act's prohibitions and persons protected by its terms to understand the types of conduct that constitute actionable quid pro quo and hostile environment harassment under the Act. This should facilitate more effective training to avoid discriminatory harassment in housing and should decrease the need for protracted litigation to resolve disputed claims.

## II. Background

Title VIII of the Civil Rights Act of 1968, as amended (the Fair Housing

[2] An agency relationship is created by contract or by law. Generally, an agency relationship is an arrangement in which one entity or person (the principal) appoints another (the agent) to act on its behalf. However, this proposed rule does not purport to define what constitutes an agency relationship.

[3] *See also, e.g., Boswell* v. *Gumbaytay,* 2009 WL 1515872, *3 (M.D. Ala. 2009) (discussing vicarious liability of property management companies); *Glover* v. *Jones,* 522 F. Supp. 2d 496, 506–08 (W.D.N.Y. 2007) (property management company can be vicariously liable for sexual harassment); *Williams* v. *Poretsky Mgmt.,* 955 F. Supp. 490, 496 (D. Md. 1996) (rental company may be liable for employee's sexual harassment of tenant).

Act), prohibits discrimination in the availability and enjoyment of housing and housing-related services, facilities, transactions and brokerage businesses because of race, color, national origin, religion, sex, disability and familial status. 42 U.S.C. 3601–19. The Act contains broad prohibitions against discrimination because of a protected characteristic. See 42 U.S.C. 3604, 3605, 3606 and 3617. These provisions prohibit, among other things, discriminatory statements, refusals to rent or sell, denying access to services, setting different terms and conditions, refusing to make reasonable modifications and accommodations, discriminating in residential real estate transactions, and retaliation.

In 1989, HUD promulgated fair housing regulations at 24 CFR part 100 that address discriminatory conduct in housing generally. The 1989 regulations include examples of discriminatory housing practices that have been interpreted to cover quid pro quo sexual harassment and hostile environment harassment generally. Section 100.65(b)(5) identifies, as an example of unlawful conduct, denying or limiting housing-related services or facilities because a person refused to provide sexual favors. Section 100.400(c)(2) offers as an example of illegal conduct ''. . . interfering with persons in their enjoyment of a dwelling because of race, color, religion, sex, disability, familial status, or national origin of such persons, or of visitors or associates of such persons.'' The 1989 regulations do not, however, define quid pro quo or hostile environment harassment, specify standards for examining such claims, or provide illustrations of other types of quid pro quo or hostile environment harassment prohibited by the Act. Nor do the 1989 regulations discuss liability standards for prohibited harassment or other discriminatory housing practices.

On November 13, 2000, HUD published a proposed rule entitled ''Proposed Fair Housing Act Regulations Amendment Standards Governing Sexual Harassment Cases'' (65 FR 67666) seeking comment on standards to be used in evaluating sexual harassment complaints. HUD never issued final regulations pursuant to that proposed rule. Because this proposed rule addresses harassment more broadly, based on any characteristic protected by the Act and not solely because of sex, this proposed rule is not a continuation of the 2000 rulemaking.

Over time, forms of harassment that violate the civil rights laws have coalesced into two legal doctrines—quid pro quo and hostile environment. Although HUD and the courts have recognized that the Fair Housing Act prohibits harassment because of race or color,[4] disability,[5] religion,[6] national origin,[7] familial status,[8] and sex,[9] the doctrines of quid pro quo and hostile environment harassment are not well developed under the Fair Housing Act.

To date, when deciding harassment cases, courts have often looked to case law decided under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 *et se.*) (Title VII), which prohibits employment discrimination because of race, color, religion, sex and national origin.[10] But the home and the workplace are significantly different environments such that strict reliance on Title VII case law is not always appropriate. One's home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one's home can be far more intrusive, violative, and threatening than harassment in the more public environment of one's work place.[11]

Moreover, as discussed below, the Supreme Court has historically recognized that individuals have heightened rights within the home for privacy and freedom from unwelcome speech, among other things.[12]

Therefore, this proposed rule would provide regulations to 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. While Title VII and Fair Housing Act case law contain many similar concepts, this proposed regulation describes the appropriate analytical framework for harassment claims under the Fair Housing Act.

The proposed rule addresses only quid pro quo and hostile environment harassment, and not conduct generically referred to as harassment that, for different reasons, may violate section 818 or other provisions of the Act. For example, a racially hostile statement by a housing provider to a tenant could indicate a discriminatory preference in violation of section 804(c) of the Act, or it could evidence intent to deny housing or discriminate in the terms or conditions of housing under sections 804(a) or 804(b), even if the statement does not create a hostile environment or establish a quid pro quo. Section 818, which makes it unlawful to ''coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of'' rights protected by the Act, or on account of a person having aided others in exercising or enjoying rights protected by the Act, could be violated by conduct that creates a quid pro quo or hostile environment, or by other conduct that constitutes retaliation or another form of coercion, intimidation, threats, or interference because of a protected characteristic.[13] Section 818

[4] *See, e.g., Smith* v. *Mission Assoc. Ltd. P'ship,* 225 F. Supp. 2d 1293, 1298–99 (D. Kan. 2002) (42 U.S.C. 3604(b)); *HUD* v. *Tucker,* 2002 WL 31018606, *3–4 (HUD ALJ 2002) (42 U.S.C. 3604(a) and (b)).

[5] *See, e.g., Neudecker* v. *Boisclair Corp.,* 351 F. 3d 361, 364 (8th Cir. 2003) (42 U.S.C. 3604(f)(2)).

[6] *See, e.g., Bloch* v. *Frischholz,* 587 F. 3d 771, 787 (7th Cir. 2009) (42 U.S.C. 3604, 3617).

[7] *See, e.g., Effendi* v. *Amber Fields Homeowners Assoc.,* 2011 U.S. Dist. Lexis 35265, *1 (N.D. Ill. 2011) (42 U.S.C. 3604(b) and 3617); *Texas* v. *Crest Asset Mgmt.,* 85 F. Supp. 722, 736 (S.D. TX 2000) (42 U.S.C. 3604(a) and (b), 3617).

[8] *See, e.g., Bischoff* v. *Brittain,* 2014 U.S. Dist. LEXIS 145945, *13–14, *17 (E.D. Cal. 2014) (3604(b)); *United States* v. *M. Westland Co.,* 1995 U.S. Dist. LEXIS 22466, *4 (C.D. Cal. 1995) (Fair Housing Act provision not specified).

[9] *See, e.g., Quigley* v. *Winter,* 598 F. 3d 938, 946 (8th Cir. 2010) (42 U.S.C. 3617); *Krueger* v. *Cuomo,* 115 F. 3d 487, 491 (7th Cir. 1997) (42 U.S.C. 3604, 3617); *Honce* v. *Vigil,* 1 F. 3d 1085, 1088 (10th Cir. 1993) (42 U.S.C. 3604(b)); *Shellhammer* v. *Lewallen,* 770 F. 2d 167 (6th Cir. 1985) (sexual harassment under the Fair Housing Act in general).

[10] *See, e.g., Honce* v. *Vigil,* 1 F. 3d 1085, 1088 (10th Cir. 1993); *Shellhammer* v. *Lewallen,* 770 F. 2d 167 (6th Cir. 1985); *Glover* v. *Jones,* 522 F. Supp. 2d 496, 503 (W.D.N.Y. 2007); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1396 (C.D. Cal. 1995); *see also Neudecker* v. *Boisclair Corp.,* 351 F. 3d 361, 364 (8th Cir. 2003) (applying Title VII concepts to find hostile environment based on disability violated Act). Unlike Title VII, Title VIII also includes disability and familial status among its protected characteristics.

[11] *See, e.g., Quigley* v. *Winter,* 598 F. 3d 938, 947 (8th Cir. 2010) (emphasizing that defendant's harassing conduct was made ''even more egregious'' by the fact that it occurred in plaintiff's home, ''a place where [she] was entitled to feel safe and secure and need not flee.''); *Salisbury* v. *Hickman,* 974 F. Supp. 2d 1282, 1292 (E.D. Cal. 2013) (''[c]ourts have recognized that harassment in one's own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment''); *Williams* v. *Poretsky Management,* 955 F. Supp. 490, 498 (D. Md. 1996) (noting sexual harassment in the home more severe than in workplace); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1398 (C.D. Cal. 1995) (describing home as place where one should be safe and not vulnerable to sexual harassment); D. Benjamin Barros, Home As a Legal Concept, 46 Santa Clara L. Rev. 255, 277–82 (2006) (discussing legal concept of home as source of security, liberty and privacy which justifies favored legal status in many circumstances); Nicole A. Forkenbrock Lindemyer, Article, Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases, 18 Law & Ineq. 351, 368–80 (2000) (noting that transporting of Title VII workplace standards for sexual harassment into Fair Housing Act cases of residential sexual harassment ignores important distinctions between the two settings); Michelle Adams, Knowing Your Place: Theorizing Sexual Harassment at Home, 40 Ariz. L. Rev. 17, 21–28 (1998) (describing destabilizing effect of sexual harassment in the home).

[12] See *e.g. Frisby* v. *Schultz,* 487 U.S. 474, 484 (1988) (''[w]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom'').

[13] A violation of section 818 may be established by the standards for quid pro quo or hostile

prohibits quid pro quo or hostile environment harassment, but is not limited to quid pro quo or hostile environment claims. In addition, the same discriminatory conduct could violate more than one provision of the Act.[14]

In sum, this proposed rule would provide standards that are uniformly applicable to claims of quid pro quo and hostile environment harassment under the Fair Housing Act, regardless of the section of the Act that is alleged to have been violated. These standards would be useful to victims of harassment as well as housing providers seeking to ensure their properties are free of illegal harassment. The proposed rule also provides HUD investigators and administrative law judges, other government agencies, and courts with the appropriate standards to be applied to claims of quid pro quo and hostile environment harassment in the housing context.

## III. This Proposed Rule

This proposed rule would amend 24 CFR part 100 to establish a new subpart H, entitled ''Quid Pro Quo and Hostile Environment Harassment,'' which would define ''quid pro quo'' and ''hostile environment harassment'' under the Fair Housing Act. This proposed rule would also add new illustrations of prohibited harassment throughout part 100 by amending existing §§ 100.60, 100.65, 100.80, 100.90, 100.120, 100.130, and 100.135, and a new § 100.7, addressing how the traditional standards for direct and vicarious liability operate in the Fair Housing Act context, including for claims of harassment.

### *A. Quid Pro Quo and Hostile Environment Harassment*

The proposed rule establishes within proposed Subpart H a new § 100.600, entitled ''Quid Pro Quo and Hostile Environment Harassment,'' which addresses what conduct constitutes these types of harassment under the Fair Housing Act. This section states that quid pro quo harassment and hostile environment harassment on the basis of race, color, national origin, religion, sex, disability, or familial status violate one or more of the prohibitions against discrimination found in sections 804, 805, 806 and 818 of the Fair Housing Act.

As with other discriminatory housing practices prohibited by the Act, any person who claims to have been injured or believes such person will be injured by prohibited harassment is an aggrieved person under the Act, even if that person is not directly targeted by the harassment.[15] For example, children may be aggrieved by harassment directed at their parents because the children may lose their housing. Similarly, a person is aggrieved if that person is denied or delayed in receiving a housing-related opportunity or benefit because another received the benefit. If, for example, a property manager awards an apartment to an applicant in exchange for sexual favors, the other applicants who were denied the apartment are aggrieved persons.[16]

#### 1. Quid Pro Quo Harassment

Paragraph (a)(1) of new § 100.600 would address quid pro quo harassment under the Fair Housing Act. Paragraph (a)(1) provides that quid pro quo harassment occurs when a person is subjected to an unwelcome request or demand because of race, color, religion, sex, national origin, disability, or familial status, and submission to the request or demand is, either explicitly or implicitly, made a condition related to his or her housing.

Claims of quid pro quo harassment may be established on the basis of protected characteristics other than sex. The theory, however, has most typically been associated with sex. For example, quid pro quo harassment occurs when a housing provider conditions a tenant's continued housing on the tenant's submission to unwelcome requests for sexual favors.[17] Similarly, conditioning the receipt of privileges or services in connection with housing or conditioning access to residential real estate-related transactions on acquiescence to unwelcome requests or demands for sexual favors is illegal quid pro quo harassment.[18] A person's conduct may constitute quid pro quo harassment even where the victim acquiesces or submits to the unwelcome request or demand. For example, if a housing manager demands sexual favors under threat of eviction and the resident acquiesces in order to keep her housing, quid pro quo harassment has occurred.[19] Conversely, a person's conduct may constitute quid pro quo harassment where the person takes or threatens to take an action that adversely affects the victim because the victim has refused to acquiesce or submit to the unwelcome demand.[20]

environment harassment set out in the rule or by the elements of a section 818 violation based on other types of unlawful coercion, intimidation, threats, or interference. The elements of a section 818 violation based on these other types of unlawful conduct mirror its language: (i) Plaintiff or complainant exercised or enjoyed a right guaranteed by 42 U.S.C. 3603–3606; (2) defendant's or respondent's conduct constituted coercion, intimidation, a threat, or interference; and (3) a causal connection exists between the exercise or enjoyment of a right and defendant's or respondent's conduct. *See, e.g., Bloch* v. *Frischholz,* 587 F. 3d 771, 783 (7th Cir. 2009); *Hood* v. *Midwest Sav. Bank,* 95 Fed. Appx. 768, 779 (6th Cir. 2004); *Nguyen* v. *Patek,* 2014 U.S. Dist. LEXIS 147295, *7–8 (N.D. Ill. 2014) (denying motion to dismiss where Vietnamese-American plaintiffs alleged white neighbors interfered with enjoyment of their housing rights by subjecting them to pattern of race and national origin harassment); *Wells* v. *Rhodes,* 928 F. Supp. 2d 920, 933 (S.D. OH. 2013) (granting plaintiffs' motion for summary judgment because a reasonable jury could conclude that ''burning a cross on Plaintiffs' front lawn, with 'KKK will make you pay' and the N-word written on it, is certainly interference (or perhaps more accurately a threat or intimidation) within the broad meaning of § 3617''); *Ohana* v. *180 Prospect Place Realty,* 996 F. Supp. 238, 243 (E.D.N.Y. 1998) (denying defendants' motion to dismiss where defendants interfered with plaintiffs' quietude by making racial and anti-Jewish slurs and epithets, threats of bodily harm, and noise disturbances). *See also* Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?,* 61 Case W. Res. L. Rev. 865 (2011).

[14] *See* 24 CFR 100.50(a).

[15] 42 U.S.C. 3602(i); *see also* 24 CFR 100.20.

[16] *See, e.g., Fair Hous. Council* v. *Penasquitos Casablanca Owner's Ass'n,* 381 Fed. Appx. 674 (9th Cir. 2010) (holding that minor children need not be the targets of sexual harassment directed at their mother but need only suffer ''actual injury as a result of the defendant's conduct'' to establish standing) (quoting *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91, 103 n.9 (1979)); *Shellhammer* v. *Lewallen,* 770 F. 2d 167 (6th Cir. 1985) (upholding a finding of discrimination in favor of plaintiffs, wife and husband, who had been evicted after wife rebuffed defendant landlord's sexual advances); *Grieger* v. *Sheets,* 689 F. Supp. 835 (N.D. Ill. 1988) (upholding both hostile environment and quid pro quo sexual harassment claims made by plaintiffs, wife and husband, where: landlord made sexual advances to the wife, landlord threatened to shoot the husband after he confronted the landlord, and landlord refused to make promised repairs after wife rebuffed landlord's advances). *Cf.* 29 CFR 1604.11(g) (EEOC regulation providing that ''[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.'').

[17] *See, e.g., Woods* v. *Foster,* 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (shelter resident submitted to manager's demands for sex in exchange for retaining her housing); cf *United States* v. *Koch,* 352 F. Supp. 2d 970, 981–83 (D. Neb. 2004) (in hostile environment case, some tenants submitted to sexual demands of landlord in order to preserve their housing).

[18] *See, e.g., Boswell* v. *Gumbaytay,* 2009 WL 1515872, *5 (M.D. Ala. 2009) (conditioning rent amount and repairs to the dwelling on whether sexual favors are granted); *Grieger* v. *Sheets,* 689 F. Supp. 835 (N.D. Ill. 1988) (conditioning tenancy and repairs to dwelling on sexual favors from tenant).

[19] *See, e.g.,* cases cited at n. 17, supra.

[20] *See, e.g., Krueger* v. *Cuomo,* 115 F. 3d 487, 490 (7th Cir. 1997) (landlord evicted tenant after she rebuffed his advances and filed a housing discrimination claim against him); *Miles* v. *Gilray,* 2012 U.S.Dist. LEXIS 90941 at *2, *7 (W.D. N.Y. 2012) (mobile home park operator served termination notice when plaintiffs rebuffed sexual advances); *HUD* v. *Kogut,* 1995 HUD ALJ LEXIS 52. *39 (HUD ALJ 1995) (property manager evicted tenant after she rebuffed his sexual advances).

2. Hostile Environment Harassment

Paragraph (a)(2) of proposed new § 100.600 addresses hostile environment harassment under the Fair Housing Act. Paragraph (a)(2) 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.[21] It is well recognized that claims of hostile environment harassment should be evaluated from the perspective of a reasonable person in the aggrieved person's position.[22]

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.

a. Totality of the Circumstances

Proposed § 100.600(a)(2)(i), entitled ''Totality of the circumstances,'' specifies that whether hostile environment harassment exists depends upon the totality of the circumstances. Proposed § 100.600(a)(2)(i)(A) provides that the factors to be considered in determining whether a hostile environment has been created include, but are not limited to, the nature of the conduct; the context in which the conduct occurred; the severity, scope, frequency, duration, and location of the incident(s); and the relationships of the persons involved.[23] Assessment of the context in which the conduct occurred involves consideration of such factors as whether the harassment was in or around the home; whether the harassment was accomplished by use of a special privilege of the perpetrator (*e.g.,* using a passkey or gaining entry by reason of the landlord-tenant relationship); whether a threat was involved; and whether the conduct was likely to or did cause anxiety, fear or hardship.

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.[24] For example, in a case decided under the Equal Protection Clause, the Court described the sanctity of the home as follows:

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual ''to be let alone'' in the privacy of the home, ''sometimes the last citadel of the tired, the weary, and the sick.'' The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.[25]

When harassment occurs in the workplace, the victim can escape to his home. In contrast, when harassment occurs in and around the home, the victim has little opportunity to escape it short of moving or staying away from the home—neither of which should be required. As one court noted in a sexual harassment case under the Act, the home is ''a place where [one is] entitled to feel safe and secure and need not flee.'' [26] Thus, the nature and frequency of harassing conduct needed to establish employment discrimination under Title VII does not necessarily transfer to cases under the Fair Housing Act. Instead, the sanctity of the home must be considered in making the totality of the circumstances assessment. Thus, while Title VII and the Fair Housing Act regulations proposed by this rule use similar terms, such as ''totality of the circumstances'' and ''sufficiently severe or pervasive,'' the same or similar conduct may result in a violation of the Fair Housing Act even though it may not violate Title VII.

Proposed § 100.600(a)(2)(i)(B) provides that the absence of psychological or physical harm is not dispositive in determining whether hostile environment harassment has occurred. Evidence of such harm is but one of many factors to be considered in the totality of circumstances. However, the severity of psychological or physical harm may be considered in determining the proper amount of any damages to which an aggrieved person may be entitled.[27]

3. Type of Conduct

Prohibited quid pro quo harassment and hostile environment harassment require unwelcome conduct, and proposed § 100.600(b) explains that the unwelcome conduct can be written, verbal, or other conduct and does not require physical contact. The unwelcome conduct may come in many forms, such as using threatening imagery (*e.g.,* cross burning or swastika); damaging property; physical assault;

[21] *See, e.g., Quigley* v. *Winter,* 598 F. 3d 938, 946 (8th Cir. 2010) (sex); *Neudecker* v. *Boisclair Corp.,* 351 F. 3d 361, 364 (8th Cir. 2003) (disability); *Krueger* v. *Cuomo,* 115 F. 3d 487, 491 (7th Cir. 1997) (sex); *Honce* v. *Vigil,* 1 F. 3d 1085, 1088 (10th Cir. 1993) (sex); *Smith* v. *Mission Assoc. Ltd. P'ship,* 225 F. Supp. 2d 1293, 1298–99 (D. Kan. 2002) (race).

[22] *See, e.g., Williams* v. *Poretsky Mgmt.,* 955 F. Supp. 490, 497 (D. Md. 1996) (in hostile environment sexual harassment case under the Act, noting that ''[w]hether a *reasonable person* would have been detrimentally affected by the harassment to which [plaintiff was] subjected is quintessentially a question of fact.'') (emphasis added) (quotations omitted); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1397–98 (C.D. Cal. 1995) (adopting ''reasonable woman standard'' in hostile environment sexual harassment case under the Act and observing that ''women remain disproportionately vulnerable to rape and sexual assault, which can and often does shape women's interpretations of words or behavior of a sexual nature, particularly if unsolicited or occurring in an inappropriate context.''). *See also Burlington Northern and Santa Fe Ry.* v. *White, 548 U.S. 53, 68–9 (2006)* (using ''reasonable employee'' standard in Title VII case); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21–22 (1993) (applying an objective and subjective reasonable person standard).

[23] *See, e.g., Hall* v. *Meadowood,* 7 Fed. Appx. 687, 689 (9th Cir. 2001) (describing circumstances to be considered in hostile environment case as including frequency of offensive conduct; severity; whether it involves threats, humiliation or ''mere offensive utterance;'' and whether it unreasonably interferes living conditions); *see also Harris,* 510 U.S. at 23 (factors to consider when determining whether a work environment is hostile under Title VII may include ''the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance'').

[24] *See, e.g., Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 625 (1995) (describing home as place to ''avoid intrusions''); *O'Connor* v. *Ortega,* 480 U.S. 709, 724 (1987) (holding reasonableness standard is proper for workplace searches because employee's expectation of privacy is much less than when they are at home); *Cohen* v. *California,* 403 U.S. 15, 21–22 (1971) (''[T]his court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . [Regarding the] claim to a recognizable privacy interest . . ., surely there is nothing like the interest in being free from unwanted expression in the confines of one's own home.'').

[25] *Carey* v. *Brown,* 447 U.S. 455, 471 (1980) (quoting *Gregory* v. *City of Chicago,* 394 U.S. 111, 125 (1969) (Black, J., concurring))

[26] *Quigley* v. *Winter,* 598 F. 3d 938, 947 (8th Cir. 2010) (sexual harassment violation of Act).

[27] *See, e.g., Harris,* 510 U.S. at 23 (noting that effect on victim's psychological well-being is relevant to determining whether she ''found the environment abusive'' but absence of psychological harm is not dispositive in determining whether harassment occurred).

threatening physical harm to an individual, family member, assistance animal or pet; or impeding the physical access of a person with a mobility impairment. The unwelcome conduct could be spoken or written, such as requests for sexual favors. It may include gestures, signs, and images directed at the aggrieved persons. It may include the use of racial, religious or ethnic epithets, derogatory statements or expressions of a sexual nature, taunting or teasing related to a person's disability, or threatening statements. In addition, the unwelcome conduct may be communicated to the targeted individual in direct and indirect ways. For example, the unwelcome conduct may involve the use of email, text messages, or social media.

As is the case with other prohibited conduct under the Act, an individual violates the Act so long as the quid pro quo or hostile environment harassment is because of a protected characteristic, even if he or she shares the same protected characteristic as the targeted person. For example, in sexual harassment claims, an individual violates the Act by harassing a person of the same sex or by harassing both men and women, so long as the unwelcome conduct is because of sex. Similarly, a person violates the Act by harassing a person of the same race or color if the unwelcome conduct is because of race or color.

With respect to sexual harassment, harassing conduct need not be motivated by sexual desire in order to support a finding of illegal discrimination. Sexually harassing conduct must occur ''because of sex,'' which can be shown by, for example, conduct motivated by hostility toward persons of one sex; conduct that occurs because a person acts in a manner that conflicts with gender-based stereotypes of how persons of a particular sex should act; or conduct motivated by sexual desire or control.

4. Number of Incidents

Proposed § 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.[28]

*B. Illustrations—Subparts B, C, and F*

The proposed rule would add illustrations of quid pro quo and hostile environment harassment to existing §§ 100.60, 100.65, 100.80, 100.90, 100.120, 100.130, and 100.135.

In § 100.60, entitled ''Unlawful refusal to sell or rent or to negotiate for the sale or rental,'' the proposed rule would add the following paragraphs as illustrations of prohibited quid pro quo and hostile environment harassment under the Fair Housing Act: Conditioning the availability of a dwelling, including the price, qualification criteria, or standards or procedures for securing a dwelling, on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability; subjecting a person to harassment because of race, color, religion, sex, familial status, national origin, or disability that causes the person to vacate a dwelling or abandon efforts to secure the dwelling. Conditioning the ''availability'' of a dwelling means the initial or continued availability of a dwelling, or both.

In § 100.65, entitled ''Discrimination in terms, conditions, and privileges and in services and facilities,'' the proposed rule would add the following paragraph as an illustration of prohibited quid pro quo and hostile environment harassment under the Fair Housing Act: Conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting the services or facilities in connection with a dwelling on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability; subjecting a person to harassment because of race, color, religion, sex, disability, familial status, or national origin that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting service or facilities in connection with the sale or rental of a dwelling.

In § 100.80, entitled ''Discriminatory representation on the availability of dwellings,'' the proposed rule would add the following paragraph as an illustration of a prohibited quid pro quo harassment under the Fair Housing Act: Representing to an applicant that a unit is unavailable because of the applicant's response to a request for a sexual favor or other harassment because of race, color, religion, sex, familial status, national origin, or disability.

In § 100.90, entitled ''Discrimination in the provision of brokerage services,'' the proposed rule would add the following paragraphs as illustrations of prohibited quid pro quo and hostile environment under the Fair Housing Act: Conditioning access to brokerage services on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability; subjecting a person to harassment because of race, color, religion, sex, familial status, national origin, or disability that has the effect of discouraging or denying access to brokerage services.

In § 100.120, entitled ''Discrimination in the making of loans and in the provision of other financial services,'' the proposed rule would add the following paragraphs as illustrations of prohibited quid pro quo and hostile environment harassment under the Fair Housing Act: Conditioning the availability of a loan or other financial assistance that is or will be secured by a dwelling on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability; subjecting a person to harassment because of race, color, religion, sex, familial status, national origin, or disability that affects the availability of a loan or other financial assistance that is or will be secured by a dwelling.

In § 100.130, entitled ''Discrimination in the terms and conditions for making available loans or other financial assistance,'' the proposed rule would add the following paragraphs as illustrations of prohibited quid pro quo and hostile environment harassment under the Fair Housing Act: Conditioning the aspect of a loan or other financial assistance to be provided with respect to a dwelling, or the terms or conditions thereof, on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability; subjecting a person to harassment because race, color, religion, sex, familial status, national origin, or disability that has the effect of imposing different terms or conditions for the availability of such loans or other financial assistance.

In § 100.135, entitled ''Unlawful practices in the selling, brokering, or appraising of residential real property,''

[28] *See, e,g., Quigley* v. *Winter,* 598 F. 3d 938 (8th Cir. 2010) (holding that a single instance of quid pro quo violated the Act where landlord implied that the return of a rent deposit depended on seeing plaintiff's nude body or receiving a sexual favor); *Doe* v. *Ore Duckworth,* 2013 U.S. Dist. LEXIS 113287, *12 (E.D. La. Aug. 12, 2013) (holding that touching of an intimate area of a plaintiff's body is conduct that can be sufficiently severe to create a hostile housing environment in violation of the Act, ''even if it is an isolated incident''); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1398 (C.D. Cal. 1995) (stating that a single incident of sexual touching that would constitute sexual battery under state law, ''would support a [hostile environment] sexual harassment claim under the federal Fair Housing Act.''); *see also* cases cited at note 11, *supra,* and accompanying text (explaining that harassment that occurs in or around one's home is especially intrusive, violative, and threatening); *cf. Faragher* v. *City of Boca Raton,* 524 U.S. 775, 788 (U.S. 1998) (noting that ''isolated incidents [of harassment] (*unless extremely serious*) will not amount to discriminatory changes in the 'terms and conditions of employment' '' constituting a hostile environment) (citations omitted;

the proposed rule would add the following paragraph regarding prohibited quid pro quo harassment under the Fair Housing Act: Conditioning the terms of an appraisal of residential real property in connection with the sale, rental, or financing of a dwelling on a person's response to harassment because of race, color, religion, sex, familial status, national origin, or disability.

The proposed rule would not add an additional example of quid pro quo or hostile environment harassment to § 100.400, entitled ''Prohibited Interference, Coercion or Intimidation,'' because existing § 100.400(c)(2) already encompasses both in identifying as an example of conduct made unlawful by section 818: ''Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.''

*C. Establishing Liability for Discriminatory Housing Practices*

This proposed rule would add new § 100.7 to subpart A (General), entitled ''Liability for Discriminatory Housing Practices.'' This proposed rule is intended to clarify standards for liability under this part, based on traditional principles of tort liability, and not to impose any new legal obligations or create or define new agency relationships or duties of care.[29]

1. Direct Liability

Proposed paragraph (a) of § 100.7 identifies direct liability under the Act. New § 100.7(a)(1)(i) proposes that a person is liable for his or her own discriminatory housing practices. New §§ 100.7(a)(1)(ii) and (a)(1)(iii) describe direct liability grounded in negligence. New § 100.7(a)(1)(ii) proposes that 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 where the person knew or should have known of the discriminatory conduct. New § 100.7(a)(1)(iii) proposes that a person is directly liable for failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party (*i.e.,* a non-agent) when the person knew or should have known of the discriminatory conduct. New § 100.7(a)(1)(iii) also proposes that a housing provider's 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.[30]

With respect to a person's direct liability for the actions of an agent, § 100.7(a)(1)(ii) recognizes that a principal who knows or should have known that his or her agent has engaged in or is engaging in unlawful conduct and allows it to continue is complicit in or has ratified the discrimination.[31] With respect to direct liability for the conduct of a non-agent, § 100.7(a)(1)(iii) codifies the traditional principle of liability, and HUD's longstanding position, that a person is directly liable under the Act for harassment perpetrated by non-agents if the person knew or should have known of the 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 harassment.[32] This liability arises when, for example, a person, including a management company, homeowner's association, condominium association, or cooperative, knew or should have known that a resident was harassing another resident, and yet did not take prompt action to correct and end it, while having a duty to do so. As recognized by § 100.7(a)(1)(iii), this duty may be created, for example, by a lease or other contract under which a housing provider is legally obligated to exercise reasonable care to protect residents' safety and curtail unlawful conduct in areas under the housing provider's control, or by federal, state or local laws requiring the same.

A principal ''should have known'' about the illegal discrimination of the principal's agent when the principal is found to have had knowledge from which a reasonable person would conclude that the agent was discriminating.[33] For example, if a housing provider's male maintenance worker enters female tenants' units without notice using a passkey, and enters their bedrooms or bathrooms while they are changing or showering and exposes himself, and the tenants complain about this conduct to the manager, the manager has reason to know that unlawful discrimination may be occurring. If the manager conveys this information to the owner, and neither the owner nor the manager takes any corrective action, they are both liable for violating the Act. In that case,

[29] *See Meyer* v. *Holley,* 537 U.S. at 282, 287 (applying ''traditional agency principles'' and ''ordinary background principles'' of tort liability to Fair Housing Act claim); *see also, e.g.,* Restatement (Third) of Agency section 7.05 (''A principal . . . is subject to liability for harm to a third party caused by [an] agent's conduct if the harm was caused by the principal's negligence in selecting, training, supervising, or otherwise controlling the agent.'').

[30] *See, e.g., Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n.,* 1997 U.S. Dist. LEXIS 21762, *26 (D.D.C. 1997) (denying association's motion for summary judgment because association knew or should have known of resident's harassment of plaintiff and had a duty to enforce its bylaws, including sanctions and litigation, yet failed to do so); *see also infra* note 32 and accompanying text).

[31] See, *e.g., United States* v. *Balistrieri,* 981 F. 2d 916, 930 (7th Cir. 1992) (owner liable for agent's racially discriminatory rental practices of which he knew and failed to stop); *Heights Community Congress* v. *Hilltop Realty, Inc.*, 774 F. 2d 135, 141, (6th Cir. 1985) (realty firm that knew of fair housing violations by its agents and failed to take corrective action were liable); *Richards* v. *Bono,* 2005 U.S. Dist. LEXIS 43585, *32 (M.D. Fla. 2005) (wife/co-owner who knew of husband's sexual harassment yet failed to stop it liable for that violation); *United States* v. *Veal,* 365 F. Supp 2d 1034, 1041 (W.D. Mo. 2004) (same).

[32] *See, e.g., Neudecker* v. *Boisclair Corp.,* 351 F. 3d 361, 364 (8th Cir. 2003) (owner may be liable for acts of tenants and management's children after failing to respond to plaintiff's complaints of harassment); *Fahnbulleh* v. *GFZ Realty, LLC,* 795 F. Supp. 2d 360, 364–65 (D. Md. 2011) (denying landlord's motion to dismiss because the Act imposes no categorical rule against landlord liability for tenant-on-tenant harassment); *Wilstein* v. *San Tropai Condo. Master Ass'n,* 1999 U.S. Dist. LEXIS 7031, *28–33 (N.D. Ill. Apr. 21, 1999) (rejecting condo association's argument that it had no duty to stop harassment of plaintiff by other residents and holding that association could be liable where evidence indicated that association knew of the harassment and bylaws authorized the association to regulate such conduct); *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n,* 1997 U.S. Dist. LEXIS 21762, * 26 (D.D.C. 1997) (condo association that knew of harassment by resident but failed to take corrective actions may violate Act); *see also. Bradley* v. *Carydale Enterprises,* 707 F. Supp. 217 (E.D. Va. 1989) (finding that owners and managers' failure to address one tenant's racial harassment of a neighboring tenant states a claim under 42 U.S.C. 1981, 1982); *Freeman* v. *Dal-Tile Corp.,* 750 F. 3d 413, 422–23 (4th Cir. 2014) (holding that ''an employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end [it].'') (4th Cir. 2014) (internal quotation marks and citations omitted); *Galdamez* v. *Potter,* 415 F. 3d 1015, 1022 (9th Cir. 2005) (''An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.'').

[33] The ''knew or should have known'' concept of liability is well-established in civil rights and tort law. As the Supreme Court has recognized, fair housing actions are essentially tort actions. *See Meyer* v. *Holley,* 537 U.S. 280, 285 (2003) (citing *Curtis* v. *Loether,* 415 U.S. 189, 195–96 (1974)); *see also Fahnbulleh* v. *GZF Realty, LLC,* 795 F. Supp. 2d 360, 363 (D. Md. 2011) (quoting *Williams* v. *Poretsky Mgmt.,* 955 F. Supp. 490, 496 (D. Md. 1996)) (''[c]onduct is imputable to a landlord, if the landlord knew or should have known of the harassment and took no effectual action to correct the situation.'').

the principal is liable as if the principal had committed the illegal act.[34]

Similarly, an 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.[35]

Proposed § 100.7(a)(2) provides that corrective actions must be effective in ending the discrimination, but may not injure the aggrieved persons.[36] For example, corrective actions appropriate for a housing provider to utilize to stop tenant-on-tenant harassment 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 nature, frequency, and severity of the harassment, and the size and authority of the provider. When the perpetrator is an employee of the housing provider, corrective actions might include training, warnings, or reprimands; termination or other sanctions; and reports to the police. The housing provider should follow up with the victim of the harassment after the corrective action is taken to ensure that it was effective. If the housing provider knows or should have known that the corrective action was ineffective, the provider has a duty to take additional corrective actions.

2. Vicarious Liability

Proposed paragraph (b) of § 100.7 provides that a person is vicariously liable for the discriminatory housing practices of his or her agents or employees, as specified by agency law. This provision is consistent with the holding of *Meyer* v. *Holley,* 537 U.S. 280, 285–289 (2003) that traditional principles of agency law apply in fair housing cases. Under well-established principles of agency law, a principal is vicariously liable for the actions of his or her 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.[37] Unlike direct liability, someone may be vicariously liable for the acts of an agent regardless of whether the person knew of or intended the wrongful conduct or was negligent in preventing it from occurring. In determining whether a principal is vicariously liable, an agent's responsibilities, duties, and functions must be carefully examined to determine whether an agency relationship exists, and also whether the conduct was within the scope of the agency relationship or aided by the existence of the agency relationship.[38]

As provided in new § 100.600(a)(2)(ii), the proposed rule would not extend to the Fair Housing Act the judicially-created Title VII affirmative defense to an employer's vicarious liability for hostile environment harassment committed by a supervisory employee. The Title VII affirmative defense permits an employer to avoid vicarious liability for such harassment by showing that (1) the employer exercised reasonable care to prevent and correct promptly the supervisor's harassing behavior, including implementing a policy to prevent and correct instances of sexual harassment and procedures for training and complaint filing; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to otherwise avoid harm.[39] The Title VII affirmative defense applies only where the supervisor's hostile environment harassment did not involve a tangible employment action, *e.g.,* hiring, firing, demotion, undesirable reassignment, or other actions resulting in a significant change in employment status.

Noting that common-law principles of agency liability ''may not be transferable in all their particulars to Title VII,'' [40] the Supreme Court fashioned this defense to employer liability in order to ''adapt agency concepts to the practical objectives of Title VII.'' [41] Specifically, the Court adopted the defense ''[i]n order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees.'' [42] The

[34] *See, e.g., Fahnbulleh,* 795 F. Supp. 2d at 360, 363; *Williams* v. *Poretsky Mgmt.,* 955 F. Supp. 490, 496 (D. Md. 1996).

[35] *See, e.g., Bloch* v. *Frischholz,* 587 F. 3d 771, 783 (7th Cir. 2009) (quoting *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n,* 388 F. 3d 327, 330 (7th Cir. 2004) (noting that interference under § 818 ''is more than a 'quarrel among neighbors' ''); *Sporn* v. *Ocean Colony Condominium Assn,* 173 F. Supp. 2d 244, 251–52 (D.N.J. 2001) (noting that section 818 ''does not [ ] impose a code of civility'' on neighbors); *United States* v. *Weisz,* 914 F. Supp. 1050, 1054–55 (S.D.N.Y. 1996) (holding that allegations that Jewish neighbor harassed complainants because of their religion were ''nothing more than a series of skirmishes in an unfortunate war between neighbors''). *But see Ohana* v. *180 Prospect Place,* 996 F. Supp. 238, 243 (E.D.N.Y. 1998) (neighbors who intentionally intrude upon quietude of another's home may violate Act).

[36] *See, e.g., Miller* v. *Towne Oaks East Apartments,* 797 F. Supp. 557, 562 (E.D. Tex.1992) (finding landlord liable for violating Act by evicting both harasser and victim of harassment instead of only harasser).

[37] *See Meyer,* 537 U.S. at 285 (''[T]raditional vicarious liability rules . . . make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.''); *Glover* v. *Jones,* 522 F. Supp. 2d 496, 507 (W.D.N.Y. 2007) (holding that ''a property owner may be vicariously liable under the Fair Housing Act for the actions of an employee even when they are outside the scope of employment . . . if the employee was aided in accomplishing the tort by the existence of the agency relation.'') (quoting *Mack* v. *Otis Elevator Co.,* 326 F. 3d 116, 123 (2d Cir. 2003) (internal quotation marks omitted); *see also Boswell* v. *GumBayTay,* No. 2:07–CV–135–WKW[WO], 2009 U.S. Dist. LEXIS 45954, *17 (M.D. Ala. June 1, 2009) (holding that vicarious liability attached to property owner where property manager's ''position essentially gave him unfettered access to communicate with and personally visit [the plaintiff]'' and he ''used his power as property manager as a vehicle through which to perpetrate his unlawful conduct by refusing repairs, raising the rent, and attempting to evict [the plaintiff] as a consequence for [her] refusal to provide sexual favors.''); *Glover* at 522 F. Supp. 2d at 507 (rejecting defendant property owner's motion for summary judgment on the issue of vicarious liability where evidence showed that property manager used his ''position as the de facto landlord to perpetrate FHA [harassment] violations . . . giving] him the opportunity to visit the apartment when he wanted, and enabl[ing] him to control Plaintiff's rent''); *Richards* v. *Bono,* 2005 U.S. Dist. LEXIS 43585, *30 (M.D. Fla. 2005) (holding that wife/co-owner of property could be vicariously liable for husband's harassment where husband acted as her agent and used his position as owner, property manager, and maintenance supervisor to subject the plaintiff to sexual harassment by using a key to enter plaintiff's apartment and threatening plaintiff with eviction).

[38] See, e.g, *United States* v. *Hylton,* 590 Fed. Appx. 13, 17 (2d Cir. 2014); *Cleveland* v. *Caplaw Enters.,* 448 F. 3d 518, 522 (2d Cir. 2006); *Alexander* v. *Riga,* 208 F. 3d 419, 430–33 (3d Cir. 2000); *Jankowski Lee & Assocs.* v. *Cisneros,* 91 F. 3d 891, 896–97 (7th Cir. 1996); *Cabrera* v. *Jakabovitz,* 24 F. 3d 372, 388 (2d Cir. 1994); *City of Chicago* v. *Matchmaker Real Estate Sales Center,* 982 F. 2d 1086, 1096–98 (7th Cir. 1992); *United States* v. *Balistrieri,* 981 F. 2d 916, 930 (7th Cir. 1992); *Walker* v. *Crigler,* 976 F. 2d 900, 903–05 (4th Cir. 1992); *Hamilton* v. *Svatik,* 779 F. 2d 383, 388 (7th Cir. 1985); *Marr* v. *Rife,* 503F. 2d 735, 741 (6th Cir. 1974); *United States* v. *Prach,* 2005 WL 1950018 *4 (E.D. Wa. 2005); *Richards* v. *Bono,* 2005 WL 1065141 *7 (M.D. Fla. 2005); *United States* v. *Veal,* 365 F. Supp. 2d 1034, 1041 (W.D. Mo. 2004); *United States* v. *Habersham Props.,* 319 F. Supp. 2d 1366,1375 (N.D. Ga. 2003); *United States* v. *Garden Homes Mgmt.,* 156 F. Supp. 2d 413, 424–25 (D.N.J. 2001); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1400–01 (C.D. Cal. 1995).

[39] *See* EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, *http://www.eeoc.gov/policy/docs/harassment.html. See also Vance* v. *Ball State,* 133 S. Ct. 2434, 2439 (2013); *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742, 765 (1998); *Faragher* v. *City of Boca Raton,* 524 U.S. 775, 806–08 (1998).

[40] *Ellerth,* 524 U.S. at 755 (internal quotations omitted) (quoting *Meritor Sav. Bank, FSB* v. *Vinson,* 477 U.S. 57, 72 (1986)).

[41] *Faragher,* 524 U.S. at 802.n3.

[42] *Ellerth,* 524 U.S. at 764.

Court reasoned that limiting employer liability would ''effect Congress' intention to promote conciliation rather than litigation in the Title VII context and the EEOC's policy of encouraging the development of grievance procedures [by employers].'' [43]

The Title VII affirmative defense is not appropriately applied to harassment in the housing context because the Fair Housing Act simply follows traditional principles of vicarious liability.[44] But even if the Fair Housing Act did authorize policy-driven adaptations of agency principles in some circumstances, the significant difference between the enforcement policies of Title VII and the Fair Housing Act make the affirmative defense to employer liability neither relevant nor appropriate to apply to liability under the Fair Housing Act. Most notably, employees are required to exhaust their administrative remedies before proceeding to court under Title VII,[45] whereas the Fair Housing Act has no exhaustion requirement. Nothing in the Act requires victims of housing discrimination, before filing a civil action, to file an administrative complaint with HUD or to await HUD's authorization to initiate a lawsuit. Rather, the Fair Housing Act ''provide[s] all victims of [housing discrimination] two alternative mechanisms by which to seek redress: *Immediate* suit in federal district [or state] court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail.'' [46] Even where a fair housing complainant chooses to file an administrative complaint with HUD, the complainant need not wait for HUD to act but rather may simultaneously initiate a lawsuit in federal or state court.[47]

Nor do the specific, practical concerns that led the Court to adopt the affirmative defense to vicarious liability for certain employment relationships arise in the housing context. In adopting the affirmative defense under Title VII, the Supreme Court distinguished between workplace harassment perpetrated by supervisors, which is often facilitated by the supervisor's agency relationship with the employer, and harassment perpetrated by co-workers, which is not similarly facilitated.[48] While the Court recognized that a supervisor's harassing conduct ''in [a] sense . . . is always aided by the agency relation'' because of his or her power and authority in the workplace,[49] the Court also noted that it is ''less obvious'' that a supervisor is aided by the agency relationship where the supervisor creates a hostile environment that does not involve a tangible employment action.[50] The Court was concerned that to hold employers vicariously liable for hostile environment harassment by a supervisor that did not involve a tangible employment action [51] would undermine the traditional distinction between employer liability for harassment by a supervisor, for which employers typically are held vicariously liable, and employer liability for co-worker harassment, for which employers are typically liable under a negligence theory.[52] To avoid this result, the Court drew a hard line separating two categories of supervisor harassment: (1) Those involving a tangible employment action, where the supervisory function is clear and manifest, and thus the tort plainly aided by the agency relationship; and (2) those not involving a tangible employment action, where the supervisors' harassment is less distinguishable from harassment by non-supervisory co-workers.[53] The Court held that where hostile environment harassment by a supervisor does not result in a tangible employment action, employers can raise the negligence-based affirmative defense to vicarious liability described above.

But the concerns that led the Supreme Court to distinguish workplace harassment by a supervisor from that by a fellow employee do not extend to the housing context where supervisory status of a housing provider's agent plays a far less significant role in facilitating harassment.[54] While workplace harassment may be perpetrated by an agent who has no authority over the terms or conditions of the victim's employment (*e.g.,* by a co-worker) such that the harassment is not aided by the perpetrator's agency relationship with the employer, harassment of a homeseeker or tenant by an agent of a housing provider does involve an agent who has authority over terms or conditions of the homeseeker's or tenant's housing or housing-related services.[55] Whether the perpetrator is a property manager, a mortgage loan officer, a realtor, or a management company's maintenance person, a housing provider's agent holds an unmistakable position of power and control over the victimized homeseeker or resident. For example, a property manager can recommend (or sometimes even initiate) the eviction of a harassment victim or refuse to renew a victim's lease, while a maintenance person may withhold repairs to a victim's apartment or may access the victim's apartment without proper notice or justification. Likewise, a realtor can refuse to show a home to or present a purchase offer from a harassment victim, while a loan officer might reject a victim's mortgage application or alter the loan terms being offered. Thus, unlike in the employment arena, an agent who harasses residents or homeseekers is aided by his agency relationship with the housing provider, whether or not a tangible housing action results.[56] For this reason, the Title VII affirmative defense is not relevant to the effective resolution of fair housing disputes. Significantly, we are unaware of any court having extended the Title VII affirmative defense to fair housing claims.

Instead, the affirmative defense would add additional burdens that are incompatible with the broad protections and streamlined enforcement mechanisms afforded by the Fair

[43] *Id.* (internal citations omitted).

[44] *See Meyer,* 537 U.S. at 285.

[45] *See* 42 U.S.C. 2000e–5(f)(1).

[46] *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91, 104 (1979) (emphasis added); *see also* 42 U.S.C. 3610, 3613.

[47] *See* 42 U.S.C. 3613(a)(2)–(3).

[48] *See Ellerth,* 524 U.S. at 763–65; *Faragher,* 524 U.S. at 801–03.

[49] *Ellerth,* 524 U.S. at 763.

[50] *Id.* (observing that ''there are acts of harassment a supervisor might commit . . . where the supervisor's status makes little difference.''); *see also id.* at 761 (defining a ''tangible employment action'' as ''a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'').

[51] With respect to harassment involving a tangible employment action, the Court held that ''When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. *Id.* at 761–62. Thus, the Court concluded, ''a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.'' *Id.* at 762.

[52] *See id.* at 760 (expressing concern that ''an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment.''); *see also id.* (citing the ''knows or should have known'' negligence standard of liability for cases of harassment between ''fellow employees'' established by 29 CFR 1604.11(d)).

[53] *See Ellerth,* 524 U.S. at 762–63.

[54] *Cf. Arguello* v. *Conoco, Inc.,* 207 F. 3d 803, 810 (5th Cir. 2000) (holding that the Title VII affirmative defense does not apply to harassment claims under 42 U.S.C. 1981 and Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a).

[55] *Cf. id.* at 810 (noting that racially derogatory remarks and other discrimination directed at plaintiff-customers by non-supervisory employee ''was just as harmful as if the discriminatory acts had been committed by one of [defendant-employer's] supervisory employees'').

[56] *See, e.g, Salisbury* v. *Hickman,* 974 F. Supp. 2d 1282, 1293 (E.D. Cal. 2013) (noting that ''Mr. Crimi's ability [as the on-site property manager] to influence Ms. Salisbury's well-being . . . adds yet another degree of severity to Mr. Crimi's [harassing] conduct. This reality exists even if Mr. Crimi did not engage in any quid pro quo sexual harassment.'').

Housing Act. Requiring victims of hostile environment harassment to complain to their housing provider or risk forfeiting their ability to obtain relief under the Fair Housing Act would unduly burden the large proportion of tenants who have little to no contact with their housing providers except through an onsite building manager or maintenance person who may be the very agent responsible for the harassment. Moreover, in HUD's experience, particularly in addressing instances of sexual harassment, tenants who are victims of sexual harassment by the landlord's agent are especially vulnerable. A housing provider's liability for such conduct should not be made contingent upon a tenant's ability to avail herself of a complaint process—even an adequate complaint procedure—established by the housing provider.

While the risk of retaliation attendant to reporting harassment is serious in the employment context, such risk is even graver in the residential context. Victims of harassment by a landlord's agent not only risk eviction, a particularly severe consequence for low-income tenants whose affordable housing options are limited, they may also suffer physical harm to themselves or their family members in retaliation for filing a grievance. In the most egregious circumstances, an agent may abuse the power conferred by his agency relationship to gain access to a victim's home and inflict violence upon the victim after the victim has reported harassment. In HUD's view, a victim of hostile environment harassment should not be forced to choose between the risk of retaliation and the risk of losing his or her right to hold a housing provider liable for the acts of its agents.

While Title VII and the Fair Housing Act share a common goal of eliminating discrimination in their respective spheres, the mechanisms for doing so are fundamentally different. In addition, as discussed above, one's workplace and one's home are very different places, with the latter having substantial expectations of privacy, security and safety. Individuals have a justified expectation of freedom from unwelcome conduct in the home.[57] The home is ''a place where [one is] entitled to feel safe and secure and need not flee.'' [58] To adopt Title VII's affirmative defense under the Fair Housing Act would be to ignore these important rights and the distinction between the home and public places, and the differences in the enforcement regimes of the two statutes.

## IV. Findings and Certifications

*Regulatory Review—Executive Orders 12866 and 13563*

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

This rule establishes uniform standards for use in investigations and processing cases involving harassment and liability under the Fair Housing Act. As has been discussed in the preamble to this rule, in establishing such standards, HUD is exercising its rulemaking authority to bring uniformity, clarity, and certainty to an area of legal practice.

The docket file for this rule is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 7th Street SW., Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Persons with hearing or speech impairments may access the above telephone number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

*Environmental Impact*

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. This rule is limited to the procedures governing fair housing enforcement. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321).

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 4321, *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule establishes standards for evaluating claims of harassment and liability under the Fair Housing Act. The scope of the rule is procedural, and the regulatory changes do not establish any substantive regulatory burdens on small entities. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

*Executive Order 13132, Federalism*

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

[57] *Frisby,* at 484.

[58] *Quigley* v. *Winter,* 598 F. 3d 938, 947 (8th Cir. 2010) (sexual harassment violation of Act).

*Catalogue of Federal Domestic Assistance*

The Catalogue of Federal Domestic Assistance Number for the equal opportunity in housing program is 14.400.

**List of Subjects in 24 CFR Part 100**

Aged, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR part 100 to read as follows:

## PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

■ 1. The authority citation for 24 CFR part 100 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d), 3600–3620.

■ 2. Add § 100.7 to read as follows:

**§ 100.7 Liability for discriminatory housing practices.**

(a) *Direct liability.* (1) A person is directly liable for:

(i) The person's own conduct that results in a discriminatory housing practice.

(ii) 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.

(iii) 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.

(2) For purposes of determining liability under paragraphs (a)(1)(ii) and (iii) of this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person.

(b) *Vicarious liability.* A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.

■ 3. In § 100.60, add paragraphs (b)(6) and (7) to read as follows:

**§ 100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.**

* * * * *

(b) * * *

(6) Conditioning the availability of a dwelling, including the price, qualification criteria, or standards or procedures for securing the dwelling, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that causes the person to vacate a dwelling or abandon efforts to secure the dwelling.

■ 4. In § 100.65, add paragraphs (b)(6) and (7) to read as follows:

**§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.**

* * * * *

(b) * * *

(6) Conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting the services or facilities in connection therewith, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting service or facilities in connection with the sale or rental of a dwelling.

■ 5. In § 100.80, add paragraph (b)(6) to read as follows:

**§ 100.80 Discriminatory representation on the availability of dwellings.**

* * * * *

(b) * * *

(6) Representing to an applicant that a unit is unavailable because of the applicant's response to a request for a sexual favor or other harassment because of race, color, religion, sex, handicap, familial status, or national origin.

■ 6. In § 100.90, add paragraphs (b)(5) and (6) to read as follows:

**§ 100.90 Discrimination in the provision of brokerage services.**

* * * * *

(b) * * *

(5) Conditioning access to brokerage services on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(6) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of discouraging or denying access to brokerage services.

■ 7. In § 100.120, add paragraphs (b)(3) and (4) to read as follows:

**§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.**

* * * * *

(b) * * *

(3) Conditioning the availability of a loan or other financial assistance on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that affects the availability of a loan or other financial assistance.

■ 8. In § 100.130, add paragraphs (b)(4) and (5) to read as follows:

**§ 100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.**

* * * * *

(b) * * *

(4) Conditioning the aspect of a loan or other financial assistance to be provided with respect to a dwelling, or the terms or conditions thereof, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of imposing different terms or conditions for the availability of such loans or other financial assistance.

■ 9. In § 100.135, revise paragraph (d) to read as follows:

**§ 100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.**

* * * * *

(d) Practices which are unlawful under this section include, but are not limited to:

(1) Using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.

(2) Conditioning the terms of an appraisal of residential real property in connection with the sale, rental, or

financing of a dwelling on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

■ 10. Add subpart H, consisting of § 100.600, to read as follows:

## Subpart H— Quid Pro Quo and Hostile Environment Harassment

### § 100.600 Quid pro quo and hostile environment harassment.

(a) *General.* Quid pro quo and hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap may violate sections 804, 805, 806 or 818 of the Act, depending on the conduct. The same conduct may violate one or more of these provisions.

(1) *Quid pro quo harassment.* Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to: The sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.

(2) *Hostile environment harassment.* Hostile environment harassment refers to 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.

(i) *Totality of the circumstances.* Whether hostile environment harassment exists depends upon the totality of the circumstances.

(A) Factors to be considered to determine whether hostile environment harassment exists include, but are 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.

(B) Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, 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.

(ii) *Title VII affirmative defense.* The affirmative defense to an employer's vicarious liability for hostile environment harassment by a supervisor under Title VII of the Civil Rights Act of 1964 does not apply to cases brought pursuant to the Fair Housing Act.

(b) *Type of conduct.* Harassment can be written, verbal, or other conduct, and does not require physical contact.

(c) *Number of incidents.* A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo.

Dated: September 28, 2015.

**Gustavo Velasquez,**

*Assistant Secretary for Fair Housing and Equal Opportunity.*

[FR Doc. 2015–26587 Filed 10–20–15; 8:45 am]

**BILLING CODE 4210–67–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2015–0032; FRL–9935–29]**

## Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of filing of petitions and request for comment.

**SUMMARY:** This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before November 20, 2015.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally is available at *http://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Susan Lewis, Registration Division (RD) (7505P), main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each pesticide petition summary.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT** for the division listed at the end of the pesticide petition summary of interest.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that