May 30, 2023

Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Partnership for Just Housing's Response to Request for Information, Docket ID FTC-2023-0024

Dear Federal Trade Commission and Consumer Financial Protection Bureau,

Thank you for the opportunity to respond to the Request for Information (RFI) issued February 28, 2023. We view this RFI as an important step forward in acknowledging the critical role consumer protection agencies must play in protecting tenant-consumers.

We write on behalf of the Partnership for Just Housing (PJH). Convened by the Shriver Center on Poverty Law, the National Low Income Housing Coalition (NLIHC), VOICE of the Experienced, the Formerly Incarcerated, Convicted People and Families Movement (FICPFM), and the National Housing Law Project (NHLP), the Partnership for Just Housing is a national collaborative of directly-impacted leaders and other advocates working to end housing discrimination against people with arrest and conviction histories. Together, we work to advance economic and racial equity at the intersection of housing and the criminal-legal system.

In forming and executing its agenda, PJH centers the expertise of people with direct criminal-legal system involvement. The substance of this response is thus based on the experience of directly-impacted individuals and other advocates who are members or allies of PJH, responses to a survey administered by PJH to people with arrest and conviction histories, and secondary source research. Please note that FICPFM, a national network of organizations composed of formerly incarcerated persons and their families, may submit its own comment, which we support.

In recent years, the use of criminal background checks for tenant screening purposes has become ubiquitous.[1] It is well established that criminal records screening practices of landlords and screening companies create major difficulties for the close to 100 million Americans who

1 Ariel Nelson, Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing, NAT'L CONSUMER LAW CNTR. (Dec. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf.

have arrest and conviction records.[2] In response to a qualitative survey administered by PJH to persons with criminal records, one consumer described the futility of his own search in the following way: "I gave up applying to places once I realized the reality - that almost all landlords have blanket bans against people with legal system involvement." A consumer with a ten-year-old robbery conviction provided a similarly depressing update: "I haven't been able to find housing."

Broad exclusion of people with records from housing causes immense harm to consumers with arrest and conviction histories, their families, and society at large.[3] Lack of protection for people with criminal records "often affects entire families, as [family members] can be denied housing if they live with a relative who has a criminal record."[4] These practices are especially harmful and discriminatory against members of protected classes more likely to have contact with the criminal-legal system due to structural bias, such as Black and Brown people,[5] persons with disabilities,[6] and members of the LGBTQ+ community.[7] These practices also may violate the Fair Housing Act, as outlined in PJH's recent comment on HUD's Affirmatively Furthering Fair Housing final rule.

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2 Preventing and Removing Barriers to Housing Security for People With Criminal Convictions, Center for American Progress, Apr. 14, 2021,https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/; Valerie Schneider, "The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact," 93 Indiana Law Journal 421, 431, (2018), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj; Matthew Doherty, Incarceration and Homelessness: Breaking the Cycle, COPS OFF. NEWSLETTER (Dept. of Justice/U.S. Interagency Council on Homelessness, Wash., D.C.), Dec. 2015, www.cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp; Julian Somers, et al., Housing First Reduces Re-offending among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial, p. 2 (Sept. 1, 2013) ("Individuals commit more offences after becoming homeless than before and, in a reciprocal manner, incarceration contributes to homelessness through the destabilization of housing, unemployment, and the erosion of human rights."), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0072946&type=printable; Crim Justice Behav. 2020 Sep; 47(9): 1097–1115. Published online 2020 Aug 6. doi: 10.1177/0093854820942285 ("We found being homeless increased the hazard of recidivism by nearly 50% (HR = 1.44, p < .001), and that each residential transition (i.e., residential instability) increased the risk of recidivism by 12% (HR = 1.12, p = .011), above and beyond demographic markers and established recidivism risk factors."), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/; Shirin Ali, "More than half of unemployed US men in their 30s have criminal records, study says," The Hill, Feb. 21, 2022, https://thehill.com/changing-america/respect/accessibility/595178-more-than-half-of-unemployed-young-men-in-the-us-have/ (noting that nearly 1 out of 3 Americans has a criminal record); A Criminal Record Shouldn't Be a Life Sentence to Poverty, Center for American Progress, May 28, 2021, https://www.americanprogress.org/article/criminal-record-shouldnt-life-sentence-poverty-2/.

3 *See, e.g.,* The Public Health Implications of Housing Instability, Eviction, and Homelessness, The Public Health Network, (Apr. 21, 2021) ("Housing instability is a public health crisis that causes and exacerbates health problems, erodes communities, and drives health inequities."), https://www.networkforphl.org/resources/legal-and-policy-approaches-towards-preventing-housing-instability/the-public-health-implications-of-housing-instability-eviction-and-homelessness/; Opening the Door, FHFJC, at *supra*, p. 14 ("Rejections based on criminal history can present significant and unique barriers for multigenerational households and can prevent people who are leaving incarceration from creating and maintaining the social support systems they need to be successful.").

4 *See, e.g.,* Romina Ruiz-Goiriena, "Exclusive: HUD unveils plan to help people with a criminal record find a place to live," USA Today, Apr. 12, 2022, https://www.usatoday.com/story/news/nation/2022/04/12/can-get-housing-felony-hud-says-yes/9510564002/.

5 Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons (Sentencing Project, October 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.

6 Becky Crowe and Chrstine Drew, Orange is the New Asylum: Incarceration of Individuals with Disabilities (Behavior Analysis in Practice, 14, 387-395, February 22, 2021), https://link.springer.com/article/10.1007/s40617-020-00533-9.

7 Alexi Jones, Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System (Prison Policy Initiative, March 2, 2021), https://www.prisonpolicy.org/blog/2021/03/02/lgbtq

These tenant screening practices have no countervailing benefit. There is little correlation between criminal records and negative housing outcomes.[8] Nor can screening tools meaningfully predict housing outcomes based on criminal records.[9] Indeed, according to a statement from the Department of Housing and Urban Development, "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."[10] Far from enhancing safety, excluding those with criminal records leads to housing insecurity, homelessness, increased recidivism, and an array of additional negative externalities.[11] Making more people homeless and housing unstable does not make society safer.

This RFI response outlines unfair, deceptive, and otherwise illegal criminal records screening practices of housing providers and tenant screening companies and recommends the adoption of specific regulations and subregulatory guidance. First, this response discusses the unfair and deceptive practices of housing providers, how the FTC should address those practices, and the FTC's authority to do so under Section 5 of the FTC Act ("Section 5"). Next, it describes the problematic practices of tenant screening companies, provides suggested regulations and guidance, and addresses both the FTC's authority to take these measures under Section 5 and the Fair Credit Reporting Act (FCRA) and the CFPB's authority to take these measures under the FCRA.

Please note that this response relies largely on the following attached exhibits, which are incorporated herein and entered into the record:

> **Exhibit A** - A letter from PJH members and allies to the FTC suggesting guidance and regulations to address the criminal records screening practices of housing providers and screening companies; this Exhibit, in turn, has three exhibits:

8 Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housingretention, Daniel K. Malone, Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders, 60 Psychiatric Servs. 224, 224-30 (2009), https://ps.psychiatryonline.org/doi/full/10.1176/ps.2009.60.2.224 (finding "absolutely no criminal background predictors of housing success or failure."); Cael Warren, "Criminal Background's Impact on Housing Success: What We Know (And What We Don't)," Wilder Foundation, Jul. 16, 2019, https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont; Opening the Door: Tenant Screening and Selection, How it Works in the Twin Cities Metro Area and Opportunities for Improvement, Family Housing Fund & Housing Justice Center, pp. 14-16. (March 2021) (discussing studies), https://www.hjcmn.org/wp-content/uploads/2021/04/Tenant-Screening-Report.pdf.

9 Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality, PD&R Magazine, May 17, 2022, https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html.

10 *Id.*

11 See attached Exhibit B, §II(2).

Ex. 1 - Suggested regulations for housing providers and tenant screening companies under Section 5 of the FTC Act. Please note: we also recommend that § 4 of Ex. 1 be adopted as regulations by the CFPB under its FCRA authority.

Ex. 2 - Suggested guidance for housing providers under Section 5 of the FTC Act.

Ex. 3 - Suggested guidance for tenant screening companies under the FCRA and Section 5 of the FTC Act. Please note: we also recommend these suggestions be adopted as regulations and/or guidance by the CFPB under its FCRA authority.

Exhibit B - A memorandum discussing the lack of correlation between criminal records and negative housing outcomes, why housing outcomes studies are more relevant to the questions at hand than recidivism studies, and how the broad exclusion from housing of tenants and applicants with criminal records constitutes 'unfairness' under Section 5 of the FTC Act.

Exhibit C - A memorandum discussing why the FTC's broad enforcement authority is not impliedly limited by the FCRA and other industry-specific laws.

Exhibit D - The initial letter sent by PJH members and allies to the Biden Administration and various federal agencies suggesting policies to enhance housing access for people with arrest and conviction histories. Exhibits A-C above build upon Exhibit D.

Unfair and Deceptive Practices of Housing Providers

The Federal Trade Commission has an essential role in protecting consumers with arrest and conviction histories from the unfair practices of housing providers.

1. *Unfair and Deceptive Practices of Housing Providers*

As described by directly-impacted individuals and other housing advocates, and per Exhibits A, B, and D, landlords and property managers often broadly exclude consumers with arrest and conviction histories from housing.[12] Further, these housing providers often extract excessive application and background check fees from consumers. Adding insult to injury, tenant applicants often have no way to know landlord selection criteria before paying these fees. As stated by one housing seeker with criminal-legal system involvement, "I have been searching for

12 *See also* Jamiles Lartey, How Criminal Records Hold Back Millions of People, The Marshall Project, Apr. 1, 2023, https://www.themarshallproject.org/2023/04/01/criminal-record-job-housing-barriers-discrimination ("More than 70 million Americans with arrest records face barriers to find work or a decent place to live"); John J. Lennon, "How Do People Released From Prison Find Housing?", NY Times, March 31, 2023, *available at* https://www.nytimes.com/2023/03/20/realestate/prison-parole-housing-shelters.html;

affordable housing for months, and am having a very hard time obtaining a place that is within my budget and which will also accept someone with a felony conviction. I have paid several hundred dollars in application fees to places which originally seemed ok with my history, but then was rejected."

When denied housing, these consumers seldom receive an explanation. Often, applicants with records receive no response at all.[13] For example, one survey respondent noted that they spent hundreds of dollars on application fees over the course of two years and only received two responses, both denying his application due to his conviction history. By 'ghosting' these consumers or denying consumers without sufficient explanation, landlords deny applicants housing based on screening reports without providing the required adverse action notice under the FCRA.[14] Further, housing providers often refuse to accept portable screening reports, which help applicants avoid significant application and screening fees. The result is that tenants and applicants with records are left housing insecure after being forced to waste hundreds of dollars in application and screening fees.

Such practices unfairly injure consumers with arrest and conviction histories and perpetuate discrimination against demographics especially likely to have contact with the criminal-legal system, as described above and in Exhibits A, B, and D.

2. *Recommended Agency Actions*

We recommend that the FTC utilize its Section 5 authority to adopt the regulatory and subregulatory changes recommended in Exhibit A(1) & (2). Doing so will help protect consumers from being unfairly excluded from safe and stable housing, reduce unfair and deceptive consumer costs, and imbue needed transparency into the rental process. Such policies will also help reduce discrimination in the rental market and prevent data aggregators and purchasers from utilizing and benefiting from racially biased data and algorithms.

3. *Agency Authority*

As articulated by Exhibits A, B, and C, the FTC is well within its authority under Section 5 of the FTC Act to adopt the suggested regulations and guidance. Exhibit A notes how adopting regulation and guidance of landlord screening and admission practices is well within the FTC's broad authority to police the national economy. Exhibit C explains that the FTC has jurisdiction under Section 5 to regulate landlord practices beyond the specific dictates of the FCRA. Although Exhibit C addresses a more specific question concerning arrest records, it also serves to explain why the FTC maintains its full authority under Section 5 to regulate the practices in

13 *See* Ese Olumhense, "'They're shut out of the market': the struggle to rent with a criminal record," The Guardian, Feb. 10, 2022, https://www.theguardian.com/lifeandstyle/2022/feb/10/new-york-renting-criminal-record;

14 *See* 15 U.S.C.A. § 1681m(a).

question even if such practices are explicitly addressed by other laws in different or more narrow ways.[15] Indeed, because no other law explicitly limits or is mutually exclusive with the exercise of the FTC's authority here, the FTC maintains its full authority to regulate screening practices and the like.[16] Finally, Exhibit B explains why both landlord and tenant screening company practices broadly excluding residents with arrest and conviction history are "unfair" under Section 5.[17] These practices perpetuate housing instability and homelessness, increase recidivism, and are associated with a number of individual and community harms; aggressive tenant screening practices have little countervailing benefit, especially as there is little correlation between criminal records and negative housing outcomes.[18]

Practices of Tenant Screening Companies

The FTC and CFPB have an essential role to play in reining in the criminal background check practices of tenant screening companies. The CFPB should utilize its power under the FCRA, and the FTC should utilize its power under both the FCRA and Section 5 of the FTC Act, to do so.

1. Unfair and Deceptive Tenant Screening Practices

As stated in exhibits A, B, and D, tenant screening algorithms often encourage housing providers to exclude tenants and applicants based upon factors that have little verified correlation with negative housing outcomes. The data underlying these algorithms, as well as the algorithms themselves, are often racially biased, and screening companies take inadequate steps to curb the use of racially biased and/or irrelevant data. Further, these algorithmic processes are opaque, as screening companies refuse to provide algorithmic inputs to consumers. Such practices are unfair and deceptive under Section 5 of the FTC Act: by feeding often irrelevant data into algorithms, purchasing, selling, and using racially biased data while failing to adopt procedures to curb this racial bias, and then refusing to disclose this underlying data to consumers, tenant screening companies violate FCRA disclosure requirements and fail to adopt reasonable policies to assure maximum possible accuracy under the FCRA.

2. Recommended Agency Action

We recommend that the FTC adopt the regulations and guidance in Exhibit A(1 & 3) under Section 5 of the FTC Act and the guidance recommended in Exhibit A(2) under the FCRA. While these recommendations are framed as recommendations to the FTC, we also

15 *See* Exhibit C, §§ II (B & C), III(2).

16 *See id.*

17 See Ex. A, pp. 4-9; Ex. B, § IV.

18 *See generally* Ex. B; PD&R Magazine, at *supra*.

recommend that the CFPB adopt the substantive recommendations in Exhibit A(1)§4 and Exhibit A(3) as regulation and/or guidance under its FCRA authority.

3. *Agency Authority*

There can be little question that the CFPB has broad regulatory and enforcement authority and the FTC has broad subregulatory and enforcement authority over screening companies under the FCRA. Notably, the FTC also has the authority to enact the suggested regulations and subregulatory guidance under Section 5 of the FTC Act. Exhibits A and B discuss why the practices in question are unfair and deceptive under the FTC Act. Exhibit C discusses why the FTC has broad power to regulate screening companies under Section 5 of the FTC Act even regarding issues addressed more narrowly under the FCRA. While some portions of Exhibit C focus specifically on the FTC's power to regulate landlords, much of the analysis also explains why the FTC's Section 5 authority should not be considered limited by the FCRA or other industry-specific laws.

Conclusion

The Partnership for Just Housing again appreciates the opportunity to respond to the Request for Information. We urge the FTC and CFPB to implement the outcomes of the RFI quickly through the use of regulation, subregulation, enforcement efforts, and other tools at their disposal.

Best Regards,

National Organizations

Appleseed Foundation
Center for Disability Rights
Corporation for Supportive Housing (CSH)
Formerly Incarcerated Convicted People and Families Movement
Justice in Aging
National Consumer Law Center (on behalf of its low-income clients)
National Disability Rights Network (NDRN)
National Housing Law Project
National Low Income Housing Coalition
Root & Rebound
Shriver Center on Poverty Law
SPLC Action Fund
Vera Institute of Justice

Who Speaks For Me?

State and Local Organizations

Advocates for Basic Legal Equality, Inc.
Advocates for Basic Legal Equality Dayton Ohio
Alameda County Fair Chance for Housing
Atlanta Legal Aid Society, Inc.
Center for Civil Justice
Center for Arkansas Legal Services
Chicago Area Fair Housing Alliance
Colorado Poverty Law Project
Columbia Legal Services
Community Legal Services of Philadelphia
Connecticut Legal Services, Inc.
Cuyahoga County Office of Reentry
The Fortune Society
Greater Hartford Legal Aid
Illinois Justice Project
James B. Moran Center for Youth Advocacy
The Just Cities Institute
Kentucky Equal Justice Center
Law Center for Better Housing
Legal Action Center
Legal Aid Justice Center
Louisiana Fair Housing Action Center
Lutheran Metropolitan Ministry
Maine Equal Justice
Massachusetts Law Reform Institute
Minnesota Second Chance Coalition
Nebraska Appleseed
New Mexico Center on Law and Poverty
Open Communities
Public Justice Center
Safe Return Project
South Carolina Appleseed Legal Justice Center
Sponsors, Inc.
Stop The Pain Inc.
TASC, Inc. (Treatment Alternatives for Safe Communities)
Uptown People's Law Center (UPLC)

Vermont Legal Aid
Voice of the Experienced
The Washington Legal Clinic for the Homeless
William E. Morris Institute for Justice

Individuals

Barbara Daly
Sr. Beverly Anne LoGrasso
Caroline Longstreet
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Dara Baldwin
Professor Kathryn A. Sabbeth
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Lorie Goshin
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November 22, 2021

Director Sam Levine
Consumer Protection Bureau
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Regulations and Guidance regarding criminal records tenant screening practices

Dear Director Levine:

Thank you so much for meeting with our coalition this summer and requesting that we provide suggested regulations and guidance regarding landlord tenant screening practices. Proposed regulations under the FTC Act are attached as Exhibit 1; proposed guidance aimed at landlords is attached as Exhibit 2; proposed guidance aimed at tenant screening companies is attached as Exhibit 3. Exhibits 2 & 3 are updates to guidance already released by the FTC in 2016.[1] This letter also helps to elucidate the basis for more extensive and formal FTC Guidance.

In the last several years, HUD, the FTC, and CFPB have released guidance highlighting risks criminal tenant screening practices pose to consumers.[2] While much of this effort was spurred by HUD's Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions,[3] it is heartening that the CFPB and FTC are also viewing such issues as consumer protection matters. Notably, the National Consumer Law Center, which has already proposed essential guidance aimed at tenant screening companies under the Fair Credit Reporting Act, has signed onto this letter. We write both to support and supplement those suggestions, with particular focus on how the FTC can use its authority to regulate unfair or deceptive practices under Section 5 of the FTC Act to rein in potentially harmful tenant screening practices. The FTC has already taken essential steps in this direction.[4]

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[1] Lisa Weintraub Schifferle, Screening tenants? Check out the FTC's new guidance, HUD, Nov 28, 2016, https://www.ftc.gov/news-events/blogs/business-blog/2016/11/screening-tenants-check-out-ftcs-new-guidance.

[2] *See, e.g.,* Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, HUD, Apr. 4, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; *see* FTC Oct. 2016 guidance & Jillson blog post, at *infra*; CFPB Bulletin 2021-03: Consumer Reporting of Rental Information.

[3] HUD, at id.

[4] *See, e.g.,* "Using Consumer Reports: What Landlords Need to Know," FTC, Oct. 2016, https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know; Lesley Fair, "A word to landlords about eviction moratoriums," FTC, Mar 29, 2021, https://www.ftc.gov/news-events/blogs/business-blog/2021/03/word-landlords-about-eviction-moratorium; *see also, e.g.,* Elisa Jillson, "Aiming for truth, fairness,

In his 2020 address to the National Fair Housing Alliance, then-FTC Chairman Chopra articulated the unique role of consumer protection agencies in protecting consumers against harmful screening practices and the importance of expanding the FTC's efforts under its Section 5 authority:

> [A] . . . tool we can use today is the FTC Act's prohibition on unfair acts and practices. As we all know, it is rare to uncover direct evidence of racist intent, which is why disparate impact analysis is a critical tool to uncover hidden forms of discrimination under sector-specific laws like the Fair Housing Act and the Equal Credit Opportunity Act. But many areas of the economy are not covered by these laws. In a recent auto lending discrimination case brought by the FTC, I argued that many discriminatory practices are also unfair under the FTC Act, which covers almost the entire economy. Unfair practices are those that are (i) likely to cause substantial injury (ii) that is not reasonably avoidable, and (iii) that is not outweighed by countervailing benefits to consumers or competition. Discriminatory practices often are three for three, causing grievous harm that cannot be avoided. This means that the F TC Act can serve as an important gap-filler to combat discrimination across the economy, particularly as machine learning and artificial intelligence make more and more decisions about our lives.[5]

We are writing as a coalition of organizations led by and composed of individuals with criminal records, as well as housing and consumer advocacy groups. Below are suggestions for how the FTC can make good on Chairman Chopra's thesis - that FTC's general unfairness authority is an essential tool to rein in tenant screening practices, both through the regulation of landlords and screening companies.

Specifically, we advocate that the FTC take the following actions. For one, the FTC can expand upon the guidance to tenant screening companies and landlords which it issued in 2016, per Exhibits 2 & 3. This will provide important information to these businesses and help elucidate the FTC's stance on these matters. Of the suggested actions, this step can likely be taken most immediately though it also may be given the least amount of deference from courts. In order that guidance be entitled to more deference, we also advocate that the FTC issue more analytically robust interpretive guidance which establishes the basis for the suggestions included in the exhibits. Finally, though we know it is a far less immediate process, we have provided suggested regulations under the FTC Act, per Exhibit 1, which also potentially serve as model language for subregulatory guidance or staff commentary.

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and equity in your company's use of AI," FTC, Apr. 19, 2021, https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair.

[5] "Introductory Remarks of [then-] Commissioner Rohit Chopra," National Fair Housing Alliance 2020 National Conference, Oct. 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1581594/final_remarks_of_rchopra_to_nfha_v3.pdf.

Application of FTC Act to Regulate Tenant Screening Practices

As highlighted by then-FTC Chairman Chopra's statement above, the FTC Act covers nearly every aspect of the economy. While other laws like TILA and RESPA focus on unfair practices surrounding the extension of credit, few federal consumer protection laws focus on protecting renters; the FTC Act itself is necessary to fill this gap.[6] The FTC and CFPB have already taken bold steps to regulate tenant screening companies and landlords' use of screening reports, generally through FCRA guidance and by taking enforcement actions against screening companies. It is essential that the FTC continue to build upon such efforts through additional guidance targeting both screening companies and rental housing providers. As stated by Chairman Chopra, the FTC is uniquely situated to take the lead in reining in harmful tenant screening practices.

Indeed, we are in the midst of both a housing crisis and a civil rights reckoning. Just as the CFPB was formed largely in response to the abusive practices of the lending industry, it is essential that the FTC take steps to minimize harmful barriers to housing faced by the most vulnerable consumers and their families.

Regulation of both tenant screening companies and the tenant screening practices of landlords[7] is well within the FTC's established bailiwick. As stated, the FTC has already addressed tenant screening practices in guidance directed to both landlords and screening companies. There is, indeed, ample precedent that discrimination, in the housing context and otherwise, also violates consumer protection laws,[8] and consumer protection agencies enforce

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[6] See Hayes, *infra*, at pp. 4, 20 (noting that consumer protection law is needed to fill gaps left by anti-discrimination laws).

[7] It bears mention that, while historically the FTC has been seemingly hesitant to regulate landlords under Section 5, there is nothing limiting its jurisdiction in this regard. Further, while historically, landlords were viewed as 'mom & pop' operations and rental transactions were viewed as more analogous to traditional land transfers than consumer dealings, today, landlords are often multi-state investor-backed operations who engage in the market like any other business and who use screening reports provided by data aggregators. *See* Eric Sirota, The Rental Crisis Will Not Be Televised: The Case for Protecting Tenants Under Consumer Protection Regimes, 54 U. Mich. J.L. Reform 667, 707-711 (rental housing marketed like any other consumer product or service such that "treating rental markets as unique from other markets is anachronistic at best."), 721-22 ("The need for increased public enforcement becomes that much greater as the rental industry becomes increasingly nationalized . . . . [C]orporations are increasingly dominating the rental market . . . As stated by Harvard's 2018 report on The State of the Nation's Housing, '. . .multifamily construction ramped up quickly to become the main source of additional supply.' In some urban areas, the dominance of these larger rental companies is especially pronounced. In fact, more recently, there has even been somewhat of a flourishing of rental-backed security investors and the like.") (Spring 2021) (citations omitted).

Further, while consumer enforcement agencies have historically hesitated to regulate housing providers, most state UDAP laws, many of which incorporate FTC Act jurisprudence, have been interpreted to include regulation of landlords. *See* NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.6.1 (10th ed. 2021), https://library.nclc.org/udap; Susan L. Thomas, Annotation, Coverage of Leases Under State Consumer Protection Statutes, 89 A.L.R. 4th 854; *see, e.g.,* Commonwealth v. Monumental Props., Inc., 459 Pa. 450, 465 (1974) (arguing that the FTC's regulation of other rental products indicates its authority to regulate rental housing).

[8] *See, e.g.,* Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, 369 F.Supp.3d 362, 381 (D. Conn. 2019) (allegations that defendant violated HUD 2016 Criminal Records Guidance also state UDAP claim);

specific prophylactic measures to guard against such discrimination in other contexts.[9] Further, the guidance suggested here aligns with the FTC's efforts to regulate 'big data' and protect consumer privacy. Not only is the criminal records data being bought and sold likely to be inaccurate and incomplete, [10] but use of such data involves the buying, selling, and disclosure of negative, often racially biased,[11] information about consumers that may have little to do with the consumer's ability to be a quality tenant.[12]

Unfair and Deceptive Practices

The FTC has broad discretion to declare individual business practices "unfair" or "deceptive." The FTC Act is designed explicitly to ensure this administrative flexibility. As stated by the Supreme Court, "'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task' . . . . the sweep and flexibility of this approach were thus made crystal clear . . . ."[13] The section

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Green v. Konover Residential Corp., 1997 WL 736528, at * 7 (D. Conn. 1997) (facts alleging Fair Housing Act violation also allege UDAP violation); Green v. Diamond, 2014 WL 5801351 (N.D. Ill. 2014) (targeting Black borrower with predatory reverse mortgage both UDAP and civil rights violation); City of Santa Monica v. Gabriel, 186 Cal.App.4th 882, 887-889 (2d Dist. 2010) (landlord sexual harassment of tenant covered by UDAP); Balthazar v. Hensley R. Lee Contracting, Inc., 214 So.3d 1032, 1039 (La.App. 4 Cir. 2017) (plausible claim for UDAP violation based on employment discrimination); Compl., FTC v. Liberty Chevrolet, Inc., 20-CV-3945, filed May 21, 2020, available at https://www.ftc.gov/news-events/press-releases/2020/05/bronx-honda-to-pay-over-1-million-to-settle-charges; Compl., State of Washington v. Greyhound Lines, Inc., 20201236-32, available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Greyhound%20Complaint.pdf (alleging Greyound committed unfair and deceptive practices by discriminating based upon immigration status); Equal Credit Opportunity Act, 15 USC 1691(a); *see also* RI ST § 6-13.1-30 ("It shall be a deceptive trade practice . . . for any retail establishment. . . to discriminate against a prospective customer by requiring the use of credit. . . .").

[9] *See, e.g.,* 15 USC 1691(d)

[10] HUD Criminal Records Guidance, at *supra*, p. 5, noting that data used by screening companies is often incomplete.

[11] *See, e.g.,* Big Data: A Tool for Inclusion or Exclusion, FTC, pp. iii-v, Jan. 2016, https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[12] Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housing-retention, referencing Malone DK, Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. Psychiatr Serv. 2009;60(2):224–230 (finding "absolutely no criminal background predictors of housing success or failure."); Cael Warren, "Criminal Background's Impact on Housing Success: What We Know (And What We Don't)," Wilder Foundation, Jul. 16, 2019, https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont (finding that out of 15 broad categories of offense, conviction records for 11 have no statistically significant consequences for housing outcomes. Even within the four remaining categories, a misdemeanor conviction has no statistically significant predictive effect after two years and a felony has no statistically significant predictive effect after five. Also conceding that even the findings of statistical significance are largely uncertain and are likely over estimations).

[13] F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 240-1 (1972) (quoting H.R.Conf.Rep.No.1142, 63d Cong., 2d Sess., 19 (1914)).

below will discuss regulation of housing providers and regulation of screening companies in turn.

1. Regulation of Housing Providers under Section 5

As several government agencies and private reports have well documented, over-broad use of criminal history screening is especially injurious to consumers, as consumers with records and their families are potentially relegated to housing instability as a result of such practices.[14] Relatedly, housing provider use of tenant application fees often creates unfair and deceptive barriers to housing, especially for those with criminal records. Addressing these matters under the Fair Housing Act is essential because such tenant screening practices disproportionately injure certain protected classes. But unnecessarily excluding those with records from rental housing injures all consumers kept out of housing due to such practices, irrespective of protected class status.

Here, the suggested regulations and guidance target several practices regarding use of criminal history reports in rental transactions:

- Overly broad exclusions of tenant applicants based on criminal history reports;
- Unfair and deceptive practices regarding the use of application fees, such as:
  - using rental application fees to extract a profit from applicants;
  - lack of transparency in landlord admission criteria in advance of applicants paying rental application fees;
  - failing to refund rental applications fees when the landlord fails to evaluate the application.

The attached suggested guidance and regulations seek to combat these practices both directly and through prophylactic measures. These unfair and deceptive practices are further elaborated upon below.

a. *Overbroad exclusions of those with criminal records*

Consumer protection agencies can take action to prevent landlords from unfairly and unjustifiably excluding tenants and tenant applicants from housing based upon criminal records.[15]

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[14] See, e.g., HUD Criminal Records Guidance, *supra*, at 1-2 ("Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing . . . because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest."); Tex Pasley et al., Screened Out, Shriver Center on Poverty Law, pp. 2-3, 9 (Jan. 2021), www.povertylaw.org/report/tenant-screening-report/.

[15] *See* Chopra, at *supra*; *see also* Jillson, at *supra*; Stephen Hayes, partner at Relman Colfax, et al., Discrimination is Unfair: Interpreting UDA(A)P to Prohibit Discrimination, pp. 14-18, April 2021, https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf.

Two landlord practices which are particularly injurious to consumers are (i) the exclusion of consumers based upon arrest records and other criminal records not resulting in a conviction and (ii) broad exclusions based on convictions with no individualized analysis of the relationship between such convictions and the likelihood of housing success.[16] Consideration of arrest and other pre-conviction records excludes tenants merely because they have been accused of a crime without any determination that the crime was actually committed. Further, pre-conviction records on screening reports are especially likely to be misleading or incomplete and thus subject consumers to housing instability based on inaccurate or incomplete data.[17] Similarly, broad exclusion of those with criminal convictions harms large swaths of people based on generalizations and stereotypes.[18] Both practices make consumers with criminal records more likely to face homelessness and an ongoing cycle of poverty and incarceration.[19]

There is no countervailing benefit which outweighs these harms, as these practices are not reasonably linked to enhanced tenant safety, the likelihood of housing success or other legitimate goals, and are, in fact, counterproductive to most legitimate outcomes.[20] As stated, the mere existence of an arrest does not demonstrate that the tenant or applicant engaged in any criminal activity. Similarly, excluding consumers from housing based upon records of convictions which have been overturned, pardoned, or vacated, or based on juvenile records, similarly harm consumers without a substantial countervailing benefit.[21] Further, even standard conviction records only rarely indicate a likelihood of an unsuccessful tenancy.[22]

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[16] See HUD Criminal Records Guidance, at pp. 4-7.

[17] *Id.,* at 5.

[18] *Id.*, at 5 ("Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden); see also Jillson, at *supra* (use of racially biased algorithms may constitute an unfair practice under the FTC Act).

[19] Matthew Doherty, Incarceration and Homelessness: Breaking the Cycle, COPS OFF. NEWSLETTER (Dept. of Justice/U.S. Interagency Council on Homelessness, Wash., D.C.), Dec. 2015, www.cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp.

[20] See, e.g., Doherty, at id.; Zerger at *infra*; Patrick Smith, Report: Stable Housing For Former Prisoners Could Save Illinois $100M A Year, NPR, Jul. 31, 2019, https://www.npr.org/local/309/2019/07/31/746909431/report-stable-housing-for-former-prisoners-could-save-illinois-100-m-a-year; 2016 HUD Guidance, at *supra*, discussing how excluding applicants from housing based on arrest records or based on convictions with no individual assessment do not serve a substantial legitimate interest or embrace a reasonable less discriminatory alternative.

21 Excluding applicants based on juvenile records, publicly unavailable records, or pardoned records also does not confer a significant benefit to society. Miller v. Alabama, 567 U.S. 460, 471-73 (2012) (citing Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003), with quotations and other citations omitted). Again, this citation speaks to the problems of using juvenile criminal history but does not imply or speak to what may constitute a proper criminal records history 'lookback period.' Andrea R. Coleman, Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices, Dept. of Justice Office of Juvenile and Delinquency Prevention December 2020, pp.2, 8-9 https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf ("criminal and juvenile justice systems, educational institutions, employers, landlords, and the public all have an ongoing role to play in ensuring that youthful transgressions do not lead to permanent collateral consequences."). Andrea Coleman also notes on page 2 that "The goal of expungement is to make it as though the records never existed." See Herrera v. Collins, 506 U.S. 390, 415 (1993) (noting that pardons are often used to correct for incorrect convictions).

[22] Warren, at *supra*. Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-

Further, where a landlord relies on a tenant screening company's rental recommendations which, for example, factor in arrest records or broadly exclude applicants based on conviction records, both the landlord and the screening company are likely using and gaining from a discriminatory algorithm.[23] As stated in a recent FTC blog post, "The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms."[24]

As such, landlords should not be permitted to exclude tenants in an overbroad way based upon their criminal histories. To ensure transparency in this process, and as a prophylactic measure, landlords should evaluate applications in the order they are received and disclose the basis for rejection when they do not choose to accept an applicant.

b. *Unfair fees and lack of transparency*

Tenant screening practices coupled with the use of rental application fees also leave tenants vulnerable to exploitation at early stages of the application process. Such practices may be both unfair and deceptive.

Landlords commonly charge tenants application fees, claiming that such fees are intended only to recoup their reasonable costs. However, landlords may also charge application fees in unfair and deceptive ways. One such unfair practice occurs when landlords profit from tenant application fees. In such instances, the "application fee" or "criminal background check fee" serves to extract additional money from often vulnerable applicants under the misleading pretense that such fees are only being used to pay for the background check.[25] Collecting application fees in excess of the landlord's actual costs are just as unfair and misleading as any other charge imposed under false pretenses.

Unlike fees linked to a valuable service, a landlord does not provide an applicant a service merely by evaluating their application. Rental screening benefits only landlords, not applicants--and rental decisions are subject to the wide discretion of landlords. The practice of using application fees to turn a profit is especially harmful and misleading where the applicant will almost certainly be rejected based on criteria the applicant has no way of knowing or in instances where the landlord does not actually evaluate the subject application. Tellingly, several states and municipalities have enacted laws regulating use of application fees.[26]

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not-predict-housing-retention, referencing Malone DK, Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. Psychiatr Serv. 2009;60(2):224–230.

[23] *See Corelogic*, 2020 WL 4570110, at *16-17.

[24] Jillson, at *supra*.

[25] *See* Consumer's Edge: Rental Application Fees, Maryland Office of the Attorney General, https://www.marylandattorneygeneral.gov/CPD%20Documents/Tips-Publications/86.pdf.

26 *See, e.g.,* Stephen Michael White, A Landlord's Guide Rental Application Fees (50 States), RentPrep, August 13, 2020, https://rentprep.com/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/#state (noting that Alaska, California, Massachusetts, Minnesota, New York, Vermont, Virginia, Washington, and Wisconsin have states laws regulating the use of rental application fees and that multiple states either prohibit fees in excessive of the actual cost of a report or prohibit application fees entirely).

As a check against such unfair and deceptive practices, first, landlords should at minimum be prohibited from charging application fees which exceed actual costs.[27] Further, potential applicants should have access to the landlord's criteria in advance of paying a fee, in enough detail to enable an informed decision about whether to apply. Finally, to prevent discrimination, make the application process more transparent, and prevent landlords from disguising profits as application fees, landlords should be required to evaluate tenant rental applications in the order they are received and fully refund fees for applications that the landlord does not evaluate.

Rental application fees may also have the effect of deterring consumers with criminal history or other significant admission barriers from applying at properties they consider more selective. On a collective scale, charging rental application fees may contribute to residential segregation in the housing market if such deterrence disproportionately steers Black and Latinx renters toward less-desirable properties in lower-opportunity neighborhoods, which consumers may perceive as more likely to accept them. The FTC should investigate whether such steering occurs and, if so, consider further restrictions on rental application fees as necessary to lessen or avoid its segregative effects.

c. *Rejection of portable screening reports*

Portable screening reports allow applicants to pay a one-time cost for a report which can be used to apply to multiple housing providers.[28] This allows tenants of limited means to apply for housing repeatedly, which may be necessary if they have criminal history or eviction records. Yet many housing providers refuse to accept such reports and require applicants to pay additional fees to apply even if they have portable screening reports available.

Housing providers who prefer to order the tenant-screening report of their choice should be free to do so. But charging an application fee to a consumer who supplies access to a recent and reasonably complete and portable report is unjustifiably injurious. Not only does this practice frustrate the efforts of tenants with difficult background information to secure needed housing, but the refusal to waive application fees for persons with portable tenant screening reports is deeply anticompetitive. By refusing to accept such products, landlords undermine the incentive for tenants to purchase them--and, by extension, the incentive for suppliers to market them.

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[27] *See* Andrea Collatz, "The Do's and Don'ts of Rental Application Fees," TransUnion, June 5, 2018, https://www.mysmartmove.com/SmartMove/blog/dos-donts-collecting-rental-application-fees.page. States are also beginning to regulate application fees. *See, e.g.,* Changes in New York State Rent Law: What You Need to Know, New York Office of the Attorney General, p. 4, https://ag.ny.gov/sites/default/files/changes-in-nys-rent-law.pdf. Some countries, like England, have outlawed them. *See, e.g.,* Tenant Fees Act, available at https://www.gov.uk/government/collections/tenant-fees-act.

[28] Marin Scott, How to Avoid Hidden Rental and Application Fees as a Renter, Avail, Sept. 17, 2021, https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter.

2. Regulation of Tenant Screening Companies under Section 5 and the FCRA

While the CFPB generally has rulemaking authority under the FCRA, the FTC may still issue guidance and regulations regarding tenant screening companies under Section 5.[29] Further, as the primary agency tasked with FCRA enforcement with respect to tenant screening CRAs, FTC FCRA guidance can signal its enforcement agenda. As cited throughout this document, the FTC has, on multiple instances, issued guidance aimed at screening companies and data sellers.

a. Tenant Screening Companies' Obligation to Take Measures to Guard Against Discrimination

As stated by the FTC's January 2016 report on big data,[30] "[under the FTC Act,] at a minimum, companies must not sell their big data analytics products to customers if they know or have reason to know that those customers will use the products for fraudulent or discriminatory purposes." Similarly, "The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms."[31] Such a principle is readily applicable to tenant screening companies' use of criminal records data and use of algorithms to generate rental recommendations. Per, for example, HUD's 2016 Criminal Records Guidance, tenant screening companies are on sufficient notice that use of criminal records information in their algorithms is prone to effectuate discrimination in the housing market. Screening companies must thus take all reasonable steps to guard against such unjustified consumer injury. As such, at the very least, tenant screening companies' algorithms should not factor in arrests and other pre-conviction records for cases not resulting in convictions, overturned or otherwise vacated convictions, juvenile records, or records sealed, expunged or otherwise made unavailable to the public. Further, algorithms should not create de facto blanket or overly broad exclusions on those with felony convictions. Overwhelming data makes clear that such practices perpetuate discrimination and thus unjustified consumer injury. Further, regardless of whether such exclusions discriminate against protected classes, such exclusions, by definition, cause unjustified consumer injury where they are not reasonably and sufficiently linked to future housing success.

The FCRA implies similar dictates, which the FTC should state explicitly as the agency primarily tasked with enforcing the FCRA with respect to tenant screening CRAs. Per § 1681e(b) of the FCRA, CRAs must "follow reasonable procedures to assure maximum possible

[29] The FTC does not lose its general Section 5 authority over an industry or practice because another agency has more specific regulatory authority over that industry or practice. *See, e.g., U.S. v. Philip Morris Inc.,* 263 F.Supp.2d 72, 76, 79 (D.D.C. 2003) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quoting *F.C.C. v. NextWave Personal Communications Inc.*, 537 U.S. 293, 303 (2003)); *L. Heller & Son v. Federal Trade Commission*, 191 F.2d 954, 957 (7th Cir. 1951) (FTC may exercise its general Section 5 authority regarding marks to amended Tariff Act as "Tariff Act discloses no language expressing an intention on the part of Congress to repeal § 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices,"); *U. S. v. Various Quantities of Articles of Drug Labeled in Part: "Instant Alberty Food * * *"*, 83 F.Supp. 882, 887 (D.D.C. 1949); *see also* Chopra, *supra*, fn. 5.

[30] "Big Data," *supra*, at iii.

[31] Jillson, at *supra*.

accuracy of the information concerning the individual about whom the report relates." By making rental recommendations without adequate precautions to ensure that the underlying algorithm avoids racial bias or data of little relevance to housing success, tenant screening companies fail to adhere to this central mandate.

b. Ensuring transparency in the use of tenant screening algorithms

The FTC should interpret the FTC Act to ensure that tenant screening companies make adequate disclosures to consumers regarding the data and information used in their algorithms and in generating their rental recommendations. More specifically, tenant screening companies must make available to consumers algorithmic inputs plugged into the algorithm and all sources of such inputs. Otherwise, "if a consumer is denied" housing "based on an error, . . . the consumer can be harmed without knowing why."[32]

The FTC can also make clear that it reads the FCRA to require similar disclosures. The Fair Credit Reporting Act requires credit reporting agencies to disclose most contents of consumers files upon consumer request.[33] This provides for essential transparency and allows consumers to hold such CRAs accountable. However, application of these requirements to tenant screening companies requires additional clarification. Specifically, tenant screening companies often provide an algorithm-generated recommendation about whether to rent to a given applicant. Such recommendations may be outcome determinative.[34] In order to ensure the transparency and accountability required by the FCRA, the 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. Such information should already be considered "on file" about a consumer and thus subject to disclosure under 15 U.S.C. § 1681g, but information of this nature is seldom disclosed to consumers outside formal litigation discovery. As such, the FTC should make clear that it intends to enforce the FCRA against tenant screening companies when they fail to make such adequate disclosures.

Requested Course of Action

We request that the FTC issue interpretive regulations and/or subregulatory guidance clarifying the prohibited tenant screening practices of housing providers and the obligations of tenant screening companies under the FTC Act. The FTC should also issue guidance to tenant screening companies regarding their disclosure obligations under the FCRA. Thank you so much for your continued attention to this matter. We would be very interested in speaking further. Please feel free to reach out to Eric Sirota, Director of Housing Justice at the Shriver Center on Poverty Law, at ericsirota@povertylaw.org or (847)903-1930.

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[32] Data Brokers: A Call for Transparency and Accountability, FTC May 2014, p. v, at https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014.

[33] 15 U.S.C. 1681g

[34] *See, e.g.,* See Connecticut Fair Housing Center v. Corelogic Rental, 369 F.Supp.3d 362, § IV(A)1 (D. Conn. 2019).

Best Regards,

Formerly Incarcerated Convicted People and Families Movement
National Housing Law Project
National Low Income Housing Coalition
National Consumer Law Center (on behalf of its low-income clients)
Operation Restoration
Shriver Center on Poverty Law
Sponsors, Inc.
Uptown People's Law Center
Voice of the Experienced (VOTE) – Louisiana

DRAFT FTC TENANT SCREENING REGULATION

§ 1. Definitions

(a) "Tenant screening report" means any consumer report made to a landlord which is prepared, used, or expected to be used in whole or in part for the purpose of serving as a factor in deciding whether to admit a consumer as a tenant or occupant of residential property.

(b) "Consumer" means an individual.

(c) "Consumer report" has the same meaning as in 15 U.S.C. § 1681d(1).

(d) "Residential property" means any property leased for residential purposes, including any room, house, building, mobile home or land in a mobile home park, or other dwelling leased for residential purposes.

(e) "Landlord" means the owner or lessor of a residential property and includes any representative of the owner or lessor, including but not limited to any property manager, realtor, or other agent, vendor, contractor, or other person or entity working on behalf of the owner or lessor.

(f) "Rental application fee" means any amount, however denominated, which is paid by a consumer to a landlord for the purpose of being considered as a tenant for a dwelling unit, including any amounts paid as reimbursement for the purchase of tenant screening reports or to obtain other background information about the consumer.

(g) "Portable tenant screening report" means a tenant screening report prepared within 30 days before an application for admission to residential property and made available to a landlord at no charge.

(h) "Rental recommendation" means any consumer report which states an opinion, recommendation, determination, score, analytical result, or other information relating to whether a consumer meets a landlord's admission criteria or otherwise as to whether a landlord should or should not admit a consumer as a tenant or occupant of residential property.

§ 2. Unfair practices with respect to rental applications and fees

(a) Prior to collecting any rental application fees, a landlord should first notify the consumer of:

(1) All types of information that will be considered in deciding whether to admit the consumer as a tenant or occupant;

(2) The sources from which all such information will be obtained;

(3) The landlord's admission criteria, in sufficient detail for a consumer to make a reasonably informed decision about whether an application would likely be accepted; and

(4) Whether any procedure is available for appealing or seeking reconsideration of a rejected application and, if so, a description of that procedure.

Such disclosures should be made to potential applicants as much in advance of collection of the application as is reasonably possible and, where applicable, access to such admissions practices should be clearly and conspicuously featured on the landlord's website and in rental advertisements.

(b) No rental application fee should exceed a landlord's actual costs in purchasing a tenant screening report or otherwise obtaining background information about a consumer. If a landlord obtains background information on a consumer other than through the purchase of a tenant screening report, the rental application fees should not exceed the average cost of a tenant screening report in the area where the residential property is located.

(c) If a landlord receives multiple applications for a rental property, the landlord should consider the applications in the chronological order in which they were received unless good cause exists to consider them in a different order. Any rental application fee collected from a consumer who was not actually considered for the residential property should be refunded.

(d) No application fee should be charged to a consumer who provides the landlord with access to a commercially reasonable portable tenant screening report. A portable tenant screening report is commercially reasonable when it (i) contains the information from which to determine whether the consumer meets the legitimate rental admission criteria the landlord has established for admission as a tenant or occupant of the residential property and (ii) does not contain any information that would be unlawful for a landlord to consider in deciding whether to admit a consumer as a tenant or occupant of the residential property.

(e) A landlord who denies a consumer's application for admission as a tenant or occupant of residential property should disclose the reason(s) for such denial.

(f) A landlord shall not deny a consumer's application for admission based, in whole or in part, upon any arrest, indictment, criminal charge, or other pre-conviction event that did not result in a criminal conviction, any conviction that has been reversed, vacated, pardoned, or sealed, or any juvenile record or upon any rental recommendation which factors in any of the same;

(g) A landlord shall not deny a consumer's application for admission, in whole or in part, based upon any criminal conviction in such a way that does not consider the nature, severity, relevance and recency of the criminal conduct, or based on any adverse rental recommendation which is in whole or in part based upon any criminal conviction in such a way that does not consider the nature, severity, relevance and recency of the criminal conduct, unless otherwise required by federal law;

(h) A landlord shall not request that a consumer applicant or prospective consumer applicant or member of the consumer applicant's or prospective consumer applicant's household make any representations about the criminal background information of the consumer or any member of the consumer's household. For purposes of this subsection, "criminal background information" shall refer to any information about contact or involvement with the criminal justice system, including but not limited to any arrest, complaint, indictment, conviction or any disposition arising therefrom. Nothing in this subsection should be read to prohibit a landlord from obtaining a tenant screening report otherwise compliant with these regulations.

(i) Advertisement, collection, or retention of a rental application fee in a manner inconsistent with the procedures set forth in this section is an unfair trade practice.

§ 3. Unfair practices regarding portable tenant screening reports

(a) It is an unfair trade practice for a consumer reporting agency that furnishes consumer reports to resellers generally not to furnish consumer reports to resellers that intend to use such consumer reports in creating or furnishing portable tenant screening reports.

(b) It is an unfair trade practice for a landlord to deny admission a consumer's application for admission as a tenant or occupant of residential property, or otherwise treat such consumer less favorably, because the consumer avoids a rental application fee by providing the landlord with access to a portable tenant screening report.

§ 4. Regarding consumer disclosures of rental recommendations

(a) It is an unfair practice for any consumer reporting agency that makes rental recommendations to fails to timely disclose the following to a consumer upon request:

(1) All text and images of the rental recommendation;

(2) All information about the consumer used in generating the rental recommendation and all sources from which it obtained such information;

(3) All admission criteria or scoring rules to which the background information was applied in connection with the rental recommendation;

(4) All filters, classifications, tags, descriptions, or other markers or categorizations applied to specific background information items in making the rental recommendation; and

(5) When necessary to determine whether background information was correctly filtered, classified, or scored in making a rental recommendation, the complete list of categories or markers that might have been applied to background information that was filtered, classified, or scored in a particular way.

(b) It is an unfair trade practice for a consumer reporting agency that has made a past rental recommendation about a consumer not to disclose the past rental recommendation along with sufficient accompanying information from which to determine whether the recommendation reflected an accurate application of the landlord's rental admission policies to the consumer's background information.

(c) It is an unfair trade practice for a consumer reporting agency to make a rental recommendation in whole or in part based upon arrests and other pre-conviction records for cases not resulting in convictions, convictions overturned, vacated, or set aside, juvenile records, or records sealed, expunged or otherwise unavailable to the public.

(d) It is an unfair practice for a consumer reporting agency to make an adverse rental recommendation based upon data or factors unless, and only to the extent that, such data or factors have been substantiated to cause a significant increased likelihood of negative housing outcomes.

When you use consumer reports to make tenant decisions, the Fair Credit Reporting Act requires you to take important compliance steps and the FTC Act requires you to refrain from the use of unfair and deceptive acts and practices. Find out more about keeping your actions within the law.

You're looking at housing applicants or deciding whether to renew a current tenant's lease. You decide to run a tenant background check through a company that compiles background information.

These tenant background checks can include a variety of information, including rental and eviction history, credit, or criminal records. They also are known as consumer reports.

When you use consumer reports to make tenant decisions, you must comply with the FTC Act and Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces both of these laws.

COMPLYING WITH THE FTC ACT

As entities that engage in methods of competition, acts, or practices in or affecting commerce, landlords must comply with Section 5 of the FTC Act in evaluating and soliciting rental applications and otherwise. This guidance focuses upon steps landlords should take, and practices landlords should avoid, in the process of screening residents or potential residents for criminal history.

Collection of Rental Application Fees

Landlords often collect rental application fees and fees for criminal background checks from tenants. Such fees should not be used as a way to extract profit from rental applicants. Further landlord practices should enable rental applicants to make an informed choice about whether to pay such fees. As such:

Prior to collecting any rental application fees, the landlord should first notify the consumer of: all types of information that will be considered in deciding whether to admit the consumer as a tenant or occupant; the sources from which all such information will be obtained; the landlord's admission criteria, in sufficient detail for a consumer to make a reasonably informed decision about whether an application would likely be accepted; and whether any procedure is available for appealing or seeking reconsideration of a rejected application and, if so, a description of that procedure. Landlords should make their admission criteria available to potential applicants at the earliest possible stage. For example, landlords should post their admission criteria to their website where possible and link to this criteria in advertisements.

Rental application fees should not exceed the actual cost to the landlord of purchasing a tenant screening report on the applicant. If the landlord gets background information on the tenant through other means, the rental application fees should not exceed the normal price of a tenant screening report in the area.

Any rental application fee collected from a consumer who was not actually considered for the residential property should be refunded.

No application fee should be charged to a consumer who provides the landlord with access to a commercially reasonable portable tenant screening report, i.e., a tenant screening report, generally prepared within 30 days before an application for admission to residential property and made available to a landlord at no charge. A landlord should not deny admission to an applicant or otherwise disadvantage an applicant because that applicant chooses to utilize a portable tenant screening report instead of paying a rental application fee.

Evaluation of Rental Applications and the Use of Criminal History Screening Reports:

If a landlord receives multiple applications for a rental property, the landlord should consider the applications in the chronological order in which they were received unless good cause exists to consider them in a different order.

A landlord who denies a consumer's application for admission as a tenant or occupant of residential property should disclose the reason(s) for such denial.

While a landlord may evaluate a rental applicant's or tenant's criminal history:

> A landlord should not request that an applicant disclose information about their criminal background on the application, beyond enabling the landlord to obtain a tenant screening report or the like, as discussed above.
>
> A landlord should not deny or otherwise disadvantage an applicant because of an arrest or other criminal record not resulting in a conviction, for a conviction that has been overturned, reversed, vacated, pardoned, expunged, sealed or where the public record of the conviction is otherwise made unavailable to the public. A landlord also should not deny or otherwise disadvantage an applicant because of a juvenile record. Landlords should not seek to avoid these obligations by using the recommendation of a tenant screening company which takes into account any of the records just listed.
>
> While landlords are not prohibited from making application determinations based upon past convictions, a landlord should not do so without first providing an individualized assessment which looks at, for example, the nature, severity, relevance, and recency of the conviction. Landlords should not seek to avoid these obligations by using the recommendation of a tenant screening company which accounts for convictions without conducting an individualized assessment.
>
> Landlords should not advertise their properties in a way that circumvents or contravenes this guidance, by stating, for example, "no felons," "no criminal history" or other representations which indicate the landlord's intent not to follow this guidance.

COMPLYING WITH THE FCRA

You must take certain steps before you can get a consumer report and after you take an adverse action based on that report.

What is a Consumer Report?

A consumer report may contain information about a person's credit characteristics, rental history, or criminal history. Consumer reports are prepared by a CRA — a business that assembles such reports for other businesses—and are covered by the FCRA. Examples of these reports include:

A credit report from a credit bureau, such as Trans Union, Experian, and Equifax or an affiliate company;
A report from a tenant screening service that describes the applicant's rental history based on reports from previous landlords or housing court records;
A report from a tenant screening service that describes the applicant's rental history, and also includes a credit report the service got from a credit bureau;
A report from a reference checking service that contacts previous landlords or other parties listed on the rental application on behalf of the rental property owner; and
A report from a background check company about an applicant or tenant's criminal history.

Before You Get a Consumer Report

You can only obtain a consumer report if you have a permissible purpose. Landlords may obtain consumer reports on applicants and tenants who apply to rent housing or renew a lease. You may obtain written permission from applicants or tenants to show that you have a permissible purpose.

You must certify to the company from which you are getting the consumer report that you will only use the report for housing purposes. You may not use the consumer report for another purpose.

It's also a good idea to review other applicable federal and state laws related to consumer reports. For example, a blanket policy of refusing to rent to anyone with a criminal record may violate the Fair Housing Act.

What is an Adverse Action?

An adverse action is any action by a landlord that is unfavorable to the interests of a rental applicant or tenant. Examples of common adverse actions by landlords include:

Denying the application;
Requiring a co-signer on the lease;
Requiring a deposit that would not be required for another applicant;
Requiring a larger deposit than might be required for another applicant; and
Raising the rent to a higher amount than for another applicant.

After You Take an Adverse Action

If you reject an applicant, increase the rent or deposit, require a co-signer, or take any other adverse action based partly or completely on information in a consumer report, you must give the applicant or tenant a notice of that fact – orally, in writing, or electronically.

An adverse action notice tells people about their rights to see information being reported about them and to correct inaccurate information. The notice must include:

the name, address, and phone number of the consumer reporting company that supplied the report;
a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; and
a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get a free report from the company if the person asks for it within 60 days.

The adverse action notice is required even if information in the consumer report wasn't the primary reason for the decision. Even if the information in the report played only a small part in the overall decision, the applicant or tenant must be notified.

While oral adverse action notices are allowed, written notices provide proof of FCRA compliance.

Take the Case of...

1. *A landlord who orders a consumer report from a CRA. Information contained in the report leads to further investigation of the applicant. The rental application is denied because of that investigation.*

   Since information in the report prompted the adverse action in this case, an adverse action

notice must be sent to the consumer.

1. *A person with an unfavorable credit history, like a bankruptcy, but no other negative indicators, who applies for an apartment. Rather than deny the application, the landlord offers to rent the apartment, requiring a security deposit that is double the normal amount.*

   The applicant is entitled to an adverse action notice because the credit report influenced the landlord's decision to require a higher security deposit from the applicant.

1. *A landlord who hires a reference checking service to verify information included on a rental application. Because the service reports that the applicant does not work for the employer listed on the application, the rental application is denied.*

   The applicant is entitled to an adverse action notice. The report is a consumer report from a CRA (the agency checking the references provided by the consumer on the application), and its report influenced the landlord's decision to deny the application.

1. *A landlord who makes it a practice to approve an application if the prospective tenant shows an adequate income or has a favorable credit report, is dealing with an applicant who has an inadequate income and a bad credit report.*

   The applicant is entitled to an adverse action notice because the credit report influenced the denial, even though income was another factor.

1. *A landlord who orders a criminal history report on a prospective tenant. Because the report shows that the applicant has a felony conviction, the landlord denies the rental application.*

   The applicant is entitled to an adverse action notice. The report is a consumer report and it influenced the landlord's decision to deny the application.

INVESTIGATIVE REPORTS

Landlords who use "investigative reports" – reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle – have additional obligations under the FCRA. These obligations include giving written notice that you may request or have requested an

investigative consumer report, and giving a statement that the person has a right to request additional disclosures and a summary of the scope and substance of the report. (See 15 U.S.C. section 1681d(a), (b)).

DISPOSING OF CONSUMER REPORTS

When you're done using a consumer report, you must securely dispose of the report and any information you gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed. For more information, see Disposing of Consumer Report Information? Rule Tells How.

Other Considerations

If you report information, like late rent payments or evictions, to a company who compiles background information, you have legal obligations under the FCRA's Furnisher Rule. Your responsibilities include:

furnishing information that is accurate and complete, and
investigating consumer disputes about the accuracy of information you provide.

For more information, see Consumer Reports: What Information Furnishers Need to Know.

FOR MORE INFORMATION

Find specific FCRA information on:

Getting consumer reports (see Section 604(a)(3)(F), 15 U.S.C. § 1681b(a)(3)(F), and Section 607(a), 15 U.S.C. § 1681e(a));
Taking an adverse action (see Section 615(a)), 15 U.S.C. § 1681m(a));
Using investigative consumer reports (see Section 606, 15 U.S.C. § 1681d).

When is a tenant background screening company a "consumer reporting agency"?

Background screening reports are "consumer reports" under the FCRA when they serve as a factor in determining a person's eligibility for housing, employment, credit, insurance, or other purposes and they include information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." Companies that sell or provide those reports are "consumer reporting agencies" under the FCRA. So even if you don't think of your company as a consumer reporting agency, it may be one if it provides information about people to landlords for use in housing decisions.

If your tenant background screening company is a consumer reporting agency under the FCRA, what does the law require you to do?

***Follow reasonable procedures to assure accuracy*.** Among other things, the FCRA requires you to establish and follow "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Certain practices may be indicators that a background screening company isn't following reasonable procedures. For example, if a report lists criminal convictions for people other than the applicant or tenant – for instance, a person with a middle name or date of birth different from the applicant's – that raises FCRA compliance concerns. Other examples that raise FCRA compliance concerns include screening reports with multiple entries for the same offense or that list criminal records that have been expunged or otherwise sealed. Another indication that a company's procedures might not be reasonable are reports that list housing court actions, but do not include the outcome of the action – for instance, that a case was resolved in the tenant's favor.

Similarly, tenant screening companies which provide rental recommendations to their customers likely do not adhere to reasonable procedures to ensure maximum possible accuracy when they make adverse recommendations based on information with no significant substantiated relationship to housing outcomes or which is likely to be incomplete or contain inaccuracies. Thus, where tenant screening companies make rental recommendations based on, for example, arrest records or indictment records not resulting in convictions, expunged, sealed or publicly unavailable records, juvenile records or records of conviction that have been overturned or vacated, the screening company likely fails to employ reasonable procedures to ensure maximum possible accuracy. While this guidance focuses primarily on tenant screening company liability under the FCRA, it should be noted that Section 5 of the FTC Act necessitates a similar result, as denying

housing applicants based on such records causes significant unjustified injury to consumers, as discussed below.

Get certifications from your clients. Consumer reporting agencies may provide consumer reports only to those with a specific permissible purpose, like housing. So verify that your clients are legitimate and get them to certify that they will use the reports only for housing purposes. Your clients may obtain written permission from the consumer that is the subject of the report to show that they have a permissible purpose.

Provide your clients with information about the FCRA. The FCRA requires you to provide your clients with information about their responsibilities under the statute (Notice to Users of Consumer Reports), which you can provide with the background screening report or before providing a report. This is a standard document available from the Consumer Financial Protection Bureau.

Provide Required Disclosures. The FCRA specifically provides that screening companies must disclose certain information in the consumer's file to consumers upon request. When a tenant screening company has made a rental recommendation to a housing provider, the tenant screening company should, upon request from the consumer, and along with all other non-exempt information in the consumer's file, disclose: the information the screening company used in generating the recommendation and all sources of this information, any admission criteria and scoring rules and filters, classifications, tags or the like applied to this information, and the general list of classifications that can be applied to such information in generating a rental recommendation even if it was not applied in this instance, as well as all of these items regarding past rental recommendations made regarding the same consumer. Such disclosures are by no means exhaustive and should be provided along with all other information required to be disclosed under the FCRA.

Honor the rights of applicants and tenants. The FCRA gives consumers certain rights with which you must comply. For example, you must give them access to their files when they ask for them, conduct a reasonable investigation when they dispute the accuracy of information, and give them written notice of the results of investigations. When providing consumers with a copy of their reports, you must include a summary of their rights under the FCRA (A Summary of Your Rights Under the Fair Credit Reporting Act), which is a standard document available from the Consumer Financial Protection Bureau. It's a violation of the FCRA not to respond in a timely way to consumers' inquiries and disputes. Another FCRA violation: creating unreasonable obstacles for consumers trying to exercise their rights under the FCRA.

A Note on FTC Act Compliance. In addition to the obligation of credit reporting agencies to comply with the FCRA, as entities that engage in methods of competition, acts, or practices in or affecting commerce, tenant screening companies must comply with Section 5 of the FTC Act. A

primary focus of the FTC Act is the prevention of substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. Tenant screening companies likely cause such consumer injury through "the sale or use of – for example – racially biased algorithms," including instances where such rental recommendations factor in data which is likely to produce a racially biased result. To guard against such consumer injury, tenant screening companies' rental recommendations should not factor in data such as arrests or indictments not resulting in conviction, juvenile records, expunged, sealed or publicly unavailable records, convictions which have been overturned or vacated, or other information which causes undue consumer injury or does not have a substantiated correlation with housing success. Further, the goals of the FTC Act can only be fulfilled through transparency and accountability. As such, tenant screening companies must make rental recommendations available to consumers along with the data and factors that went into its generating the rental recommendations which are reasonably necessary for the consumer to gain an understanding how the rental recommendation was generated and to ensure proper transparency, including any past recommendations for the consumer, inputs, the sources of information and inputs, data categorizations, scoring/recommending mechanism used in generating the rental recommendation, and admissions criteria.

Where can I find citations to relevant portions of the Fair Credit Reporting Act?

Here are cites to some of the provisions mentioned in this publication.

CITATION	FCRA SECTION	FAIR CREDIT REPORTING ACT PROVISION
15 U.S.C. § 1681a(d)	Section 603	definition of a "consumer report"
15 U.S.C. § 1681b(a)(3)(F)	Section 604	permissible purpose for consumer reports

15 U.S.C. § 1681c	Section 605	information excluded from consumer reports
15 U.S.C. § 1681e(a)	Section 607	required user identity verification and permissible purpose certification
15 U.S.C. § 1681e(b)	Section 607	consumer reporting agencies' obligation to follow reasonable procedures to assure maximum possible accuracy of information
15 U.S.C. § 1681e(d)	Section 607	required notice of user responsibilities
15 U.S.C. § 1681g(a)	Section 609	consumer reporting agencies' obligation to disclose to consumers all information in their file
15 U.S.C. § 1681g(c)(2)	Section 609	consumer reporting agencies' obligation to provide consumers with a summary of rights
15 U.S.C. § 1681h	Section 610	form of disclosure to consumers of their file

15 U.S.C. § 1681i	Section 611	consumers' right to challenge information they believe is inaccurate and consumer reporting agencies' obligation to reinvestigate
15 U.S.C. § 1681j	Section 612	charges for disclosures to consumers of information in their files

Resources for Business

To find out more about federal laws relating to background reports, visit www.business.ftc.gov, or call the FTC toll-free, 1-877-FTC-HELP (1-877382-4357); TTY: 1-866-653-4261.

For additional information on tenant background reports, read:

Using Consumer Reports: What Landlords Need to Know

YOUR OPPORTUNITY TO COMMENT

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to sba.gov/ombudsman.

ABOUT THE FTC

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law. To file a complaint or to get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, How to File a Complaint, to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

From: Reentry & Housing Working Group

Kim Johnson, National Low Income Housing Coalition, kjohnson@nlihc.org

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Date: January 26, 2022

To: FTC

Re: Evidence regarding the link between conviction records and housing outcomes

MEMORANDUM

I. Introduction

In a letter provided to the FTC on November 22, 2021, the Reentry & Housing Working Group ("Working Group") argued that the FTC should consider it an unfair practice for landlords and screening companies to exclude applicants from housing based on conviction history without substantiating a significant link between that history and the likelihood of negative housing outcomes. [1] Specifically, the Working Group argued that the FTC should consider it unfair for screening companies to make an adverse rental recommendation without substantiating a significant nexus between the factors considered in the screening algorithm and negative housing outcomes. Further, though this memorandum focuses primarily on unfairness analysis under the FTC Act, the Working Group also argued that such screening procedures fail to assure maximum possibly accuracy under the FCRA. Additionally, the Working Group recommended that it be considered and unfair practice for housing providers to exclude applicants based on conviction

[1] The adverse recommendations from screening companies and adverse rental decisions from landlords, while distinct, are often discussed together here, as landlords are increasingly reliant on and deferential to screening company recommendations; courts have documented the significant role screening companies play in landlord rental decisions. *See Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions,* 478 F.Supp.3d 259, 289 (D. Conn. 2020); *see also* Tex Pasley et al., Screened Out, Shriver Ctr. on Poverty Law (Jan. 2021), p. 1, 17, 20, www.povertylaw.org/report/tenant-screening-report/ (describing landlord use of tenant screening rental recommendations as routine in the rental application process),

history without conducting a individualized assessment. These screening practices, which are particularly prone to error,[2] condemn formerly incarcerated people to chronic housing instability, with particularly devastating effects for Black and Brown households.[3]

At a December 8, 2021, meeting, the FTC requested that the Working Group provide additional support for its contention that there is not a strong link between conviction history and negative housing outcomes. The FTC further requested that the Working Group provide suggestions of how the FTC could adequately set a record supporting this point.

This memorandum first surveys relevant data which demonstrates both that there is not a substantial connection between conviction history and negative housing outcomes. Rather, a robust body of data indicates that it is the exclusion of formerly incarcerated persons from housing which produces overwhelmingly negative outcomes. Second, this memorandum discusses ways for the FTC to set the proper record for guidance or regulation, including through the just-referenced data. The memorandum concludes by contextualizing its analysis within the FTC's Section 5 unfairness criterion, arguing that through these overbroad exclusions of tenants with conviction histories, screening companies and landlords necessarily cause significant unavoidable consumer harm with few countervailing benefits.

II. Data showing that there is not a strong correlation between justice-involvement and negative housing outcomes

[2] Lydia X. Z. Brown, "Tenant Screening Algorithms Enable Racial and Disability Discrimination at Scale, and Contribute to Broader Patterns of Injustice," Cntr. for Democracy & Tech., Jul. 7, 2021, https://cdt.org/insights/tenant-screening-algorithms-enable-racial-and-disability-discrimination-at-scale-and-contribute-to-broader-patterns-of-injustice/.

[3] Cyrus Farivar, "Tenant screening software faces national reckoning," NBC News, March 14, 2021, https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975; Schneider, *infra*¸ at p. 431, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj.

This Section lays out much of the data showing that little correlation exists between conviction records and negative housing outcomes. Rather, data strongly indicates that ensuring formerly incarcerated persons receive stable housing is essential to reducing homelessness, recidivism, and other harms.

1. Housing outcome studies are more relevant to tenant screening than recidivism studies

Stakeholders to this conversation often look to recidivism studies to assess the harms and benefits of housing providers excluding applicants based on conviction history. Perhaps most famously, a 2012 study authored by Megan Kurlychek suggested that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.[4] This study has been used to justify the use of 6–7-year lookback periods in criminal history screenings for prospective tenants.

Recidivism studies, however, should not be the basis for assessing the harms and benefits of tenant screening policies. First, recidivism rates are based on incomplete data, failing to take into account differences in policing, charges, and supervision after release.[5] Further, in this context, use of such studies puts the cart before the horse, as these studies do not consider whether an individual has had access to critical supports, such as stable housing.[6] Perhaps most importantly, recidivism studies do not assess housing outcomes.

[4] Megan C. Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology and Pub. Pol'y 483 (2006)
[5] Jeffrey A. Butts & Vincent Schiraldi, Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections, Harvard Kennedy Sch. Prog. in Crim. Just. Pol. and Mgmt., p. 1, https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf.
[6] *See* Jack Duran & Shawnda Chapman Brown, Fewer People are Going Back to Prison—But that Doesn't Paint the Entire Picture, Vera Inst. (Aug. 7, 2018), https://www.vera.org/blog/fewer-people-are-going-back-to-prison-but-that-doesnt-paint-the-entire-picture.

More relevant to tenant screening are studies which squarely address the link between conviction history and housing outcomes.[7] For example, a 2009 study by Daniel Malone measured criminal history as a predictor of future housing success.[8] Using multivariate regression analysis, the study found that, generally, past involvement in the criminal-legal system plays no role in predicting whether an individual will be a responsible tenant.[9]

These findings were largely corroborated by a 2019 study by the Wilder Foundation. Per the Wilder Report,

> "The most meaningful and conclusive findings include:
> **Most types of criminal offenses do not significantly increase a household's likelihood of a negative housing outcome when other observable factors are held constant.**
>
> – Of 15 categories of criminal offenses, 11 showed no evidence of a significant impact on the likelihood of a negative housing outcome. Categories that show no evidence of a link to housing outcomes include: marijuana possession, other minor drug offenses, alcohol-related offenses (e.g., public consumption/open bottle), prostitution, and minor public order offenses, among others.
>
> **The effect of a prior criminal offense on a resident's housing outcome declines over time.** The impact of a misdemeanor becomes insignificant after two years, while felonies become insignificant after five years."[10]

The Wilder study "used a robust regression analysis to control for the existence of supportive services in order to make the data and conclusions set forth in the Success in Housing Report

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[7] Opening the Door: Tenant Screening and Selection, How it Works in the Twin Cities Metro Area and Opportunities for Improvement, Family Housing Fund & Housing Justice Center, pp. 14-16. (March 2021) (discussing studies), https://www.hjcmn.org/wp-content/uploads/2021/04/Tenant-Screening-Report.pdf.

[8] Daniel K. Malone, Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders, 60 Psychiatric Servs. 224 (2009), https://ps.psychiatryonline.org/doi/full/10.1176/ps.2009.60.2.224. While Malone studied individuals with both conviction and non-conviction criminal histories, the report indicates no significant difference in the housing outcomes between these populations: "People with a more extensive criminal history succeeded at rates equivalent to those of others, as did people with more recent criminal activity, people with more serious criminal offenses, and people who began criminal activity at an earlier age. In other words, the criminal history of those who succeeded in housing was nearly indistinguishable from that of those who failed in housing."

[9] *Id.*; *see also* Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housing-retention.

[10] Wilder Report, *supra*, at p. 23.

generally applicable throughout the rental housing industry."[11] Additional housing outcome studies are in progress.[12]

While the link between convictions and negative housing outcomes is itself attenuated, exclusions based on past justice involvement are often particularly arbitrary. Indeed, "Many of the criminal offenses regularly cited in tenant screening and selection policies and used by landlords as a basis for rejecting tenant-applicants were found to be erroneous predictors of future negative housing outcomes."[13] For example, "screening and selection policies" often cite criminal records for marijuana possession "as a basis for rejecting tenant applicants."[14] But the Wilder report indicates that those with a history of marijuana possession are, if anything, slightly less likely to experience negative housing outcomes than the general population, thus articulating the capriciousness of common criminal screening practices.[15]

Further, "[h]ighlighting the arbitrary nature of criminal history tenant screening practices, forty percent (40%) of rejections based on criminal history, as reported by tenants, were for offenses more than ten (10) years old."[16] Indeed, even studies which screening companies and housing providers use to justify excessive look-back periods find that, after 6-7 years of not offending, someone with a record is approximately no more likely to offend than the general public.[17]

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[11] *Id.*, at p. 16.
[12] Opening the Door, FHFHJC, *supra*, at p. 16 (noting that the Family Housing Fund is working with larger housing providers on new study); Roman Battaglia, Does a criminal background make you a worse tenant? Lawmakers look for answers, Del. Pub. Media (Jul. 22, 2021), https://www.delawarepublic.org/politics-government/2021-07-22/does-a-criminal-background-make-you-a-worse-tenant-lawmakers-look-for-answers.
[13] Opening the Door, FHFHJC, *supra*, at 15.
[14] *Id.*
[15] Wilder Reports, *supra*, at p. 19.
[16] *Id.,* at 14.
[17] *See* Kurlychek, at *supra*

As such, existing data indicates that screening practices habitually exclude applicants based on criminal history that bears no statistically significant relation to their likelihood of housing success. As summarized by one scholar, "Regardless of the nature of the crime, its recency, or its relation to an individual's likelihood to fulfill his or her obligations as a tenant, such criminal records (or in many cases, even an arrest record with no ultimate conviction) have often served as an absolute bar to finding housing . . . ."[18]

In reviewing existing literature, the FHFHJC concludes that, while further study is needed,

> "At this point, several things are clear:
>
> Arrests should not be considered in screening and selecting tenants.
>
> Some crimes have no bearing on housing success and should not be considered in screening and selecting tenants.
>
> Even if we disagree about the appropriate lookback periods for some crimes, it is clear that most crimes have a diminishing relevance to future housing success over time, and therefore, reasonable lookback periods must be established.
>
> Individual or mitigating circumstances must be considered in screening and selecting tenants."[19]

The Working Group argues that it is unfair for landlords and screening companies to ignore these realities, not that exclusions based on criminal history are categorically unfair. Rather, it is unfair for landlords and screening companies to exclude member of this already vulnerable consumer group from housing through "bald assertions based on generalizations or stereotypes."[20]

2. <u>Housing Instability for Formerly Incarcerated Persons Strongly Correlates with an Array of Harms, including Increased Recidivism</u>

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[18] Schneider, *infra*¸ at p. 431, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj.
[19] Opening the Door, FJFJHC, *supra*, at p. 16.
[20] HUD 2016 Criminal Records Guidance, p. 5, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

An abundance of research demonstrates that housing instability amongst formerly incarcerated persons has overwhelmingly negative outcomes for these individuals, their families, and society at large. Research from the Prison Policy Initiative found that individuals who had been incarcerated in a prison once are seven times more likely to experience homelessness than the general population; those incarcerated more than once are 13 times more likely to experience homelessness.[21]

Housing instability, in turn, increases peoples' interactions with the criminal-legal system, as communities turn to policing to address homelessness. Many states and communities enact laws criminalizing the life-sustaining activities people experiencing homelessness must engage in to survive, including sleeping in public, camping, and sitting or lying down in public spaces.[22] Moreover, in the absence of supportive services and stable housing, formerly incarcerated individuals facing the challenges of homelessness may also turn to crimes of survival (for example, theft, trespassing, or sex work).[23] Indeed, it should go without saying that leaving people without stable housing makes society less safe, not more.[24]

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[21] Lucius Couloute, Nowhere to Go: Homelessness among formerly incarcerated people, Prison Policy Initiative (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html.

[22] Housing Not Handcuffs 2019, National Law Center on Homelessness & Poverty, pp. 37-50. (Dec. 2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf.

[23] Crimes of Desperation, United Way of Calgary. (March 2008), *available at* https://fliphtml5.com/xdom/qurg/basic.

[24] *See, e.g.,* The Public Health Implications of Housing Instability, Eviction, and Homelessness, The Public Health Network, (Apr. 21, 2021) ("Housing instability is a public health crisis that causes and exacerbates health problems, erodes communities, and drives health inequities."), https://www.networkforphl.org/resources/legal-and-policy-approaches-towards-preventing-housing-instability/the-public-health-implications-of-housing-instability-eviction-and-homelessness/; Open the Door, FHFJC, at supra, p. 14 ("Rejections based on criminal history can present significant and unique barriers for multigenerational households and can prevent people who are leaving incarceration from creating and maintaining the social support systems they need to be successful."); Julian Somers, et al., Housing First Reduces Re-offending among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial, p. 2 (Sept. 1, 2013) ("Individuals commit more offences after becoming homeless than before and, in a reciprocal manner, incarceration contributes to homelessness through the destabilization of housing, unemployment, and the erosion of human rights."), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0072946&type=printable; Crim Justice Behav. 2020 Sep; 47(9): 1097–1115. Published online 2020 Aug 6. doi: 10.1177/0093854820942285 ("We found being homeless increased the hazard of recidivism by nearly 50% (HR = 1.44, p < .001), and that each residential

Housing First, a method of addressing homelessness that prioritizes access to safe, stable, affordable housing with supportive services when needed, disrupts the cycle between incarceration, homelessness, and recidivism by ensuring people exiting incarceration and those at-risk of or actively experiencing homelessness have stable housing.[25] A pilot study in Ohio looking at the impact of supportive housing on re-incarceration found that participants who received housing services were 40% less likely to be rearrested than those who did not receive housing services.[26] Similarly, an evaluation of New York's Frequent Users Service Enhancement (FUSE) program found that participants spent 40% fewer days incarcerated than people in the control group; after two years 86% of participants were living in permanent housing, compared to 42% of people in the control group.[27]

III. Building a Record

Thus, existing data can help answer many of the questions at hand, per the discussion above. Evaluations of housing programs that target services to people exiting incarceration – like those listed above – evidence the tremendous societal benefits of ensuring that those with conviction histories have access to safe, stable, and affordable housing.[28] Conversely, existing data indicates that overly stringent criminal background screening practices do not significantly

transition (i.e., residential instability) increased the risk of recidivism by 12% (HR = 1.12, p = .011), above and beyond demographic markers and established recidivism risk factors."), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/.

[25] Sarah Gillespie, et al., Addressing Chronic Homelessness through Policing Isn't Working. Housing First Strategies Are a Better Way, Urban Inst., vi – viii. (June 29, 2020), https://www.urban.org/urban-wire/addressing-chronic-homelessness-through-policing-isnt-working-housing-first-strategies-are-better-way.

[26] Jocelyn Fontaine, et al., Supportive Housing for Returning Prisoners: Outcomes and Impacts of the Returning Home-Ohio Pilot Project, Urban Inst. (Aug. 2012), https://www.urban.org/research/publication/supportive-housing-returning-prisoners-outcomes-and-impacts-returning-home-ohio-pilot-project.

[27] Angela A. Aidala, Frequent Users Service Enhancement 'Fuse' Initiative, Columbia Univ. Mailman Sch. of Pub. Health, 53-4. (2014), https://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final_Linked.pdf.

[28] Section II(2) of this memo, at *supra*.

improve housing outcomes.[29] Notably, the Family Housing Fund and that State of Delaware are conducting further study on the nexus between criminal records and housing outcomes.[30]

Outside of empirical studies, interviewing formerly incarcerated individuals about their experience finding housing would provide valuable insights on not only the barriers they face to housing access but the broad consequences they face due to restrictive tenant screening practices. Several of the organizations leading the Working Group, as well as organizations in their networks, are composed of directly-impacted individuals who can directly assist in this process.

Recent federal, state, and local fair chance policies provide additional basis for insight. For example, in administering Emergency Housing Vouchers in response to the pandemic, HUD mandated that housing providers significantly relax their criminal screening practices.[31] Several states and localities have enacted fair chance housing laws. [32] Public Housing Authorities, like the Housing Authority of New Orleans and the Housing Authority of Champaign, Illinois, have done away with most exclusions based on criminal history.[33] Data regarding the outcomes of these programs will be valuable, as will be the experiences of policy administrators, housing authority leadership, and others on the ground.

IV. Conclusion: Application of Section 5 Analysis

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[29] *See* Section II(1) of this memo, at *supra*.
[30] *Id.*
[31] PIH Notice 2021-15.
[32] *See, e.g.*, Illinois, 775 Ill. Comp. Stat. §§ 5/1-103, 3-102 (2020); New Jersey, N.J. Fair Chance in Housing Act, Pub. L. 2021, c. 110, secs. 2, 3; San Francisco, S.F., Cal., Police Code § 4906(1) (2021); Cook County, Ill., Code § 42-38(a), (e)(1)–(2) (2021) Detroit, Mich., City Code § 26-5-5 (2021) Seattle, Wash., Code § 14.09.025 (2021); *see also* John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, "Opening Doors: How to develop reentry programs using examples from public housing authorities," Sept. 2017, https://www.vera.org/publications/opening-doors-public-housing-reentry-guide.
[33] *See, e.g.,* Hous. Auth. of New Orleans, Admissions and Continued Occupancy Policy 23–24 (2019), http://hano.org/plans/ACOP2019.pdf (eliminating ban on providing housing assistance to people with criminal records); History & Important Facts FY2020 Housing Authority of Champaign County's Accomplishments, Housing Authority of Champaign Cook County, https://hacc.net/history/; *see also* La. Hous. Corp., Memorandum on Fair Housing and Tenant Selection with Regard to Criminal Record Screening (Jul. 14, 2021).

Current data, which can be bolstered as just discussed, thus indicates that broad exclusion of tenants based upon their conviction records "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

Housing providers and screening companies suggest that these broad exclusions help preserve resident safety, prevent property damage, and help property managers choose more reliable tenants. However, the evidence does not broadly support these propositions.[34] And notably, the Working Group does not request that the FTC consider unfair all exclusions based on conviction history but rather acknowledge that, to the extent any correlation exists between conviction history and negative housing outcomes, it is the exception to the rule.[35] We thus ask that, instead of relying upon generalizations and misconceptions, screening companies and landlords bear the burden of substantiation and proper assessment. Currently, the cost of these overly broad exclusions is largely internalized by already vulnerable housing applicants and their families.

Further, even if housing providers' justifications for screening practices were correct, such a finding would not translate into an actual benefit to society. To put it bluntly, everyone must live somewhere. At most, a landlord's exclusion of an applicant with a conviction history merely transfers the alleged risks accompanying that applicant to another housing provider. Screening practices which perpetuate this housing instability are thus far more injurious than beneficial, almost by definition.

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[34] *See* Section II of this memo, at *supra*.

[35] Malone, at *supra* ("The finding that criminal history does not provide good predictive information about the potential for housing success is additionally important because it at least partially contradicts the expectations of housing operators and others. It certainly runs counter to common beliefs that housing needs to be free of offenders in order to be safe for the other residents."); Wilder, *supra*, p. 24.

As such, both data and reason indicate that exclusion of those with records fails to significantly enhance public safety or reduce negative housing outcomes[36] and that exclusion of formerly incarcerated persons from housing does tremendous harm.[37] As stated, those with conviction records frequently face housing instability and homelessness. This, in turn, has snowballing negative consequences, not just for the health and well-being of the individual and their family, but for society generally.[38] Indeed, ensuring that formerly incarcerated persons have stable housing will only serve to make society more safe.

Further, HUD's 2016 Guidance and the data underlying it show that broadly exclusionary screening pratices are likely to have especially deleterious effects on Black and Brown people. This discriminatory harm to consumers must be weighed against any purported benefits of these practices.[39]

There already exists a breadth of empirical support for many of these claims. Existing data makes clear that formerly incarcerated persons are especially likely to experience homelessness or housing instability and that this housing instability has significant negative consequences for these individuals and society. It should be no surprise that data indicates that increased housing instability increases recidivism.

Existing data also indicates there is little correlation between justice-involvement and negative housing outcomes. While such data is less robust than the data linking housing

[36] Wilder Report, *supra*, at p. 24.
[37] *See, e.g.,* Public Health Network, at *supra*.
[38] Valerie Schneider, "The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact," 93 Indiana Law Journal 421, 431-2 (2018), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj.
[39] Elisa Jillson, "Aiming for truth, fairness, and equity in your company's use of AI," FTC, Apr. 19, 2021, https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair.

instability to public health harms and the like, these housing outcome studies still offer definitive takeaways and a great deal of insight.[40] Additional studies are in progress.

These matters can be further explored through qualitative means, such as interviewing those directly affected by such practices, eliciting expert testimony from criminologists and sociologists, and engaging in discussion with housing authorities and municipalities who have limited the ability of housing providers to exclude applicants based upon their record. The Working Group would be very happy to provide references to individuals and organizations that may be of assistance.

[40] Opening the Door, FJFHJC, *supra*, at p. 16.

SUMMARY OF MEMORANDUM

From: Reentry & Housing Working Group ("Working Group")

Eric Sirota, Shriver Center on Poverty Law, ericsirota@povertylaw.org

Kim Johnson, National Low Income Housing Coalition, kjohnson@nlihc.org

To: FTC

Date: January 26, 2022

Questions:

1. Does 15 U.S.C. § 1681c(a) ("FCRA Rule") of the Fair Credit Reporting Act impliedly limit the FTC's discretion under Section 5 of the FTC Act to curtail tenant screening companies' publishing of arrest records, including arrest records less than seven years old?

2. If the FCRA Rule does limit the FTC's Section 5 authority per the question above, does this limitation prevent the FTC from adopting the specific suggestions provided by the Working Group to the FTC on November 22, 2021?

Answers:

1. No, the FCRA Rule does not limit the FTC's Section 5 authority. The FCRA Rule neither expressly limits the FTC's Section 5 authority nor is the FCRA Rule mutually exclusive with the FTC using its Section 5 authority to generally limit tenant screening companies from publishing arrest records.

2. No, even if the FCRA Rule does limit the FTC's use of Section 5 authority in this regard, this limitation would not be an obstacle to adoption of the Working Group's specific policy suggestions. The Working Group does not suggest that the FTC stop screening companies from publishing arrest records, but rather that the FTC: i. take steps to stop landlords from basing adverse housing decisions upon arrests not resulting in convictions; and ii. take steps to stop screening companies from adversely factoring arrests not resulting in convictions into their algorithmic rental recommendations.

MEMORANDUM

I. Introduction

Per 15 U.S.C. § 1681c(a), "no consumer reporting agency may make any consumer report containing . . . [an] . . . arrest that, from date of entry, antedates the report by more than seven years . . ." (this provision will be referred to as the "the FCRA Rule" or the like; the Fair Credit Reporting Act generally will be referred to as the "FCRA").

At the December 8, 2021 meeting between the FTC and the Working Group, the FTC raised the question: does the FCRA Rule limit the FTC's authority under Section 5 of the FTC Act to discourage tenant screening companies' and housing providers' use of more recent arrest records in screening reports and rental decisions?

The FCRA Rule does not limit the FTC's authority under Section 5. Even if it does, these limitations do not pose obstacles to the Working Group's specific suggestions.

II. The FCRA Rule does not limit the FTC's authority under Section 5

This is, first, made apparent by the plain language of the FCRA Rule, which does nothing more than prohibit CRAs from publishing arrest records more than seven years old. Courts will not read one law as limiting a federal agency's authority under a separate law unless Congress has made that limitation explicit or to the extent that the operation of the two laws *cannot* coexist. *See, L. Heller & Son v. FTC*, 191 F.2d 954, 957 (7th Cir. 1951); *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 350-1 (1963). The FCRA Rule neither explicitly caveats the FTC's Section 5 authority nor is it mutually exclusive with the application of the FTC's Section 5 authority

discussed here. The FCRA Rule and FTC Act, likewise, ask different questions such that the former should not be read to limit the FTC's authority under the latter. *See Philadelphia Nat. Bank*, id., at 351-52.

A. The FCRA Rule provides a floor limiting CRA behavior, not a ceiling protecting it

The FCRA Rule does not limit the FTC's enforcement authority under Section 5 of the FTC Act. In fact, the FCRA Rule arguably does not even shield CRAs from other provisions of the FCRA insofar as they are read to limit the publishing of recent arrest records. Rather, the FCRA Rule simply restrains the conduct of CRAs; the Rule is limiting upon CRAs, not permissive. In any case, the FCRA Rule certainly does not shield tenant screening companies or limit the FTC's unfairness authority under Section 5 of the FTC Act.

B. The FCRA Rule should not be read to provide an implicit caveat to Section 5, nor is the operation of the two laws mutually exclusive.

The FCRA Rule should not be read to constrict the FTC's Section 5 authority "by implication." *Maine Community Health Options v. United States,* 140 S.Ct. 1308 (2020); *see also, e.g., U.S. v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *Philadelphia Nat. Bank*, 374 U.S., at 350-1; *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern.*, Inc., 534 U.S. 124, 141-142 (2001); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-4 (1992); *Wood v. United States*, 16 Pet. 342, 363 (1842); *L Heller & Son*, 191 F.2d, at 957 [all internal citations for string cite omitted]. As noted by the Supreme Court in rejecting the argument that federal laws specifically governing the business practices of farmers served to "repeal" (*Borden Co., infra*, 198-99) the Sherman Antitrust Act's authority over farmers:

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The

> intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient . . . to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'. *Borden Co.*, 308 U.S., at 198-99 (1939) (citations and quotations omitted).

As such, it is of little importance that the FCRA is a more specific law and the FTC Act a more general one: "The relevant issue is not whether one of two overlapping statutes is more specific than the other, but whether the statutes actually conflict with one another. So long as they do not, both must be given effect." *U.S. v. Philip Morris Inc*., 263 F.Supp.2d 72, 77 (D.D.C. 2003); *see also, e.g., Philadelphia Nat. Bank*, 374 U.S., at 350-1; *Borden Co.*, 308 U.S., at 198-200, 204-07.

The FCRA Rule contains no express limitations on FTC Authority. Further, it is not mutually exclusive for the FCRA to prohibit CRAs from publishing arrests records older than seven years and the FTC to utilize its Section 5 unfairness authority to limit tenant screening companies' use of arrest records as injurious to consumers more generally. As such, the FCRA Act does not impliedly limit this application of the FTC Act. *See Philadelphia Nat. Bank,* at *id.; L Heller & Son*, 191 F.2d, at 957. If publishing arrest records meets the standard for Section 5 unfairness, "[t]hat plainly brings the case within [the FTC's] powers, regardless of how far these permit it to forbid other practices" under more specific statutes. *Segal v. Federal Trade Commission*, 142 F.2d 255, 256 (2d Cir. 1944).

This argument maintains its force even though the FCRA Rule arguably condones the publication of more recent arrest records. *See Philadelphia Nat. Bank*, 374 U.S., at 350-51. Again, unless the more specific law confers "express immunity" from the general law or there is a "plain repugnancy" between the two, a practice may be condoned by the specific law while

being prohibited by the general. *Id.; see also, e.g., Germain,* 503 U.S., at 253-4 (federal statute governing appeals in bankruptcies does not impliedly limit statute governing appeals generally). Applying these principles, the Supreme Court held in *Philadelphia National Bank* that federal antitrust laws could prohibit a bank merger, even where the merger was specifically approved by federal banking agencies under the Bank Merger Act. *Id.*, at 350-2. The Court again evokes the principle cited throughout this memorandum, noting that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *Id.*, at 350.

Similarly, if a law seeks to limit existing agency authority, that limitation must be clearly stated: "Limitations on existing powers of the Federal Government must be clearly manifested by an Act of Congress, and repeal of those powers requires a clear expression of that purpose. Furthermore, repeals by implications are not favored, and may not be readily drawn from the language of the statute, or its legislative history. It is only where two laws are clearly repugnant to each other" that one law will prevail at the exclusion of the other. *L. Heller & Son*, 191 F.2d, at 957. The FCRA Rule is in no way written to limit the FTC's existing Section 5 unfairness authority and certainly "does not cross the clear-expression threshold" or provide the "overwhelming evidence needed to establish repeal by implication." *Maine Community Health*, 140 S.Ct., at 1326; *Pioneer*, 534 U.S., at 137 (citations omitted).

C. The FCRA Rule and FTC Act ask different questions

"Nothing in the statute or the case law suggests that the FCRA provides the exclusive remedy" regarding credit reporting practices, even where the FCRA specifically addresses such practices. *See Fritz v. Resurgent Capital Services, LP*, 955 F.Supp.2d 163, 172 (E.D.N.Y. 2013). In *Fritz*, the court held that consumers maintain a private right of action against a debt collector under the FDCPA for misreporting information to a CRA even though the FCRA does not

provide a private right action for similar conduct. *Id.* Adopting similar logic, in *Moscona*, the Southern District of California held that, despite the consumer not taking the necessary steps to bring a private right of action under the Consumer Credit Reform Act, the consumer was entitled to summary judgment under the FDCPA against a furnisher for providing inaccurate information to a CRA. *Moscona v. California Business Bureau, Inc.*, 2011 WL 5085522, at *4 (S.D.Ca. 2011). Implicitly applying the presumption against 'repeals by implication,' the court stressed that "federal law may preempt state laws, not other federal laws." *Id.*

While some courts refuse to hold that furnishers engage in per se FDCPA violations by violating FCRA provisions which do not provide for a private right of action, those same courts readily hold that furnisher conduct violates the FDCPA even where consumer-plaintiffs cannot succeed in a private right of action under the FCRA. *See Daley v. A & S Collection Associates, Inc.*, 717 F.Supp.2d 1150, 1154-5, 1157 (D. Ore. 2010).

Similarly, as to the topic of this memo, "the FCRA does not provide that it is the exclusive remedy" regarding the reporting of arrest records. *See Id.*, at 1155. It thus does not limit the FTC's Section 5 authority to restrict this practice should the FTC find it to unduly harm consumers. *See Moscona*, at id.; *Segal,* at id.

Indeed, the FCRA Rule and the FTC Act employ distinct analysis. The FCRA Rule sets a floor for CRA conduct, establishing a bright-line rule prohibiting CRAs from publishing arrest records older than seven years. On the other hand, to establish Section 5 unfairness, the FTC must consider whether the "act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. 45(n). The two laws employ distinct criteria and ask distinct questions in establishing liability. As such, in the absence of

express language, they should not be read to limit each other's scope. *See Philadelphia Nat. Bank*, 374 U.S., at 351-2 (reasoning that federal agencies apply different analysis in considering the legality of a merger under the Bank Merger Act and under antitrust laws); *Pioneer*, 534 U.S, at 143-4 ("Indeed, when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Here we can plainly regard each statute as effective because of its different requirements and protections.") (internal citations/quotations omitted).

The FCRA Rule indicates that arrests older than seven years are irrelevant to a consumer's general creditworthiness. That says nothing about whether the publication of newer records in tenant screening reports is otherwise unduly injurious to housing applicants per Section 5.[1]

III. Even if the FCRA Rule limits the FTC's Section 5 authority, such limits are not an obstacle to the Working Group's specific suggestions

The FTC may enact the specific suggestions put forth by the Working Group even assuming that the FCRA Rule implies that the FTC cannot utilize Section 5 to stop screening companies from publishing an "arrest that, from date of entry, antedates the report by" less "than seven years." FCRA Rule, 15 U.S.C. 1681c(a). The Working Group does not ask the FTC to use its unfairness authority to stop credit reporting agencies from publishing arrest records. Rather, the Working Group suggests that the FTC utilize its Section 5 authority to: 1. discourage landlords from excluding tenants and rental applicants based upon arrests not resulting in

[1] Please see the accompanying memorandum, detailing the harms these screening practices impose upon housing applicants with justice involvement, their families and society at large. The accompanying memorandum further details how these screening practices do not, and cannot, lead to significant countervailing benefits.

convictions; and 2. discourage tenant screening companies from adversely factoring arrests not resulting in convictions into their rental recommendations.

The language of the FCRA Rule, which prohibits any credit reporting agency from "mak[ing] any consumer report containing" arrest records older than seven years, does not impliedly limit the FTC's Section 5 authority to curtail the use of arrest records in the tenant screening process in the specific ways the Working Group suggests. The case law quoted throughout the above section applies that much more readily here, as reading the FCRA Act as restricting the FTC's Section 5 authority to limit the use of arrest records in housing decisions would constitute an even more radical "repeal[] by implication." *Borden Co.*, 308 U.S., at 198.

1. Limits on the Discretion of Landlords

First, the Working Group suggests that the FTC utilize its Section 5 authority to discourage *landlords* from excluding rental applicants based upon arrests not resulting in conviction. The FCRA Rule does not purport to address the behavior of landlords. As such, even if the Rule shields CRAs from the FTC's unfairness authority, it cannot be read to shield housing providers from the same.

2. Limits on the Use of Arrests in Algorithms

Second, even if CRAs have the right to publish newer arrest records, that does imply that tenant screening companies have to right to adversely factor such records into their algorithms if the FTC determines that such a practice unduly injures consumers. *See Borden Co.*, 308 U.S., at 204-5 (that farmers are explicitly permitted to unite and collaborate under the Capper-Volstead Act does not imply that they can engage in other anti-competitive practices under antitrust acts).

Notably, the FCRA itself treats information published in credit reports as distinct from risk predictions generated by reporting agencies. *See* 15 U.S.C. § 1681g(a)(1)(B). The two are distinctly regulated. *See id.* For example, the FCRA obligates CRAs to disclose contents of the credit file to the consumer upon request but specifies that CRAs need not disclose credit scores or other risk predictors. *See id.* Thus, even if CRAs have the right to publish newer arrest records, this does not imply that screening companies have the right to harm consumers by factoring such records into their rental recommendations. *See Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions,* 478 F.Supp.3d 259, 289 (D. Conn. 2020) (discussing how screening company rental recommendations influence landlord decisions).

IV. Conclusion

"The Federal Trade Commission Act is a broad statute forbidding . . . 'unfair or deceptive acts or practices' in interstate commerce." *See Heller & Son*, 191 F.2d, at 957. Section 5 deliberately imbues the FTC with broad and flexible authority to take action against practices that harm consumers. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240-1 (1972) (stressing the "scope and flexibility" of the FTC Act). The FCRA Rule prohibits CRAs from publishing arrest records older than seven years. This restriction on CRAs simply does not contain the explicit language needed to constrict the FTC's Section 5 authority. Similarly, it is not mutually exclusive for the FCRA Rule to prohibit CRAs from publishing older records and the FTC to utilize its unfairness authority to curtail the use of arrest records as a harmful business practice more generally.

But even if the FCRA Rule does constrict the FTC's Section 5 authority, this would not limit the FTC's ability to adopt the specific policy suggestions at issue. The Working Group does not suggest that the FTC attempt to stop credit reporting agencies from publishing newer arrest

records. Rather, we suggest that it is harmful for landlords to use arrests not resulting in convictions as a basis to reject applicants or for screening companies to recommend such an outcome through their tenant screening algorithms.

Shriver Center on Poverty Law

For economic and racial justice

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May 10, 2021

The Honorable Joseph Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

The Honorable Kamala D. Harris
Vice President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Re: Access to Stable Housing for Justice-Involved Individuals

Dear President Biden and Vice President Harris,

In her groundbreaking work *The New Jim Crow: Mass Incarceration in the Age of Colorblindness,* Michelle Alexander observes as follows:

> [I]t is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind.

Addressing and dismantling systemic racism are at the core of your agenda. As acknowledged by your platform, systemic racism cannot be dismantled without significant criminal justice reform. Criminal justice reform, however, must address matters beyond the prison walls and behavior of police officers. The efforts to change these institutions must be coupled with reforms ensuring that justice-involved individuals receive a second chance and are able to fully re-integrate into society. No person can thrive without safe, secure, and affordable housing. Yet those with criminal records often face insurmountable hurdles to meet this basic need.

During its tenure, the Obama-Biden administration enacted essential policy acknowledging this reality. Critically, President Obama convened a cabinet-level Federal Interagency Council on Reentry that led to the coordination of numerous important reentry-related policies, including game-changing Fair Housing guidance from the U.S. Department of Housing and Urban Development. Indeed, HUD has encouraged public housing

authorities (PHAs) and project owners to use their discretion to give "second chances" to justice-involved individuals and to help them "gain access to one of the most fundamental building blocks of a stable life – a place to live."[1] The Trump Administration, however, went to great lengths to roll back these efforts. We urge your Administration, not only to reinstitute, but to push beyond the essential work of the Obama-Biden administration to ensure that barriers to safe and affordable housing are removed for justice-involved individuals.

We thus write to you as a broad coalition of housing and criminal justice advocates, including not-for-profit organizations, attorneys, policy analysts, social workers, and, perhaps most importantly, justice-involved individuals. Over the last decade, centralizing the experience and expertise of those who have had contact with the justice system has proven essential to related reform efforts. For racial justice, criminal justice reform, and the fight against poverty and crime to be priorities of this Administration, those with criminal records must have the chance to find safe, stable, and affordable housing and we must continue prioritizing the voices of justice-involved individuals in arriving at meaningful solutions.

Indeed, as a result of policies restricting justice-involved individuals' access to adequate housing, those who come into contact with the criminal justice system experience homelessness at high rates.[2] Many must sleep in shelters or double-up with family, both of which are especially dangerous during the pandemic.[3] The difficulties faced by justice-involved individuals have been compounded by the dawn of the digital age and the near-ubiquity of the tenant screening industry in rental transactions. The Shriver Center on Poverty Law recently published a report focusing on how tenant screening practices may result in tenants being unfairly excluded from housing and permanently blacklisted.[4]

As such, additional legislation, regulation, and guidance are urgently needed to ensure that those with criminal records are not effectively blacklisted from finding suitable housing. Of course, many reforms must be enacted to achieve these goals. While this letter includes some legislative suggestions, it focuses primarily on regulatory measures the Administration can take near the outset of its term, namely: (1) strengthening the policies instituted by the Obama-Biden Administration and reversing Trump-era policies weakening Fair Housing Act enforcement; (2) limiting the discretion of public housing authorities' (PHAs) and participating property owners' to deny access to public and subsidized housing to those with criminal records; and (3) enhancing agency regulation of tenant-screening companies.

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[1] Letter from Shaun Donovan, HUD, to Public Housing Authority Executive Directors (June 17, 2011).
[2] Matthew Doherty, *Incarceration and Homelessness: Breaking the Cycle*, COPS OFF. NEWSLETTER (Dept. of Justice/U.S. Interagency Council on Homelessness, Wash., D.C.), Dec. 2015, www.cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp.
[3] Daniela Silva, *With winter approaching, homeless shelters face big challenges against coronavirus*, NBC NEWS (Dec. 5, 2020), www.nbcnews.com/news/us-news/winter-approaching-homeless-shelters-face-big-challenges-against-coronavirus-n1249906.
[4] Tex Pasley et al., *Screened Out*, SHRIVER CNTR. ON POVERTY LAW (Jan. 2021), www.povertylaw.org/report/tenant-screening-report/.

HUD Should Reinstitute and Bolster Obama-Biden Fair Housing Act Regulations and Guidance to Ensure Greater Housing Access to People with Criminal Records

Problem to be Addressed: Effective October 26, 2020, the Trump Administration implemented a final rule[5] greatly limiting disparate impact liability[6] under the Fair Housing Act. The Trump rule rolled back Obama-Biden regulations[7], thus also undermining Obama-Biden guidance relying on these regulations, such as that limiting the discriminatory use of criminal background checks[8] and crime free/nuisance ordinances[9] (CFNO)[10]. However, even with the Obama-Biden disparate impact regulation in place, the corresponding guidance on criminal background checks and CFNOs are not binding and are vulnerable to rescission, being afforded low levels of deference,[11] or even legal challenges.[12]

Further, before the end of its term, the Trump administration began the process of publishing additional rules weakening FHA protections for those with criminal records. The Trump administration, for example, proposed the rescission[13]of the rules implementing the FHA's mandate to affirmatively further fair housing, a mandate which, in turn, undergirds the Obama-Biden guidance discussed above regarding criminal background checks and CFNOs.

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[5] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, RIN 2529-AA98, https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-19887.pdf.

[6] Nick Adjami, *Disparate Impact: A Crucial Fair Housing Protection Under Attack*, Equal Rights Ctr. (Oct. 14, 2019), www.equalrightscenter.org/disparate-impact-under-attack/. Per the Equal Rights Center, "[u]nder the Fair Housing Act, 'disparate impact' refers to a policy or practice that seems neutral on its face, but has the effect of disproportionately harming people of a certain protected class." *Id.* For example, HUD has noted in its criminal records guidance that, while excluding all housing applicants with arrest records may be a race-neutral policy, such a policy likely has a 'disparate impact' on racial demographics whose members are more likely to have arrest records.

[7] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013), www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF.

[8] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, U.S. Dept. of Housing and Urban Dev. (April 4, 2016), www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

[9] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, U.S. Dept. of Housing and Urban Dev. (Sept. 13, 2016), www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

[10] Crime Free Nuisance Ordinances, or CFNOs, generally refer to municipal laws that "punish landlords and tenants based on the need for police or other emergency services at a property." *Local Laws That Punish Tenants and Landlords for Calls to Police*, ACLU (last accessed Mar. 19, 2021), www.aclu-il.org/en/campaigns/crime-free-housing-nuisance-ordinances. For example, some municipalities may obligate a landlord to evict tenants if there have been too many calls to the police from or regarding the property where the tenants reside. *Id.*

[11] Per *United States v. Mead Corp.*, 533 U.S. 218 (2001), while agency regulations are entitled to the force of law, subregulatory guidance, such as the Obama-Biden criminal records and CFNO guidance, are only entitled to deference insofar as they have the "power to persuade." *Id.*, at 235.

[12] *See Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), www.law.justia.com/cases/federal/appellate-courts/ca5/18-10638/18-10638-2019-08-06.html.

[13] Preserving Community and Neighborhood Choice, 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903 (July 23, 2020), www.hud.gov/sites/dfiles/ENF/documents/6228-F-01%20Preserving%20Housing%20and%20Neighborhood%20Choice.pdf.

Recommended Action:

• HUD should prioritize taking action to repeal the Trump 2020 disparate impact rule[14] through the procedures established by the January 20th White House Memorandum[15] or, if necessary, Congressional Review Act and reinstate the 2013 disparate impact rule. Fortunately, the Massachusetts District Court has stayed implementation[16] of the Trump disparate impact regulation for the pendency of the litigation. The Biden Administration has taken the essential steps of withdrawing the Trump Administration's appeal of that stay and issuing an executive order[17] to review the Trump rule. To continue along this course:

> •The Administration should thus immediately withdraw any defense of the Trump rule in litigation while also taking the necessary steps to rescind the rule and reinstitute a bolstered version of the Obama-Biden Era protections.
>
> •This bolstered rule should serve not only to reestablish disparate impact as a meaningful basis for Fair Housing Act liability, but to also maintain "perpetuation of segregation"[18] as a basis for liability under the CHA

• HUD should strengthen its Fair Housing guidance on the use of criminal background checks by codifying this subregulatory guidance into regulation. The Obama-Biden guidance on criminal background checks and CFNOs should be reviewed, updated, clarified, and bolstered to enhance their efficacy and persuasive value[19] to courts. The guidance should then be codified into regulation through the necessary processes to make the guidance binding and to avoid challenges to its legality[20] under the Administrative Procedure Act.

> •Suggested improvements to guidance regarding use of criminal records:
>
> > •The guidance should be clarified to ensure plaintiffs are able to meet their initial burden through the use of readily available data without undue burden or expense.

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[14] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 24 C.F.R. pt. 100 (Sept. 24, 2020), www.s3.amazonaws.com/public-inspection.federalregister.gov/2020-19887.pdf.
[15] Ronald Klain, *Regulatory Freeze Pending Review*, WHITE HOUSE (Jan. 20, 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/.
[16] Mass. Fair Housing Cntr. v. U.S. HUD, 2020 U.S. Dist. LEXIS 205633 (D. Mass. Oct. 25, 2020), http://lawyersforcivilrights.org/wp-content/uploads/2020/10/Nationwide-PI-Against-HUD.pdf.
[17] President Joseph R. Biden, *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/.
[18] A policy may violate the Fair Housing Act by perpetuating segregation and impeding the development of integrated neighborhoods. For example, if a town's zoning rules prevent multifamily housing, instead forcing such housing to be concentrated within other areas, such a policy may violate the Fair Housing Act by perpetuating the segregation of families of color likely to reside in such multifamily housing from the rest of the population.
[19] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), https://supreme.justia.com/cases/federal/us/323/134/.
[20] *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), https://law.justia.com/cases/federal/appellate-courts/ca5/18-10638/18-10638-2019-08-06.html.

Courts have rejected disparate impact claims, at the outset of the case, because the plaintiff failed to bring forth data about the specific applicant pool,[21] though such data is seldom readily available to plaintiffs.

•Further, this guidance should be expanded to analyze use of criminal records, not only under a disparate impact theory, but also under a 'perpetuation of segregation' theory and, where applicable, under municipalities' duty to affirmatively further fair housing.

•The guidance should also analyze the Fair Housing implications of the use of criminal background checks on persons with disabilities. This guidance should also be codified into formal regulation.

• HUD should strengthen its Fair Housing guidance on CFNOs and codify it into regulation.

•<u>Suggested improvements to guidance regarding CFNOs</u>:

•The current guidance focuses on how CFNOs result in sex discrimination, in intent and/or effect, by harming victims of domestic violence and others who may need police or emergency services. Such application is laudable and necessary.

•HUD should also update this guidance to discuss the other forms of discrimination resulting from the enactment and enforcement of CFNOs, including the targeting of Black and Latinx renter households with these laws in order to maintain racial boundaries and perpetuate residential segregation[22].

•As the police are key enforcers of these laws locally, HUD must draw the connection between discriminatory policing, including the over policing of Black and Latinx communities, with the blunt and crude enforcement of these laws.

•In addition, updated guidance should address how municipalities who are entitlement jurisdictions or subrecipients of federal housing community development funds may be acting contrary to their duty to affirmatively further fair housing through the implementation of CFNOs.

•HUD also needs to move forward with issuing guidance on how CFNOs could lead to discrimination against persons with disabilities.

•As stated above, this guidance should also be codified into formal regulation.

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[21] *See, e.g., Inclusive Communities Project, Inc. v. Lincoln Property Co.,* 920 F.3d 890 (2019). *See also Alexander v. Edgewood Mgmt. Corp.*, Civil Case No. 15-1140 (D.D.C., Jun. 25, 2019), www.leagle.com/decision/infdco20190708691 and the following cases with analogous holdings in the employment context: *Mandala v. NTT Data, Inc*., 975 F.3d 202 (2d Cir. 2020); *Lyons v. Washington State Department of Social and Health Services*, 2020 WL 816017, slip op. (W.D. Wash., Feb. 19, 2020).

[22] *See generally* Emily Werth, *The Cost of Being Crime Free* SHRIVER CNTR. ON POVERTY LAW (originally published Aug. 2013, updated March 2017 & Oct. 2020), https://www.povertylaw.org/article/the-cost-of-being-crime-free/.

•Relatedly, HUD, the Department of the Treasury, and USDA Rural Development should issue guidance to their federally assisted housing providers about CFNOs, making clear that those housing providers must honor the rights of tenants within their stock to only be evicted for cause and must comply with the FHA and VAWA. HUD, Treasury, and RD should make clear that for-cause protections, the FHA, and VAWA preempt CFNO policies that set a lower threshold or run contrary to the mandates of these federal laws.

Federal Agencies Should Ensure Justice-Involved Individuals Have Equitable Access to Federally Subsidized Housing

Problem to be Addressed: As stated above, individuals involved with the criminal justice system must endure housing instability in large part because local housing authorities and property owners participating in subsidized housing programs have wide discretion to exclude or evict individuals based upon their records.[23] While the federal government has made some effort to impose limits on this discretion, often such limits are too vague to be meaningfully enforced.

Recommended Action:

Legislative Action

• Congress should pass legislation modeled on the Fair Chance at Housing Act of 2019. Introduced by Vice President Kamala Harris during her tenure as U.S. Senator, the Fair Chance at Housing Act is aimed at removing barriers to obtaining federal housing assistance for individuals with criminal records and their families. This proposed legislation seeks to undertake a comprehensive reform of eviction and screening policies for HUD-subsidized housing programs by taking the following measures:

- Banning blanket "1-strike" policies, which allow tenants to be evicted for a single incident of criminal activity, no matter how minor, in favor of a holistic review;
- Banning "no-fault" policies, which allow an entire family to be evicted for criminal activity by a guest of a household member even without the knowledge of anyone in the household;
- Raising the standards of evidence to be used by public housing authorities (PHAs) and owners and requiring a holistic consideration of all mitigating circumstances when making screening or eviction determinations based on criminal activity;
- Limiting the discretion of PHAs and owners to exclude households for certain types of criminal records such as juvenile records, expunged records, fines and fees violations, and arrests not leading to conviction;

[23] Marie Claire Tran-Leung, *When Discretion Meets Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Shriver Cntr. on Poverty Law (Feb. 2015), https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf.

- Ensuring that tenants who are evicted for criminal activity and applicants who are denied admission for criminal activity are given adequate written notice of the reasons for the decision and the opportunity to present mitigating evidence or appeal a decision;

- Prohibiting the use of suspicionless drug and alcohol testing by owners and PHAs; and

- Providing PHAs with additional administrative funding to help house people with criminal records through the Section 8 Housing Choice Voucher program.

•Congress can also amend 42 USC 1437d(q)(1)(C) to prohibit PHAs and participants in federal housing programs from accessing juvenile records in the process of making a housing decision.

Administrative

• HUD and USDA should take action to ensure that the admissions and evictions policies of PHAs and project owners comply with existing federal law, regulations, and subregulatory guidance, as outlined in HUD Notice H 2015-10, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on the Use of Arrest Records in Housing Decisions (Nov. 2, 2015), https://www.hud.gov/sites/documents/15-10HSGN.PDF. The Government Accountability Office has already recommended that HUD take two immediate steps:

> •First, HUD should update its guidebooks for the public housing and Housing Choice Voucher programs to reflect HUD Notice H 2015-10, the 2016 fair housing guidance on the use of criminal records, and other guidance on criminal history policies.
>
> > •In recommending this specific action to ensure PHA compliance in August 2018, GAO observed that HUD had not yet made progress toward effectuating these updates, despite statements indicating otherwise. GAO-18-429, Rental Housing Assistance: Actions Needed to Improve Oversight of Criminal History Policies and Implementation of Fugitive Felon Initiative (Sept. 20, 2018), https://www.gao.gov/assets/700/693855.pdf.
> >
> > •As GAO noted, "updating its HCV and public housing guidebooks to reflect newer criminal history guidance [is necessary for HUD to] ensure that these guidebooks serve as consolidated and up-to-date references for PHAs that accurately communicate HUD's current guidance on criminal history policies." *Id.* at 23.
>
> •Second, HUD and USDA should put into place measures to routinely monitor compliance by PHAs and project owners with federal requirements on criminal history policies.
>
> > •At the very least, HUD should ensure that its Compliance Monitoring Checklist for high-risk and very-high-risk PHAs include questions to address the federal requirements on criminal history policies.

•In addition, HUD and USDA should revise their checklist instructions to direct HUD and USDA staff to obtain information on implementation of these requirements by PHAs and project owners and to determine whether implementation is consistent with written policy.

•For example, the checklist does not question instances when a PHA or project owner relies on arrests to prove disqualifying criminal activity, nor do the instructions guide HUD staff on determining whether a PHA with a written policy of excluding arrests in fact uses them. *Id.* at 25.

•In addition to these GAO-recommended actions, HUD and USDA should ensure that third-party property managers of HUD-assisted properties follow criminal history policies consistently. In New Orleans, for example, even though the Housing Authority of New Orleans has adopted and implemented a model policy around the use of arrest and conviction records, many of the third-party managers of its properties have declined to use the same policy. What results is a patchwork of policies, which ultimately harms the families trying to access subsidized housing. Increased guidance and intervention from HUD and USDA in these types of cases will go a long way to ensuring consistency in policies.

•HUD and USDA should issue detailed rules and guidance clarifying what constitutes a "reasonable" look-back period for criminal background checks per 42 U.S.C. § 13661(c) after engaging in research including consultation with directly impacted experts.

•HUD should issue detailed rules and guidance clarifying a public housing authority's discretion to deny admission to a household where any member is "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents," 42 USCA § 13661, by, for example:

•Submitting H.U.D.'s 2015 guidance[24] regarding the use of criminal records through the formal rule making process and adding clarification that pre-conviction records beyond arrest records (such as supervised release status) are not sufficient evidence to demonstrate that a person is "engaged" in prohibited criminal activity and therefore may not be used as a basis to exclude any individual from housing;

•Limiting use of "one strike, you're out" policies and providing detailed limits on what criminal activity may be considered "drug-related" or "violent" and what criminal activity may be considered to "adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents" by providing limiting factors and, in some instances, prohibiting public housing authorities and owners from using certain crimes as a basis for denial of admission. For example, regulation or guidance may provide more tangible parameters and/or clarify that the targeted, drug-related, violent, and other criminal activity must **clearly and demonstrably**

[24] Lourdes Castro Ramirez and Edward Golding, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, Notice H 2015-10, U.S. DEPT. OF HOUSING AND URBAN DEV. (Nov. 2, 2015), https://www.hud.gov/sites/documents/15-10HSGN.PDF.

adversely **impact** the health, safety, or right to peaceful enjoyment of the premises by other residents, **beyond what is experienced by the community-at-large**.

> •The 2020 election served, in many ways, as a bipartisan refutation of the war on drugs[25] and its reach. As such, HUD should seize this historical moment to significantly limit the discretion of public housing. authorities to deny admission to applicants on the basis of convictions for simple possession.

• HUD should issue rules and guidance prohibiting housing authorities and property owners from using arrests or expunged records as a basis for excluding any individual from housing and clarifying that housing authorities may not exclude individuals for being on supervised release awaiting trial;

• HUD should issue rules and guidance significantly limiting the discretion of PHAs and property owners to evict tenants because of the conduct of their guests or visitors under "one-strike" rules.

> •In *HUD v. Rucker*, for example, a housing authority evicted an elderly couple because their grandchildren were caught smoking marijuana in the building's parking lot. While the Supreme Court held[26] that the housing authority was within its rights, such a decision was merely permissive; HUD retains discretion to limit this practice through its regulatory authority.

•Federal agencies other than HUD, primarily the Department of Treasury and Department of Agriculture, administer federally subsidized housing programs. These federal agencies should actively ensure that housing providers within these federally subsidized housing programs are complying with the HUD 2015 and 2016 criminal records guidance.

> •More than any other federal program, the Low Income Housing Tax Credit helps to subsidize the greatest number of affordable housing units in the country, which means that guidance from the Treasury Department about the obligation of housing providers to adopt reasonable criminal history policies could have far reach. The Treasury Department has been silent on the issue of criminal history policies.
>
> > •A few state housing finance agencies have addressed the need for housing for justice-involved individuals in their qualified allocation plans (e.g., Georgia, Ohio, Pennsylvania) and can provide important models for other states. The time has come, however, for the Treasury Department to take a critical leadership position on this issue.

[25] Nicholas Kristof, *Republicans and Democrats Agree: End the War on Drugs*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/opinion/sunday/election-marijuana-legalization.html.
[26] Petitioner's Brief, *HUD v. Rucker Oakland Housing Auth. v. Rucker*, 534 U.S. 1111 (2002) (Nos. 00-1770 and 00-1781).

•Similarly, the U.S. Department of Agriculture should issue guidance for housing providers within its Rural Development program and outline their obligations to adopt reasonable criminal history policies.

Federal Agencies Should Increase their Regulation of the Tenant-Screening Industry

Problem to be Addressed and Recommended Actions:

•Issue to be Addressed 1: In recent years, the use of criminal background checks for tenant screening purposes has become ubiquitous.[27] Yet the tenant screening industry is poorly understood. As technology has improved, screening companies have begun to offer more sophisticated products with algorithms that may offer landlords a means of attempting to skirt their obligations in violation of the Fair Housing Act.[28] Tenant-screening practices that may purport to be objective and non-discriminatory may still process information in a way that disproportionately injures protected classes. For example, a district court recently allowed a Fair Housing Act case against CoreLogic, a tenant screening company, to go to trial after CoreLogic's report recommended denying housing to a Latinx applicant because of a single arrest record. *See Conn. Fair Hous. Ctr. v. CoreLogic*, 3:18-CV-705, 2020 U.S. Dist. LEXIS 141505 (D. Conn. Aug. 7, 2020).

•Recommended Action: Currently, HUD has offered no guidance for tenant screening companies on their obligations under the Fair Housing Act. Because algorithmic products offer recommendations about whether to accept a housing applicant, screening companies will begin to play a more instrumental role in the housing provider's decision-making process. Thus, HUD should make it a priority early on to draft Fair Housing Act guidance addressing tenant screening providers specifically. Such a guidance should also apply to companies that screen tenants for USDA and Department of Treasury assisted housing.

•Issue to be Addressed 2: The increasing ubiquity of tenant screening reports should be addressed, not only as a civil rights issue, but also as a consumer protection matter. Under the Fair Credit Reporting Act, tenant screening companies are obligated to ensure that their reports are accurate and up to date. The Federal Trade Commission and Consumer Financial Protection Bureau have taken some preliminary steps[29] to improve the accuracy of these reports. But as the tenant screening industry grows and evolves, these agencies must collaborate with HUD to implement effective regulations.

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[27] Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, Nat'l Consumer Law Cntr. (Dec. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf.

[28] Notably, Article 22 of the European Union's General Data Protection Regulation requires that before anyone can be denied housing, a job, or something else important based on automated screening, there needs to be an opportunity for human review, which provides for a good model.

[29] Juliana Gruenwald Henderson, *FTC and CFPB to Host December Workshop on Accuracy in Consumer Reporting*, Fed. Trade Comm. (Sept. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/ftc-cfpb-host-december-workshop-accuracy-consumer-reporting.

•Recommended Action: The FTC, CFPB, and HUD should convene a joint task force to draft regulations in order to ensure that screening reports are accurate and not used to encourage housing discrimination.

Thank you so much for taking the time to engage with these recommendations. We would invite the opportunity to dialogue further on implementing the President's agenda. If you have any questions, please contact Eric Sirota, Director of Housing Justice, Shriver Center on Poverty Law, at (312) 767-9273 or ericsirota@povertylaw.org.

Sincerely,

Shriver Center on Poverty Law

National Organizations

A Little Piece Of Light
Center for Disability Rights
Equal Rights Center
Google
Health Justice Innovations
Housing Rights Initiative
National Alliance on Mental Illness
National Housing Law Project
National Low Income Housing Coalition
NETWORK Lobby for Catholic Social Justice
The Daniel Initiative
Tzedek Association

State and Local Organizations

All Square
Centro Legal de la Raza
Chicago Area Fair Housing Alliance
Community Renewal Society
Community Service Society of New York
Disability Rights Maryland
Florida Rights Restoration Coalition
Harvard Legal Aid Bureau
Housing Action Illinois
Housing Choice Partners
Interfaith Action for Human Rights
Justice & Accountability Center of Louisiana
Kansas Appleseed Center for Law and Justice
Legal Aid Justice Center

Louisiana Fair Housing Action Center
Louisiana Fair Housing Action Center
Mobilization for Justice
New Haven Legal Assistance Association
Northwest Side CDC
Northwest Side Housing Center
Operation Restoration
Pathways to Housing DC
Public Justice Center
Public Law Center
Regional Housing Legal Services
Sponsors, Inc.
Takoma Park Mobilization
The First 72+
The R.I. Center for Justice
The Washington Legal Clinic for the Homeless
Uptown People's Law Center
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