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May 30, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW,
Suite CC-5610 (Annex B)
Washington, DC 20580

Submitted via www.regulations.gov

Re: Tenant Screening Request for Information

I. Introduction

The National Low Income Housing Coalition (NLIHC) is dedicated solely to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. Our members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on policy and funding improvements for extremely low-income people who receive and those who need federal housing assistance.

This comment is in response to the Request for Information (RFI) on tenant screening published by the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB). Even before the COVID-19 pandemic, the country was in the midst of a pervasive affordable housing crisis impacting every state and Congressional district in the country. In the wake of the pandemic, and as federal resources and tenant protections disappear, tenants – and in particular tenants with the lowest incomes – are facing high rents, evictions, and increased housing instability and homelessness.

Reforms to tenant screening policies and practices are critically needed to ensure everyone has a safe, stable, accessible, and affordable place to call home. The FTC's and CFPB's role in enforcing the Fair Credit Reporting Act (FCRA) and identifying practices that unjustly prevent consumers from finding and maintaining housing means the agencies can also play an

important role in strengthening and enforcing renter protections, particularly as they relate to tenant screening.

Due to the length of the RFI, the responses below respond to the RFI's four main headings: "Tenant Screening Generally," "Criminal Records in Tenant Screening," "Eviction Records in Tenant Screening," and "Using Algorithms in Tenant Screening." Any questions regarding this comment can be directed to NLIHC Policy Manager Kim Johnson (kjohnson@nlihc.org).

II. Tenant Screening Generally

An estimated 90% of landlords use background screening companies to evaluate prospective tenants.¹ Reports on tenants are generated largely through automated searches of aggregated data, and receive minimal, if any, review before being sent to a landlord or property manager. However, the data used to generate these reports is often incomplete, missing key personal identifiers, and outdated, leading to erroneous reports that can result in a prospective tenant being unjustly denied housing.²

While the Fair Housing Act provides federal protections against housing discrimination for protected classes, laws governing background screening and assessment criteria for prospective tenants vary widely by state and locality. As a result, landlords and property managers generally have broad discretion in screening potential tenants. Some tenant screening agencies also offer automated decision making to landlords, which "score" an applicant, based on retrieved records and reports, against eligibility criteria provided by the landlord or the agency itself. The screening company then provides a determination as to whether the landlord should accept the potential tenant.³

Screening agencies utilizing automated decision making typically do not provide the landlord with a copy of the screening report, or the underlying records – rather, they issue an up-or-down determination as to whether the tenant meets the designated eligibility criteria.⁴ As a result, the criteria being used in screening and the report itself are often unclear to prospective tenants, making it difficult for tenants to know why their application is being denied and refusing them the opportunity to dispute inaccurate information.

Moreover, the data on which tenant screening companies rely to generate reports often contain inaccurate, incomplete, or misleading information, including sealed or expunged records, misclassified offenses, or omissions of material information on the resolution or dismissal of a case.⁵ Prospective tenants denied housing are not typically provided the opportunity to refute or correct information in reports, if they are able to see the report at all.⁶ These issues persist despite

¹ Nelson, A. (2019). "Broken Records Redux: How Errors by Criminal Background Companies Continue to Harm Consumers Seeking Jobs and Housing." National Consumer Law Center. Retrieved from: <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>

² Ibid.

³ National Housing Law Project. (2018). *An Affordable Home On Reentry: Federally Assisted Housing and Previously Incarcerated Individuals*. Retrieved from: <https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf>

⁴ Ibid.

⁵ Nelson, A. (2019). "Broken Records Redux: How Errors by Criminal Background Companies Continue to Harm Consumers Seeking Jobs and Housing." National Consumer Law Center. Retrieved from: <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>

⁶ Ibid.

FCRA's mandate that background screeners have in place processes to ensure the accuracy of reports.

Bias inherent to the criminal-legal system has caused people of color – particularly Black, Latino, and Native people – as well as people with disabilities and members of the LGBTQ+ community, to be disproportionately represented among systems-impacted people.⁷ Discrimination in the housing and job markets are two factors that put people of color – and especially Black women with children – at disproportionately high risk of eviction.⁸ As a result, tenant screening mechanisms that impose blanket denials on people with conviction or eviction records, or that provide inaccurate, misleading reports, will always disproportionately impact these groups.

Landlords and property managers should be required to provide a comprehensive, transparent list of screening criteria that will be included in a background check. This information should be available in plain language and in the preferred language of the prospective tenant. Tenants must also be guaranteed the opportunity to view the screening report, and to correct, refute, or provide additional context for missing, incomplete, or inaccurate information. Landlords and property managers should provide applicants plain-language information detailing their rights under FCRA, the process by which tenants can refute inaccurate information, and contact information for legal aid, housing counselors, and other advocates who can help guide a prospective tenant through the process of correcting information.

In addition, it is critical for CFPB and FTC to use their authority under FCRA to rein in the unjust practices of tenant screening companies, including by:

- Reaffirming that FCRA applies to companies that sell information used for FCRA-covered purposes, including tenant screening, and that disclaimers do not shield these companies from liability.
- Creating and requiring tenant screening companies to follow measures to ensure the accuracy of reports.
- Requiring tenant reporting and screening agencies to develop a program to evaluate the accuracy and completeness of background check reports.
- Requiring companies to provide prospective tenants with a full copy of the report, and to provide tenants the opportunity to refute or correct any misleading, inaccurate, or incomplete information.
- Requiring tenant background screening and consumer reporting agencies to register with the CFPB.
- Investigating tenant background screening companies for FCRA compliance.
- Holding companies found in violation of FCRA requirements accountable for changing their practices.
- Partnering with the Department of Housing and Urban Development (HUD) and other federal agencies to convene a task force, charged with researching the tenant screening

⁷ Delaney, R., Subramanian, R., Shames, A., & Turner, N. (2018). "American History, Race, and Prison." *Reimagining Prison Web Report*. Vera Institute for Justice. Retrieved from: [American History, Race, and Prison | Vera Institute](#)

⁸ National Partnership for Women and Families. (2021). *Black Women, the Wage Gap, and Evictions: An Urgent Call for Equitable Housing Solutions*. Retrieved from: <https://nationalpartnership.org/wp-content/uploads/2023/02/black-women-and-evictions.pdf>

industry; investigating the frequency and impact of tenant screening errors, with a focus on the potential disparate impact on people of color, people with disabilities, and other protected classes; and drafting tenant screening regulations that ensure reports contain accurate, up-to-date information.

It is also critical to place limits on how much – if anything – landlords and property managers can charge in application fees for prospective tenants. The nation’s severe shortage of affordable housing, which is a central cause of spiking rents,⁹ has placed tremendous pressure on rental housing markets across the nation, with sometimes dozens of households applying to rent the same unit.¹⁰ Landlords and property managers can profit immensely off charging non-refundable rental application and screening fees to prospective tenants, even knowing that only one applicant will ultimately be selected.

For individuals and families with extremely low incomes, application fees can be an insurmountable barrier to affordable housing. Extremely low-income households – those earning 30% or less of Area Median Income (AMI), or less than the federal poverty guideline – have limited money available to spend on repeated application fees, which can quickly add up and drain any available savings.¹¹ Tenants with a Housing Choice Voucher (HCV) looking to rent a unit in the private market can find themselves out of luck because HCVs do not cover the cost of application fees. People of color, members of the LGBTQ+ community, and people with disabilities are also disproportionately represented among extremely low-income and voucher-holding households.

These barriers point to the need for regulatory reforms to ensure the tenant screening process is as equitable as possible, and advances housing stability for applicants. For example:

- If application and screening fees are allowed at all, the cost of the fee should not exceed the actual cost of the screening.
- Landlords and property managers should be required to return application and screening fees to prospective tenants in the event they are denied housing, or their application is not considered.
- Landlords and property managers should be required to provide a complete list of their screening criteria to tenants, so tenants can make an informed decision about whether to apply.

CFPB should also consider creating and promoting a “model” universal application, which would provide standardized, transparent criteria for tenancy and ensure prospective tenants do not incur fees for multiple applications.

III. Criminal Records in Tenant Screening

The use of criminal background checks in tenant screening has become ubiquitous, but certain screening policies and practices create major barriers to housing access for the estimated 70 to

⁹ Aurand, A., et al. (2023). *The Gap: A Shortage of Affordable Rental Homes*. National Low Income Housing Coalition. Retrieved from: <https://nlihc.org/gap>

¹⁰ Ludden, J. (2023). “Rental Application Fees Add Up Fast in a Tight Market. But Limiting Them is Tough.” *National Public Radio*. Retrieved from: <https://www.npr.org/2023/01/13/1148426491/rental-application-fees-housing-affordable-market-states-laws>

¹¹ Ibid.

100 million people who have an arrest or conviction record.¹² Many tenant screening practices are conducted under the guise of “safety” but provide no actual countervailing benefit.¹³ Screening tools do not meaningfully predict an individual’s success as a tenant,¹⁴ and there is little correlation between admitting people with conviction records and negative housing outcomes.¹⁵ According to a statement from HUD, “there are currently no empirically validated tools predicting the risk of harm a rental applicant might present to other tenants and property available to housing providers and their property managers.”¹⁶

Broad exclusion of people with records from both public and private market housing places people impacted by the criminal-legal system at risk of housing instability and homelessness. In fact, formerly incarcerated people are ten times more likely to experience homelessness than the general public.¹⁷ Homelessness, in turn, increases the likelihood of recidivism, as communities move to criminalize homelessness¹⁸ and as increasingly desperate people resort to crimes of survival to meet their basic needs.¹⁹

As previously mentioned, tenant screening agencies rely on huge databases of aggregated criminal records data and a mostly automated process to generate background reports. However, there is no standardized reporting format or criteria for tenant screening, and agencies are not typically transparent about how their reports are generated.²⁰ Moreover, potential tenants often have no way of knowing a landlord’s selection and screening criteria before paying an application or screening fee, so people with conviction histories are more likely to lose a significant amount of money on these fees alone.²¹

After being denied housing, rejected applicants with conviction histories rarely receive an explanation, and sometimes never receive a response to their application at all. This behavior may violate FCRA’s required adverse action notice,²² and makes it impossible for prospective tenants to correct information, or provide additional context and mitigating circumstances surrounding a conviction. Because of the disproportionate toll the criminal-legal system exacts

¹² Lartey, J. (2023). “How Criminal Records Hold Back Millions of People.” The Marshall Project. Retrieved from: <https://www.themarshallproject.org/2023/04/01/criminal-record-job-housing-barriers-discrimination>

¹³ Johnson, K. and Sirota, E. (2022). “Evidence Regarding the Link Between Conviction Records and Housing Outcomes.” Reentry & Housing Working Group. Retrieved from: <https://tinyurl.com/nz339454>

¹⁴ Malone, D.K. (2015). “Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders.” *Psychiatric Services*, 60:2. Retrieved from: <https://ps.psychiatryonline.org/doi/full/10.1176/ps.2009.60.2.224>

¹⁵ Warren, C. (2019). “Criminal Background’s Impact on Housing Success: What We Know (And What We Don’t).” Amherst H. Wilder Foundation. Retrieved from: <https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont>

¹⁶ Johnson, C. (2022). “Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality.” Department of Housing and Urban Development. Retrieved from: <https://www.huduser.gov/portal/pdredge/pdr-edge-firm-asst-sec-051722.html>

¹⁷ Bae, J. (2023). *Opening Doors to Affordable Housing: The Low-Income Housing Tax Credit Program and People with Conviction Histories*. Vera Institute of Justice. Retrieved from: <https://www.vera.org/downloads/publications/Opening-Doors-to-Affordable-Housing-Report.pdf>

¹⁸ Olivet, J. (2022). “Collaborate, Don’t Criminalize: How Communities Can Effectively and Humanely Address Homelessness.” United States Interagency Council on Homelessness. Retrieved from: <https://www.usich.gov/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address-homelessness/>

¹⁹ Vera Institute of Justice. (2018). “Legal Perils of Homelessness.” *The Human Toll of Jail*. Retrieved from: <http://humantollofjail.vera.org/legal-perils-of-homelessness/>

²⁰ Ibid.

²¹ Ibid.

²² 15 U.S.C.A. § 1681m(a)

on people of color, people with disabilities, members of the LGBTQ+ community, and other protected classes, these practices and others that act as a de facto ban on people with conviction histories may also violate provisions of the Fair Housing Act (FHA).²³

In 2021, the CFPB issued an advisory opinion warning consumer reporting agencies that using inadequate matching procedures on screening reports – like name-only matching – may violate FCRA.²⁴ This recognition represents an important step towards improving tenant screening policies, practices, and guidance, including for people with conviction and arrest histories. To further this work, CFPB and (where applicable) FTC should also:

- Require screening companies to verify the accuracy of records retrieved through an automated search, including by using multiple criteria – like full name, date of birth, and Social Security Number – to match records to applicants.
- Prohibit the use of “name-only matches” in criminal record screening, which frequently leads to inaccurate information being shared about a potential tenant.
- Prohibit the use of multiple reports about the same offense, even if reports are from different sources.
- Reaffirm and clarify the applicability of FCRA to screening companies that own or maintain aggregated criminal records databases, and to software providers offering automated screening searches or analysis.
- Ensure records that have been expunged, sealed, barred from consideration by local or state law, or similarly relieved are not included in tenant screening reports.
- Provide guidance to screening and reporting agencies clarifying that failure to maintain procedures to verify the accuracy of information in tenant screening is a violation of FCRA.
- Investigate and hold accountable tenant screening agencies that utilize records that have been sealed or expunged for screening reports.
- Partner with HUD and other federal agencies to convene a task force, charged with investigating the frequency and impact of criminal record screening errors, with a focus on the potential disparate impact on people of color, people with disabilities, and other protected classes; and drafting guidance and regulations on utilizing conviction histories in tenant screening reports.

IV. Eviction Records in Tenant Screening

Like conviction histories, eviction records are a tremendous barrier to housing access. While FCRA states eviction filings should be removed from a tenant’s report after seven years, records are often available online without any time limit. Screening companies that utilize data scraping software to assemble reports, or that buy information from a data broker, typically include available eviction filings regardless of how long ago the filing occurred or whether the outcome

²³ Johnson, K., and Sirota, E. (2023). “Comment Re: Docket No. FR-6250-P-0: Affirmatively Furthering Fair Housing.” Partnership for Just Housing. Retrieved from: https://nlihc.org/sites/default/files/HUD-AFFH_PJH_Comment_Final_Sigs.pdf

²⁴ Consumer Financial Protection Bureau. (2021). “Fair Credit Reporting: Name-Only Matching Procedures.” Retrieved from: https://files.consumerfinance.gov/f/documents/cfpb_name-only-matching_advisory-opinion_2021-11.pdf

was favorable to the tenant.²⁵ Screening companies often include eviction records that have been expunged or sealed in their reports, and eviction court records often lack key details of a case, including the outcome.²⁶ These errors may violate FCRA’s mandate that screening agencies “follow reasonable procedures to ensure the maximum possible accuracy of the information.”²⁷

Due to historical and ongoing discrimination in the housing and job markets, evictions disproportionately impact people of color, and particularly Black mothers who rent.²⁸ Black, Latino, and Native people, as well as people with disabilities, older adults, and members of the LGBTQ+ community, are disproportionately represented among renters with the lowest incomes, and therefore at higher risk of housing instability and eviction.²⁹ Accordingly, unfettered access to eviction filings and any policies that automatically reject potential tenants with an eviction filing on their record will have a disparate impact on these groups.

The COVID-19 pandemic and its resulting economic fallout exacerbated the housing stability challenges renters with the lowest incomes were already facing. Before the pandemic, nearly ten million extremely low- and very low-income renter households – disproportionately people of color, people with disabilities, older adults, and members of the LGBTQ community – were severely housing cost burdened, spending over half of their income on rent alone.³⁰ By August 2020, over 44 million people had filed for unemployment, and without government intervention an estimated 19 to 23 million renters were at-risk of eviction.³¹

The federal government acted, and provided unprecedented resources and protections for renters to stave off what would have been a historic wave of evictions. These resources included over \$46 billion for emergency rental assistance (ERA), which has been used to help over 10.8 million households, the majority of which are extremely low-income, remain stably housed.³² As COVID resources and protections run out, however, there is reason to be concerned by how renters with the lowest incomes are faring. As of April 2023, an estimated 5.2 million renter households were still behind on rent.³³ Millions more are relying on untenable means to support

²⁵ National Consumer Law Center. (2020). *Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores*. Retrieved from: https://www.nclc.org/wp-content/uploads/2022/09/IB_Salt_in_the_Wound.pdf

²⁶ Ibid.

²⁷ National Consumer Law Center. (2022). *Zombie Records: How Sealed or Expunged Court Records in Tenant & Employment Screening Reports May Illegally Cost People Jobs & Housing*. Retrieved from: https://www.nclc.org/wp-content/uploads/2022/08/IB_Zombie_Records-1.pdf

²⁸ Hepburn, P, Louis, R., and Desmond, M. (2020). “Race and Gender Disparities among Evicted Americans.” *Sociological Science*. Retrieved from: <https://sociologicalscience.com/articles-v7-27-649/>

²⁹ Aurand, A., et al. (2023). *The Gap: A Shortage of Affordable Rental Homes*. National Low Income Housing Coalition. Retrieved from: <https://nlihc.org/gap>

³⁰ Aurand, A., Emmanuel, D., and Threet, D. (2020). *NLIHC Research Note: The Need for Emergency Rental Assistance During the COVID-19 and Economic Crisis*. National Low Income Housing Coalition. Retrieved from: <https://nlihc.org/sites/default/files/Need-for-Rental-Assistance-During-the-COVID-19-and-Economic-Crisis.pdf>

³¹ National Consumer Law Center. (2020). *Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores*. Retrieved from: https://www.nclc.org/wp-content/uploads/2022/09/IB_Salt_in_the_Wound.pdf

³² National Low Income Housing Coalition. (2023). “More Than \$37 Billion in ERA Funds Spent Between January 2021 and December 2022.” *Memo to Members and Partners*. Retrieved from: <https://www.nlihc.org/resource/more-37-billion-era-funds-spent-between-january-2021-and-december-2022>

³³ National Equity Atlas. (2023). *Rent Debt in America: Stabilizing Renters is Key to Equitable Recovery*. Retrieved from: <https://nationalequityatlas.org/rent-debt>

their households and keep roofs over their heads, including borrowing money from friends and families, relying on loans or taking on credit card debt.³⁴

While Congress must also act with urgency to keep low-income renters safe from evictions, CFPB and FTC can play a vital role in creating guidance and regulations to provide tenants with long-term protections, and ensure an eviction filing does not preclude someone from finding safe, stable, affordable housing in the future. CFPB and, where applicable, FTC should:

- Prohibit reporting of rental arrears on credit reports, if ERA funds have been used to pay back rent owed.
- Create guidance to ensure eviction records that have been expunged, sealed, barred from consideration by local or state law, or similarly relieved are not included in tenant screening reports.
- Collaborate to bring enforcement actions against tenant screening companies whose practices are in violation of FCRA.
- Partner with HUD and other federal agencies to convene a task force, charged with researching the tenant screening industry; investigating the frequency and impact of eviction reporting errors, with a focus on the potential disparate impact on people of color, people with disabilities, and other protected classes; and drafting tenant screening regulations that ensure reports contain accurate, up-to-date information.

V. Using Algorithms in Tenant Screening

Tenant screening companies are increasingly turning to algorithms and machine learning software to evaluate potential tenants. While screening companies tout algorithms as an efficient, effective tool for evaluating and making a determination on an applicant, algorithms often carry inherit bias that leads systems to disproportionately reject Black and Latino renters, as well as renters using Housing Choice Vouchers³⁵ and renters with disabilities.³⁶

Algorithms and machine learning rely on historical data to produce and analyze reports; algorithms will therefore reflect and perpetuate the biased policies and patterns that have produced historical data. Additionally, conscious and unconscious bias from programmers, as well as inaccurate and incomplete data, can influence algorithmic results. However, because algorithms utilize data and seemingly remove human bias from decision making, there is a popular (but incorrect) perception that algorithms and machine learning produce impartial results.³⁷

As the use of algorithms, machine learning, and artificial intelligence becomes more widespread in tenant screening, it is important for CFPB and FTC to create and implement guidance to

³⁴ Aurand, A. and Threet, D. (2021). *The Road Ahead for Low Income Renters*. National Low Income Housing Coalition. Retrieved from: <https://nlihc.org/sites/default/files/The-Road-Ahead-for-Low-Income-Renters.pdf>

³⁵ Ibid.

³⁶ Ibid.

³⁷ Schneider, V. (2020). "Locked Out By Big Data: How Big Data, Algorithms, and Machine Learning May Undermine Housing Justice." *Columbia Human Rights Law Review*, 51:1. Retrieved from: https://hrlr.law.columbia.edu/files/2020/11/251_Schneider.pdf

ensure these tools move us towards greater housing equity, rather than more deeply entrenching existing discrimination.³⁸ CFPB and, where applicable, FTC should:

- Clarify that FCRA should be interpreted to require screening companies to disclose algorithmic inputs in sufficient detail for consumers to determine whether their criminal history information, eviction records, and other consumer data was properly sorted, classified, filtered, and produced a “recommendation” or other analytical outcome consistent with the housing provider’s admission criteria.
- Use existing authority to hold accountable tenant screening companies utilizing algorithms that result in discriminatory decision making.
- Encourage companies to develop algorithms that reduce the impact on racial disparities and help affirmatively further equitable housing outcomes.
- Partner with HUD and other federal agencies to convene a task force, charged with researching the use of algorithms and other automated decision making technology in tenant screening; investigating the impact of algorithmic decision-making, with a focus on the potential disparate impact on people of color, people with disabilities, and other protected classes; and drafting regulations that ensure the use of algorithms and other automated decision-making technology in tenant screening furthers racial and social equity.

VI. Conclusion

The CFPB’s and FTC’s role in enforcing FCRA, identifying unjust consumer practices, and providing guidance and regulations to screening companies means the agencies play a vital role in strengthening and enforcing tenant protections. Thank you for the opportunity to submit these responses, we look forward to continuing to work with the agencies to ensure tenants – and especially tenants with the lowest incomes – have an equitable opportunity to find and maintain safe, stable, affordable, and accessible housing. Any questions regarding this comment can be directed to NLIHC Policy Manager Kim Johnson (kjohnson@nlihc.org).

³⁸ Ibid.